



Neutral Citation Number: [2020] EWHC 1407 (Ch)

Case No: PT-2019-000787

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**PROPERTY, TRUSTS & PROBATE LIST (CHD)**

Rolls Building  
7 Rolls Buildings  
Fetter Lane  
London, EC4A 1NL

Date: 05/06/2020

**Before :**

**MR JUSTICE FANCOURT**

**Between :**

**MONSOLAR IQ LIMITED**

**Claimant**

**- and -**

**WODEN PARK LIMITED**

**Defendant**

**Toby Watkin and Luke Wilcox (instructed by Osborne Clarke LLP) for the Claimant**  
**Caroline Shea QC (instructed by Geldards LLP) for the Defendant**

Hearing dates: WRITTEN SUBMISSIONS ONLY

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
THE HON. MR JUSTICE FANCOURT

**Fancourt J :**

1. On 25 and 26 September 2019, each of the parties issued a Part 8 claim form raising for determination the same issue under the terms of a lease made on 8 July 2013 between the defendant as lessor and the claimant as lessee (“the Lease”). It has been agreed that the claimant’s claim will be the lead claim. I shall refer to the claimant as “the Tenant” and the defendant as “the Landlord”. The issue is the true interpretation and effect of the indexation clause in the rent review provisions of the Lease.
2. The property demised by the Lease was 15 acres of bare agricultural land at Woden Park, Cwrt-Yr-Ala Road, Michaelson Le Pit in the Vale of Glamorgan (“the Land”). The Land was part of a larger holding of 38 acres previously acquired by the Landlord, the title to which was registered. The Land was demised for a term of 25 years and six months from 8 July 2013 in consideration of the rent reserved and for use only for:

“the installation, repair, replacement, renewal, alteration, upgrade, re-siting within the Site and operation of the Apparatus, the generation, distribution and supply of electricity and uses ancillary or preparatory thereto and for any other activities reasonably related to the operation and maintenance of a solar photovoltaic development”.

The registered particulars of the Lease record that no premium was paid for its grant.

3. The “Apparatus” was defined as a solar photovoltaic system, including all related equipment and structures and other equipment reasonably required for the permitted use, as may from time to time be installed by or on behalf of the Tenant or the Distribution Network Operator, to whose electricity distribution system the Apparatus would be connected.
4. The Lease does not impose an obligation on the lessee as such to install the Apparatus; it gives the lessee the right to do so and imposes various obligations as to the carrying out of the works if the tenant does so. The lessee is then obliged to keep the Apparatus in a safe state of repair and condition throughout the term. The Lease is assignable with the consent of the Landlord, not to be unreasonably withheld or delayed, and may be charged but not sub-let.
5. Rent is payable by the Tenant in accordance with the Sixth Schedule to the Lease. That Schedule defines “Rent” as “A x B, where ‘A’ equals the area of the Site measured in acres which is **15 acres** and ‘B’ equals £1,000.00 (**£1,000.00 per acre**)”. The rent is payable half yearly in arrears and is to be reviewed annually on each anniversary of the date of grant of the Lease (a “Review Date”). Paragraph 3 of the Sixth Schedule provides:

“The Rent payable under this Lease will be reviewed in accordance with this paragraph 3 on each of the Review Dates and such Rent payable from and including each such Review Date shall be the Revised Rent which shall be calculated as follows:

$$\text{Revised Rent} = \text{Rent payable prior to the Review Date} \\ (\text{disregarding any suspension of Rent}) \times \frac{\text{Revised Index Figure}}{\text{Base Index Figure}}$$

6. “Base Index Figure” is defined as “the Index Figure published in respect of the month two months before the commencement of the Term”, i.e. the figure for May 2013. “Revised Index Figure” is defined as “the Index Figure published in respect of the month two months before the relevant Review Date”. Thus, the relevant figure for the first Review Date of 8 July 2014 would be that for May 2014. “Index Figure” is defined as “the figure published at the relevant time as the General Index”, and “General Index” as:

“the General Index of Retail Prices (RPI – all items) (or any identical index under a different title) officially published from time to time by the Office for National Statistics or any other government department ministry or other body upon which the duties in connection with such index may have been devolved”.

7. Paragraph 4 of the Sixth Schedule provides (so far as material) as follows:

“4.1 In the event of any change after the date hereof in the reference base used to compile the General Index, the figure taken to be shown in the General Index after such change shall be the figure which would have been shown in the General Index if the reference base current at the date hereof had been retained

4.2 If the General Index shall cease to be published then there shall be substituted as the relevant calculation in paragraph 3 a new arrangement for indexation (the “Revised Indexation”) whereby the figure to be calculated under paragraph 3 shall reflect increases in the cost of living on a similar basis to that set out in paragraph 3 ...”

The Lease contains an option for the Tenant at any time during the term to break the term on six months’ prior notice.

8. It is accepted by the Tenant that, read literally, the indexation clause operates as follows. On the first anniversary date, the rent is increased by the RPI increase over the first year of the term. On the second anniversary date, that Revised Rent is further increased by the aggregate RPI increase over the first and second years of the term. On the third anniversary date, that further Revised Rent is further increased by the aggregate RPI increase over the first, second and third years of the term. And so on during the 25 years and six months of the term, so that at the end of year 24 the Revised Rent currently payable would be further increased by the aggregate RPI increase over the first twenty-four years of the term and a year later it would be further increased by the aggregate RPI increase over the first twenty-five years of the term.
9. Assuming RPI increases of 5% in each of the first three years of the term, the rent of £15,000 would thereby increase to £15,750 at the end of year one; to £17,325 (i.e.

