



# Rent review: common sense and the presumption of reality

## Summary and implications

The "presumption of reality" is an important principle which has been developed by the Court to help to interpret rent review clauses.

However, the presumption will not apply where the parties to a lease have clearly displaced the presumption by a direction in the lease, or where they have contradicted reality in an important respect. This question was considered recently by the High Court in *Nissim v Ablethird*\*.

This decision is important, because it provides an example of how the Court will apply the presumption of reality to a particular set of facts. The Judgment shows that commercial common sense is becoming an increasingly important issue that must be addressed in any rent review dispute. It can sometimes be difficult to predict where commercial common sense lies, although not in this instance.

## What happens when the lease contradicts reality?

In *Nissim v Ablethird*, the user clause in the lease provided for the property to be used as an amusement arcade. However, the lease directed that it should be valued as a retail shop, despite the fact that it could not actually be used as a shop.

The lease contained a proviso that the tenant should pay 125% of the open market rent, once that rent had been agreed or determined ("the Proviso").

The rent review clause also contained the following provisions:

- an assumption that the premises could be used as a retail shop. The assumption extended to the user clause in the hypothetical lease and also to the position in relation to planning legislation;
- a disregard of any increase in value attributable to the user specified in the actual lease ;
- a direction to the arbitrator to disregard comparables which were amusement arcades ;

## Ask a question

If you have any questions please contact  
Iain Travers, Partner  
T +44 (0)20 7524 6283  
[i.travers@nabarro.com](mailto:i.travers@nabarro.com)

\**Nissim v Ablethird* [2009] EWHC 585  
(Ch)

- an assumption that no capital needed to be spent on the property to enable it to be used as a retail shop.

### The tenant's arguments

The tenant argued that the Proviso should be included in the hypothetical lease, on the basis that it was an onerous clause and would inevitably have an adverse effect on the rent. The tenants' arguments included the following points:

- a provision similar to the Proviso would not usually be found in a rent review clause and would probably not be found in the comparables; and
- the arbitrator should follow the clear and express direction that the hypothetical lease has the same terms as the actual lease.

### The landlord's arguments

The landlord disagreed and argued that the hypothetical lease did not contain the Proviso. The valuer should find the open market value of the property on the basis that it could be used as a shop and multiply that figure by 125% to find the rent payable. If that argument was incorrect, the valuer should disregard any increase in rent as a result of the inclusion of the Proviso.

### The Judge's decision

The Judge, Mr Justice Morgan, decided the case in favour of the landlord. He said:

- in general, the terms of the review clause in the hypothetical lease are the same as the terms of the actual rent review clause; but
- some changes had to be made so that, when disregarding the effect of the Proviso when assessing the rent on the review date, one also disregarded the Proviso as a term appearing in the hypothetical lease.

The Judge then applied a cross check, to make sure his interpretation did not offend commercial common sense, and came to the view that it did not. He saw no difficulty in cutting the Proviso out of the hypothetical lease, to leave a workable document.

Ultimately, he took the view that the presumption of reality was of limited assistance in this case, because the parties had already expressly contradicted reality.

### The presumption of reality

In the absence of express words, or a clear indication in the lease, the following will apply:

- the premises will be valued at the rent review date in the state they were actually in on that date;
- the length of the hypothetical lease will be the unexpired residue of the actual lease at the rent review date;
- the terms and covenants in the actual lease will be reproduced in the hypothetical lease; and
- the surrounding circumstances will be as they were on the rent review date. So, if the property had the benefit of planning permissions or licences on the review date, those will be taken into account on review.

The Judge said: "I see no difficulty in a simple excision of the proviso from the hypothetical lease, leaving a workable document in other respects"

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<p><b>London</b>                  Lacon House,                  84 Theobald's Road,                  London WC1X 8RW                  T +44 (0)20 7524 6000                  F +44 (0)20 7524 6524</p>	<p><b>Sheffield</b>                  1 South Quay,                  Victoria Quays,                  Sheffield S2 5SY                  T +44 (0)114 279 4000                  F +44 (0)114 278 6123</p>	<p><b>Brussels</b>                  209A Avenue Louise,                  1050 Brussels, Belgium                  T +32 2 626 0740                  F +32 2 626 0749</p>
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Alliance firms

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<p><b>France</b>                  August &amp; Debouzy                  Gilles August                  T +33 (0)1 45 61 51 80                  www.august-debouzy.com</p>	<p><b>Germany</b>                  GSK Stockmann + Kollegen                  Rainer Stockmann                  T +49 (30) 20 39 07 - 0                  www.gsk.de</p>	<p><b>Italy</b>                  Nunziante Magrone                  Gianmatteo Nunziante                  T +39 06 695181                  www.nunziantemagrone.it</p>
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**Nabarro LLP**

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