£15,750 + 10%) at the end of year two; and to £19,923.75 (i.e. £17,325 + 15%) at the end of year three. Thus, increases in rent upon the sequential annual rent reviews are not merely compounded, in the sense that it is the current, previously increased rent that is further increased on each Review Date; the current rent is also increased once more by the same factor by which the rent was previously increased, not just by a new factor reflecting the subsequent increase in the RPI index.

10. Departing from the arithmetically simple example based on successive 5% annual RPI increases, the Tenant's evidence is that if an annual rate of increase equal to the average RPI increase over the 20 years before the date of grant of the Lease (2.855% p.a.) is applied according to the formula in the Lease on each Review Date during the term of the Lease, the rent payable by year 25 of the term will be just over £76,000,000, as compared with less than £30,000 if non-cumulative RPI increases at that same average rate are applied to the reserved rent of £15,000 p.a.
11. It is of course the case that the RPI index is capable of decreasing as well as increasing – this in fact happened, for a single year only, in 2009 – and that the rate of increase (or decrease) over time cannot accurately be predicted. The Landlord's evidence is that if annual RPI increases of 1% p.a. were assumed over the length of the term of years, the annual rent would increase to only £380,660 in year 25. Neither side disputes the other's arithmetic but the appropriate assumptions to make to examine the effect of the indexation clause are very much disputed.
12. The Tenant's case is that the indexation formula in paragraph 3 of the Sixth Schedule is a clear mistake and that it is clear that what the parties to the Lease meant was:  

**“Revised Rent = Rent payable ~~prior to the Review Date~~ in the first year of the tenancy (disregarding any suspension of Rent) x Revised Index Figure / Base Index Figure”.**
- It submits that if, objectively, it is clear that a mistake was made in the language of paragraph 3 and clear what the mistake was, the Lease can and should be read in its intended sense and not literally as written: see Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101.
13. The Landlord's case is that it is not obvious that a mistake was made in the language or syntax of the Sixth Schedule and that the outcome of the application of its provisions (which cannot be predicted) is irrelevant to that assessment. Alternatively, if the predicted outcome is relevant, that the indexation formula, though potentially operating adversely to the Tenant's interests, does not necessarily produce such an absurd result that the objective observer would conclude that it must be mistaken in its terms.
14. In support of their cases, each party relied on the evidence of a director: Mr Feakins, in the case of the Landlord, and Ms Meyer in the case of the Tenant. Ms Meyer made a witness statement in support of the Tenant's claim form and Mr Feakins made a witness statement in support of the Landlord's claim form. Each then responded, by her and his second witness statement respectively, to the evidence of the other.
15. There is a dispute about the admissibility of evidence on each side. The Tenant complains that a significant part of the contents of Mr Feakins' statements consists of

evidence of his subjective intention when the Lease was granted, of matters that would not have been known other than by him, and his inadmissible opinions on various issues. The Landlord complains that numerous parts of Ms Meyer's witness statements are comments, argument, submissions, speculation and inadmissible opinion evidence. The parties originally proposed that I should resolve these issues on day 1 of the trial, 20 May 2020, since the need for cross-examination of Mr Feakins would be likely to depend on my ruling.

16. In the event, the hearing of the trial did not proceed because, unhappily, counsel instructed by one of the parties fell ill on the previous day. The trial would have been adjourned by consent but, as a result of an enquiry by the court and discussion between the parties' solicitors, it was agreed that I should proceed to make my decision based on the documents and the full written arguments that I had received. The Landlord was content that I should determine the case on the basis of those parts of Mr Feakins' evidence to which no objection was taken, provided that the parts of Ms Meyer's evidence that sought to respond to the rest of it were similarly excluded. The Tenant had indicated in its submissions that in those circumstances those parts of Ms Meyer's evidence would be inadmissible.
17. By that stage, I had given a provisional indication to the parties that a few (only) of the disputed parts of Mr Feakins' witness statements probably were admissible, contrary to the argument of the Tenant. Although the Tenant maintains that they are inadmissible, it accepted that there would be no relevant cross-examination of Mr Feakins in relation to those parts and so was content that I should decide their admissibility as part of my decision.
18. On that basis, both parties decided that they would prefer to have an early decision on the meaning of the Lease than to wait for a re-scheduled trial to take place.

### The Evidence

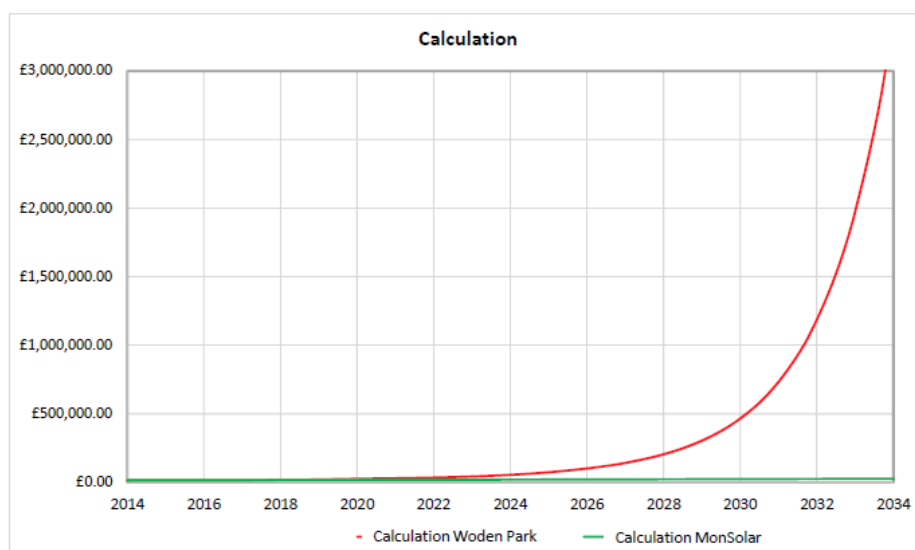
19. The background to the grant of the Lease is as follows and is not in dispute. The Landlord was incorporated on 11 September 2012. It purchased 38 acres of agricultural land at Woden Park (including the Land) in January 2013 and was registered as proprietor at HM Land Registry shortly thereafter. The sole director of the Landlord was and is Mr Feakins. Planning permission for use of the Land for a 5MW solar photovoltaic park was obtained on 8 March 2013. At that time, valuable government subsidy of solar farms under the Renewable Obligation Scheme (ROCS) was available. The Tenant was incorporated on 12 April 2013. Mr Feakins was its sole director. The Lease was then granted in July 2013 and control of the Tenant subsequently passed to others, eventually Grid Essence UK Limited, of which Ms Meyer is a director. Mr Feakins was therefore the person behind and with control of both the Landlord and the Tenant when the Lease was granted.
20. Mr Feakins' disputed evidence is that there was in fact no mistake made by him in the terms of the Lease. He says that the Tenant was incorporated as a single purpose vehicle to hold a lease of the Land, as part of a structure to enable a sale of the project development rights. He says that in May 2013 he was approached by brokers for large scale solar farms in the UK, who wished to broker a sale of the project development rights on the Land. These rights were to consist of a lease of the Land, the electricity grid connection offer (that the Landlord had obtained) and the planning permission.

There was considerable interest in the development rights, given that generous government subsidy was due to end in March 2014.

21. Mr Feakins says that he drafted the Lease himself, using precedents available on the internet, and that the terms of the Lease were not negotiated or discussed by anyone. The terms of the Lease are exactly as he intended, and the prevailing commercial considerations were taken into account by him on behalf of both parties to the Lease. The rent review clause was fair and reasonable to both parties, in the context of the Lease as a whole: the reason for using a compounded indexation clause was that electricity would continue to increase in value far in excess of inflation and that income from the farm was directly related to the value of electricity. Whereas RPI had been negative “in previous years” before the grant of the Lease, electricity costs were rising at 10% per annum. The Lease had a reduced starting rent and no profit share for the Landlord, as other solar farm leases did. A Tenant option to break the Lease on 6 months’ prior notice (not contained in other solar farm leases) was included to protect the Tenant in case the rent should become unaffordable. The rent review formula was “purposefully drafted to work on a bilateral basis: [the Landlord] would gain an advantage with inflation but with deflation [the Landlord] would receive a reduced rent”.
22. The substantial majority of this evidence is plainly inadmissible, and I put it out of my mind in considering what the Lease means. Indeed, the Landlord’s skeleton argument admits that it is wholly irrelevant to the issue of interpretation. Whether irrelevant or not, it is inadmissible: see Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 at 913, reaffirmed in the Chartbrook v Persimmon case at [14]; and Arnold v Britton [2015] AC 1619 at [15].
23. There is no issue in this claim apart from the true interpretation of paragraph 3 of the Sixth Schedule to the Lease. Nevertheless, the Landlord argues that the disputed evidence of Mr Feakins is admissible as being relevant to the question of the commercial background against which the Lease was entered into “because whatever his views of that background were at the relevant time were necessarily the views of both parties to the Lease”. This is to confuse objective factual background and subjective intention, but it is presumably the reason why Mr Feakins emphasised in his witness statement that he knew the commercial considerations and took them into account “on behalf of both the parties to the Lease”. However, that part of his evidence belies the argument that this is admissible evidence of commercial background: his own views of the “commercial background” are only in evidence because they are used to explain and justify his subjective intentions in drafting the Lease.
24. Even where objective facts about the background to the Lease are known or reasonably available to the parties, the Tenant argues that a more restrictive approach must be taken to admissibility of such evidence, and that only facts that would reasonably be supposed to be known by any reader of the registered lease can be taken into account, given that the Lease might be assigned to or relied upon by third parties: see Cherry Tree Investments Ltd v Landmain Ltd [2013] Ch 305 at [124]-[130], per Lewison LJ. That argument is advanced on the basis that the Lease is a registrable public document, not a private commercial contract, and so facts known only to the parties themselves ought not to affect its interpretation. However, the passage from the judgment of Lewison LJ at [128] (citing Campbell JA in the New South Wales Court of Appeal) on which the Tenant relies makes it clear that this does not render the facts inadmissible but goes to

the weight that the reasonable person reading the contract would place on them as affecting the true meaning of the document.

25. In my judgment, on that basis, the following facts contained in Mr Feakins' witness statements are admissible because they are, objectively, the genesis of and background to the grant of the Lease: first, the proposal in May 2013 to 'package' the project development rights (including the Lease) for sale and purchase; second, the Tenant being incorporated as a clean SPV for the purpose of facilitating sale of the development rights; and third, the Tenant being owned by companies ultimately owned by or held on behalf of Mr Feakins, so that the Lease was not an arm's length transaction. Where a lease is negotiated and granted in a market transaction, evidence about how and why the grant came about is rarely relevant, since what is material is that the lease was a negotiated, commercial transaction. The same approach cannot be taken where the Lease is not an arm's length transaction, as was clearly the case here. What weight if any should be put on those facts is a matter to which I will return.
26. The remainder of the disputed evidence of Mr Feakins is inadmissible, as is the responsive evidence of Ms Meyer and the other passages of Ms Meyer's witness statements that are not evidence of relevant facts but argument, speculation and evidence of her opinions. I have disregarded it all in reaching my conclusions.
27. The admissible evidence of the Tenant includes a graph to demonstrate the effect over the length of the term of the exponential increases in rent for which the formula literally provides. It measures the rate of increase in the rent assuming annual increases of RPI in line with the longer-term average of 2.855% p.a.. The shape of the rent line on the graph will be similar for any consistent annual increase in RPI, though the quantum of rent reached on the 'y' axis will differ according to the amount of the annual RPI increase. That graph is reproduced below. It shows the first 21 years of the term:



28. Having excluded most of the disputed evidence of Mr Feakins seeking to explain or justify the terms of the Sixth Schedule, it is appropriate to summarise the parties' cases in the light of the admissible evidence.

### The Parties' Cases

29. The Tenant's case is that the formula in paragraph 3 of the Sixth Schedule contains an obvious mistake because it produces an arbitrary and absurd result in the quantification of the rent payable. It is said to be absurd because, making the assumption about future RPI increases that a reasonable person would make in July 2013, viz that they would probably be on average during the term at the same rate as the average rate of increase in the previous 20 years, the rent would reach an exorbitant and unaffordable level before the end of the term of the Lease. It is said to be arbitrary because, although the RPI index (which reflects increase or decrease in the value of money) is used to index the rent, it is apparently to be used in a way that does not reflect a decrease (or increase) in value but produces a compounded multiple of previous decreases (or increases) in value. Any proportionate increase in rent resulting from indexation in a given year is repeated and compounded in every following year of the term, in addition to an adjustment for any rise or fall in the index in succeeding years. Further, the amount of the overall increase in rent during the term of the Lease depends on when during the term significant increases in the index occur: if in the early years, substantial increases will be multiplied many times over in the remaining years of the term; if only in the later years, substantial increases will only be repeated a few times in the remaining years of the term.
30. This combination of arbitrariness, absurdity and irrationality is said by the Tenant to be such that the formula is "so commercially nonsensical that the parties could not have intended it". It submits that it goes well beyond the scale of a case like Arnold, where the Supreme Court was able to conclude that the flat rate increase mechanism was imprudent and its consequences not foreseen, but which in the economic conditions at the time would not necessarily have been considered by a lessee to be unacceptable or unattractive.
31. The Tenant submits that any reasonable observer or reader of the Lease would be bound to conclude that something had gone wrong. That is so notwithstanding the presence of the break option, which it is said only allows the Tenant to walk away – at an unpredictable time – from an investment on which it has spent considerable sums, and for which privilege it may incur site remediation liability.
32. Textual considerations that the Tenant says supports its case are, first, the choice of a measure of inflation to index the rent; secondly, the provision in paragraph 4.1 of the Sixth Schedule for the effect of the indexation to be preserved in the event that the basis of calculation of the RPI index changes. It is said that such a provision, aiming to preserve the fidelity of the application of RPI, is at odds with its being applied in such an arbitrary way with unpredictable effect. Thirdly, the Tenant relies on paragraph 4.2 of the Sixth Schedule, which makes provision for the case where the RPI index is no longer published. In such a case, a new arrangement for indexation is to be substituted "whereby the figure calculated under paragraph 3 shall reflect increases in the cost of living on a similar basis to that set out in paragraph 3". That, the Tenant argues, implies that the parties understood the paragraph 3 calculation as being intended to reflect changes in the cost of living, i.e. as a means to protect the Landlord against inflation. The literal interpretation of paragraph 3 is plainly at odds with that. The Tenant also argues, fourthly, that other drafting errors or infelicities in the Lease suggest that it is not a carefully or expertly drafted document, thus rendering it more likely that the parties also made a mistake in the language of paragraph 3.



33. The Tenant contends that, once it is accepted that something has gone wrong, it is just as obvious and unambiguous that what the parties actually intended was that the rent would increase (or decrease) annually (but non-cumulatively) in line with RPI. Both of the criteria in Chartbrook for a “corrective interpretation” are therefore present.
34. The Tenant also relies on three contextual considerations in support of its case. The first is that Mr Feakins, as a director of both parties, owed each of them fiduciary duties, such that it would not be assumed that one party’s interests had been made subject to the interests of the other, or otherwise exploited. Second, that on average there was likely to be inflation at more than a nominal rate during the term of the Lease (only in 2009, out of the 20 years before the date of grant, had the RPI fallen). Third, the electricity market in 2013 was volatile and unpredictable (and had fallen sharply just before the grant of the Lease), and the subsidy for the Land was index-linked on a non-cumulative basis. The reasonable observer would not therefore have assumed, contrary to Mr Feakins’ view, that exponential growth in income from the Land was to be expected that justified the levels of rent likely to be payable under the Lease.
35. The Landlord’s case is that the language of the Sixth Schedule is unambiguous and that there is no obvious mistake in its wording. It emphasises the requirement in the authorities that it be clear *on the face of the document* that a mistake has been made. The terms of paragraph 3 are said not to be inconsistent with any other term of the Lease nor an obvious nonsense, so that a reasonable reader would not conclude that a mistake must have been made. The fact that the rent review provisions may produce a result unfavourable to the Tenant is not a sufficient basis for concluding that there is a mistake. The Landlord also says that the fact that one person drafted the Lease on behalf of both parties makes it less likely that a mistake was made.
36. The decision in Arnold v Britton is relied upon by the Landlord as an example of a case where there is no ambiguity in the words, and the fact that the words might (and in that case, certainly would) produce a result that was extremely unfavourable to one party was not a basis for holding the words to be an absurdity requiring them to be read in a different way. The Landlord argues that whether it could be foreseen that the provisions would turn out to be extremely unfavourable to the Tenant is irrelevant, since a failure to appreciate the consequences of terms that were agreed is not a relevant mistake; but, if relevant, it is not the case that the indexation provisions produce an absurd result that must be a mistake.
37. In that regard, the Landlord points to the fact that inflation (or deflation) could not accurately be predicted; that the starting rent was favourable to the Tenant (although there was little evidence beyond Mr Feakins’ own opinion to support this); and in particular to the presence of the break option, which entitled the Tenant to terminate the Lease at any time on only six months’ notice if and when it considered that the rent was unfavourable in the economic circumstances prevailing at that time. The presence of the break option means that there is no absurd imbalance in the parties’ rights and liabilities under the Lease.
38. The Landlord, while not expressly conceding the point, did not advance an argument to the effect that even if it was clear that a mistake had been made it was not clear what that mistake was, i.e. how exactly the Sixth Schedule should be read in a sense different from the terms of paragraphs 3.

## The Law

39. The basic principle applying to the construction of commercial documents is to seek to ascertain the objective meaning of the language used by the parties. The court must consider the language used and ascertain what a reasonable person, namely someone who has all the background knowledge which would reasonably have been available to the parties as they were circumstanced at the date of the contract, would have understood them to have meant. The contract must be considered as a whole and in its wider factual context. That context may be more or less significant, depending on the quality of the drafting of the contract. Where there are two possible constructions, the court is entitled to prefer the construction that is consistent with business common sense and reject the other construction.
40. As explained in Arnold v Britton at [15], the court should generally give effect to the natural and ordinary meaning of the words that the parties have used, even if the consequences of doing so are surprising. However, the process of construction is an “iterative” approach, requiring due consideration to be given to various factors, including the implications of the competing constructions: Wood v Capita Insurance Services Ltd [2017] UKSC 24; [2017] AC 1173 at [11].
41. Difficulty arises where the relevant clause of the contract may contain a grammatical error, or where the natural and ordinary meaning of the clause produces an absurd outcome. In the Investors Compensation Scheme case at p.913, Lord Hoffmann said:

“The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.”

42. In Chartbrook v Persimmon, Lord Hoffmann reviewed earlier authority, including the cases of East v Pantiles (Plant Hire) Ltd [1982] 2 EGLR 111 and KPMG LLP v Network Rail Infrastructure Ltd [2007] Bus LR 1336, both decisions of the Court of Appeal, and said:

“What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant”.

In so stating, Lord Hoffmann also made it clear, first, that correction of mistakes was merely one aspect of the single task of interpreting the contract in its context, and second that the court in so doing is not confined to reading the document without regard to its background or context: “As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.”

43. In Arnold v Britton, Lord Neuberger of Abbotsbury PSC reviewed the general principles applying to the interpretation of contracts, with particular reference to a lease that appeared to produce an uncommercial result for the tenant. A 99-year lease of a holiday chalet included a covenant by the tenant to pay a proportionate part of expenses incurred by the landlord in a yearly sum of £90 plus VAT for the first three years of the term “increasing thereafter by £10 per hundred for every subsequent three year period or part thereof”. Applying the literal interpretation of those words, compounded 10% increases would result in a service charge of £2500 in year 35 of the term and over £550,000 by year 92. Judged by experience of inflation at the date of trial, that produced an alarming outcome for the tenants and was said to be one that the parties could not have intended.
44. Lord Neuberger said that reliance placed on commercial common sense and surrounding circumstances should not be used to undervalue the importance of the language actually used in the contract; that the less clear the drafting, the more readily the court might be persuaded to depart from its natural meaning; and that while commercial common sense was a very important factor, a court should be very slow to reject the natural meaning of a provision as correct simply because it appeared to be a very imprudent term for one of the parties to have agreed:
- “The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of the court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.”
45. It was held that there was no sufficient ambiguity about the term in the lease that would allow the court to hold that it meant something different from the natural and ordinary meaning of the words, or to imply a term qualifying that meaning.
46. Lord Neuberger did not refer specifically to the cases on “corrective construction”, but Lord Hodge JSC did in his judgment, agreeing with Lord Neuberger’s decision. He held that the jurisprudence on “corrective construction” was simply not available to the tenant on the facts of that case, because a mistake was not clear from the limited factual matrix surrounding the grant of the lease that was in evidence, nor was it clear what correction was called for.
47. The case of Trillium (Prime) Property Group GP Ltd v Elmfield Road Ltd [2018] EWCA Civ 1556 concerned the true meaning of an indexation clause in the rent review provisions of a commercial lease. A renewed lease of offices was granted in 2010 at an agreed rent of £1.2 million per annum. A rent review in 2015 required the initial rent to be multiplied by the RPI index for the month preceding the review date, dividing the result by a specified base figure for the RPI index. The base figure for the index was the index figure for September 2005, not July 2010 when the lease was granted. Thus, the initial rent was increased by reference to 10 years’ increase in the RPI index, not five years as might have been ordinarily expected.

48. Lewison LJ concluded that there was no ambiguity in the meaning of the indexation provisions and then considered the argument that it was clear against the commercial background and given the effect of the clause that something had gone wrong with its language. He referred to and applied the principle summarised by Lord Hoffmann in Chartbrook v Persimmon. The argument was rejected on the basis that there was more than one possible explanation for the language of the indexation clause and more than one possible solution to the alleged drafting error. The factual background in the Trillium case provided a possible explanation of the unusual rent review provisions (the rent under the previous lease had been consensually reduced with effect from September 2005 as part of the agreement for the grant of the new lease) and it did not make clear what else the parties must have meant.
49. The Tenant places particular reliance on a decision of the New South Wales Court of Appeal (Priestley JA, Fitzgerald JA and Foster AJA), Westpac Banking Corporation v Tanzone Pty Ltd [2000] NSWCA 25. In that case, a 20-year lease was granted to Westpac at an initial rent of A\$69,404, subject to reviews at the expiry of every two years of the term. The reviewed rent on each occasion was the greater of (i) a fixed increase of 1.1664 times the current rent and (ii) an indexation of the current rent, based on the change in a relevant consumer price index between the grant of the lease and the review date. Therefore, as in the Lease in the instant case, on each rent review the rent was capable of being increased by reference to increases in the index that had already been used to increase the rent on a previous review date. The result was an exponential growth in the rent claimed by the landlord.
50. Under Australian law, if an interpretation produced an “absurd” result the court could interpret the contract differently from its apparent meaning; but if it only produced an “unreasonable” result the apparent meaning stood. The New South Wales Court of Appeal held that the trial judge was wrong to conclude that the result was not absurd. The effect of the review provisions was that “the lessor, throughout a twenty year lease, got at least a multiple inflation effect increase at every rent review after the first”. The basis of review was held to be irrational and incompatible, for the reason that the exponential increase was absurdly high and could not have been intended; and because once the index had increased by a multiple of at least 1.164 (which in fact had happened on the first review date), the first alternative basis of review ceased to have any relevance. The Court said that it must have been a mistake to omit in the clause words that stipulated that for any but the first review date the base index figure was the date of the immediately preceding review date, not the date of grant of the lease.
51. Although the clause in the Westpac case was in part in very similar terms to that in issue in this case and the same exponential growth of rent resulted from its literal application, the New South Wales Court of Appeal in that case concluded that it was clear that the parties meant to provide for a compounded increase in rent, in that any increase in the index during the two years immediately before the current review date was to be applied to the previously increased current rent. In that case, that conclusion was supported by the first alternative basis of review, which required the current rent to be indexed and therefore mandated cumulative increases in rent.

### Discussion and Decision

52. Applying binding authority, as I must, the question for decision is whether, on the facts of this case, it is clear that the indexation provisions in paragraph 3 of the Sixth

Schedule to the Lease are a mistake, and if so whether it is clear what paragraph 3 means. If both those conditions are satisfied, the Lease will be interpreted contrary to the literal meaning of the words of paragraph 3. If one condition is unsatisfied, paragraph 3 can only be “corrected” by way of relief granted in a rectification claim. No such claim has yet been made.

53. The terms of paragraph 3 are unorthodox and are not in use as a standard commercial precedent. They purport to use an index that is a measure of inflation to determine the amount of the annual increase (or decrease) in rent, but in a way that does not increase or decrease the rent according to the way that the index is intended to operate, nor according to any measure of inflation in the preceding year (save in the case of the first rent review). I agree with the Tenant’s submission that the increases in rent produced are irrational and arbitrary, in that the increase bears no relation to the increase (if any) in the index during the year since the previous Review Date, but (at least from the end of the third year of and for the residue of the term) principally reflects the movement of the index in the period from the date of grant to the *previous* Review Date, which movement was taken fully into account on the previous rent review.
54. The effect can be further illustrated by assuming that the RPI increases by 2% in each of the first nine years of the term. In accordance with the formula as written, the rent upon review at the end of year 9 is increased by 18% over the amount of the previous year’s rent. In year 10, if the RPI should fall by 1%, the formula requires that at the end of year 10 the rent is not reduced but increased by 17%. Over years nine and ten of the term, in which RPI increased by 1% in aggregate, the rent nevertheless increases by 35%. This is wholly illogical and is not the result of making inherently improbable assumptions about the movement of RPI during the term of the Lease.
55. The results produced by the formula are both illogical and arbitrary. That conclusion can be reached without making assumptions about what happens to RPI during the term of the Lease. Whatever movements occur, the rent payable immediately before a review date will be being adjusted by reference principally to factors that have previously been factored into the rent payable, not by reference only to RPI movements during the current year. Had Mr Feakins intended to provide for compounded annual increases in rent well in excess of RPI increases, in an attempt to reflect expected growth in land or electricity values, he could easily have done so in a way that provided for minimum compounded increase each year with an additional component to reflect that year’s RPI increase. Or he could have stipulated for the Landlord to be paid a share of the Tenant’s annual profit from the Site.
56. I also accept the Tenant’s argument that the amount of rent can be arbitrarily affected very significantly by when, during the term of 25 years and 6 months, the greatest increases in RPI occur. If sharp increases in RPI occur early in the term, they will be repeatedly applied to the rent passing in every remaining year of the term; if only towards the end of the term, the number of repeated applications will be fewer. The consequence is that the final rent will be different in amount even if the overall increase in the RPI index over the length term is the same. That is a necessary consequence of the replication of each year’s increase in RPI in every remaining year of the term. It is fair to say that the same effect will result from compounded RPI increases year by year, but not to the same degree because the proportionate RPI increases are not repeated in every succeeding year. When the effect of the formula is so arbitrary and unpredictable, it can fairly be said, as the Tenant does, that paragraph 4.1 of the Sixth Schedule looks

very odd. It contains an agreement to preserve – at potentially substantial trouble and cost to the parties – consistency between the historic and the future basis on which the RPI index is calculated. The operation of the formula in the Lease would not depend on such internal consistency, as long as the RPI or some other index can be applied for future rent reviews.

57. More significantly, I accept that paragraph 4.2 of the Sixth Schedule recognises that the purpose of the formula contained in paragraph 3 is for the reviewed rent to reflect increases in the cost of living (“... *the figure to be calculated under paragraph 3 shall reflect increases in the cost of living on a similar basis to that set out in paragraph 3*”). It is the revised rent itself, not the index, that is to reflect increases in the cost of living. But, with the exception of the first Review Date, the figure calculated as the reviewed rent by applying the formula as written in paragraph 3 does not “reflect” an increase in the cost of living: it reflects, principally, increases in the RPI that have already been reflected in the rent before the review. In other words, the terms of paragraph 4.2 support the argument that something has gone wrong with the formula.
58. As to whether paragraph 3 has an absurd effect, in that (unless inflation is nominal or there is a sustained period of deflation) the rent will grow to an unaffordable level during the later years of the term, the arguments are more subtle.
59. The economic background in 2013 was one of modest inflation – there had been one recent year in which the RPI had fallen over a full year, but since that year there had been two years of above average inflation. The longer-term average was around 2.8% per annum. Although the future level of inflation could not be known or predicted with accuracy, there was in my judgment no basis for a reasonable person to conclude that, over the term of the Lease, inflation was likely to be significantly lower than the longer-term average. There was no reason to predict a prolonged period of deflation, though deflation at some time during the term was not impossible. There might be a period of higher inflation, though the well-established economic policy at the time was to aim to keep inflation at or around 2%. A reasonable assumption would therefore have been that inflation at somewhere between 2% and 3% per annum would be likely to continue.
60. On that basis, the rent payable would inevitably become unaffordable towards the end of the term of years, unless there was equivalent exponential growth in the value of electricity. Failing that, RPI growth would need to be assumed to be consistently below 1% per annum during the term of the Lease to avoid huge and unaffordable increases in rent. The wholesale value of electricity was volatile in 2013 but the general trend was one of significant growth in value. The value of the subsidy element of the lessee’s income would not, however, increase in real terms with time. Although the future value of electricity could not accurately be predicted, the reasonable observer of the Lease would in my judgment conclude that the exponential increase in rent later in the term would inevitably outstrip any increase in the value of electricity, simply because of the cumulative *and* repeating effect built into the formula.
61. It is however to be noted that unless inflation was at a rate higher than the longer-term average, the rent would not reach the stage of huge annual increase until after about year 14 of the term: see the graph reproduced in paragraph 26 above. The lessee’s break option means that the lessee could escape the more extreme consequences of the formula, but at the expense of dismantling the Apparatus and possibly having to reinstate the Land. That is because the Lease gives the Landlord the option to require

removal of the Apparatus and reinstatement (paragraph 1.3.3. of the Third Schedule). Those provisions are separate from the Tenant's right to remove its own trade fixtures. The exercise of the break option would mean that much of the cost of the Apparatus might have to be written off by the Tenant over an uncertain number of years, possibly significantly fewer years than the 25 years of the term of the Lease.

62. Although the presence of the break option gives more balance to the Lease in commercial terms and might have been considered adequate protection by some lessees, it does nothing to mitigate the irrational and arbitrary way in which the formula operates just because it provides the lessee with an escape from its worst ravages. It does not explain why, objectively, the Landlord would have required a rent review provision in such terms, if it was not a mistake.
63. The Lease was not a negotiated arm's length transaction, but rather a component part of a structure intended to achieve the effective sale of the opportunity to develop the Land. Neither side has suggested, in evidence or argument, that the formula was deliberately included in the Lease in the hope that a purchaser of the rights would fail to spot or fully understand its probable effect, and I therefore discount that possibility. The Lease was, however, created in order to be a vehicle for the sale of the development rights, and the Landlord would have had in mind to seek to obtain a capital payment upon sale if it could (whether this was attributed to the grant of the Lease or the sale of the grid connection rights) as well as an income stream during the term of the Lease. It is therefore difficult to accept that the Landlord could have intended the formula to operate as written in paragraph 3 of the Sixth Schedule, as it would either suppress the sale value of the rights or prevent a sale to any well-advised purchaser.
64. As previously explained, the fact that the Lease was granted to a connected company, in order to create a vehicle for the sale of the development rights, is an admissible part of the factual background. A lease of a solar farm is a specialist property interest, the value of which to a purchaser depends on matters other than the terms of the lease itself, in particular the terms of and title to the subsidy and the grid connection agreement. Anyone intending to buy the Lease, or take an interest in or security over it, would inevitably look carefully at the broader picture, not just at what was registered at the Land Registry. The factual circumstances in which the package of rights was created would be of significance to any person intending to rely on the terms of the Lease and would therefore be given some weight by a reasonable and informed person seeking to understand its meaning.
65. The conclusion that such a person would reach is not that an irrational and arbitrary provision that could have absurd rental consequences was intended, because the Landlord was in a position to foist it onto the Tenant, but that it must be a drafting mistake because it makes no sense, regardless of the presence of a tenant break option that gives the Tenant an escape route from an unaffordable investment. This is a conclusion that I would have reached, taking into account evidence of the economic background in 2013, regardless of the admissibility of the particular background facts about the circumstances of the grant of the Lease to which I have referred. The review provisions remain irrational, arbitrary and very likely to produce an absurd result in their effect over time whether the Lease is viewed as part of the structuring of the sale of development right or whether it is viewed as an arm's length transaction. Further, I do not accept that a drafting mistake is inherently less likely to have been made because the Lease was prepared by one person on behalf of both parties.

66. The factual background in the Arnold case was different, as the first leases were granted by the lessor at a time of high inflation. Although the compounding effect of the 10% triennial increases could have been predicted, it was possible that a lessee would knowingly have accepted such a term, without having done the arithmetic to realise its full implications. There was nothing irrational or arbitrary about a triennial 10% increase in the amount of a fixed service charge, even if it did produce a harsh result for the lessee later in the term of the lease. Here, by contrast, the formula is inherently arbitrary and irrational from the outset, regardless of the arithmetic. In my judgment, the terms of paragraph 4.2 of the Sixth Schedule are a more reliable indication of the fact that a mistake was made than the presence of a tenant break option suggests that the Lease contains a balanced and considered package of mutual rights.
67. Is it, however, clear what the Sixth Schedule was (objectively) intended to mean? I consider that there are clear indicators that what was intended was the application of the RPI to the current rent, on an annual and cumulative basis; not the application of the aggregate RPI increase to the reserved rent of £15,000, as the Tenant contends.
68. The first indication is that paragraph 3 of the Sixth Schedule states, twice, that it is the rent payable that is to be reviewed annually, not the rent initially reserved, or the “Rent”, as defined. Even accepting that paragraph 3 contains a mistake, it is inherently unlikely that the draftsman was twice mistaken in identifying what it was that was to be indexed, as opposed to wrongly expressing the way in which the indexation would be calculated. Second, the formula in paragraph 3 expressly requires there to be disregarded “any suspension of Rent” when the reviewed rent is being calculated. If it was always to be the reserved rent of £15,000 being indexed, there would be no need for any such stipulation, as the initial rent was payable from day 1 and is identifiable as such, regardless of whether or not the rent currently payable rent was suspended on a Review Date. The disregard only makes sense if it is the current rent payable that is to be indexed. The retention of these words in the Tenant’s suggested draft of how the formula should be read serves no purpose at all and implies that the Tenant’s formulation is not what was meant.
69. Apart from these textual indications, non-cumulative indexation of the initial rent, as suggested by the Tenant, could and would much more simply have been provided for, if that was all that the draftsman had in mind (e.g. “£15,000 per annum, subject to adjustment at the end of each year of the term in accordance with the aggregate increase or decrease in the Retail Prices Index since the Term Commencement Date”). Further, simple indexation, as suggested by the Tenant, makes no allowance over a 25-year term for increase in the value of land or to reflect increase in real terms in the lessee’s income derived from the Land. In a lease containing no profit share for the landlord and an unrestricted tenant-only break option, that would be a surprising rent review provision to include in a lease of such a potentially valuable site. It is possible that the structure was devised to maximise the capital value of the development rights (contrary to what Mr Feakins suggests in his inadmissible evidence), and so reserves a rent that in real terms would not increase over 25 years. However, a rent of £1,000 per acre for bare agricultural land in 2013 was far from negligible, so it is not evident that this was intended.
70. Accordingly, the conclusion that I reach is that it is clear that a mistake was made in the formula included in paragraph 3 of the Sixth Schedule to the Lease. What was clearly intended was that the rent passing immediately before each successive Review



Date would be indexed, not the initial rent of £15,000. The indexation would be by reference to the increase or decrease in the RPI over the previous year only, not over the entire expired part of the term. Thus, the Base Index Figure is “the Index Figure published in respect of the month two months before the commencement of the Term”, as the Sixth Schedule states, for the review of rent upon first Review Date only; and thereafter it would be the Index Figure published in respect of the month two months before the immediately preceding Review Date.

71. Although the effect of this is to compound any increases in rent from year to year, it is neither irrational nor arbitrary that the value of the current rental income enjoyed by the Landlord should be preserved in real terms by an adjustment for the effect of inflation or deflation during the year that has just expired. The rent will decrease in the event of a year of RPI deflation. Most significantly, the language of the Sixth Schedule points to this having been the parties’ intention. Although the re-writing of the Sixth Schedule might require more words, in the definition of Base Index Figure, to give effect to this intention than the alteration suggested by the Tenant, the test is not which alternative is most easily accommodated by the mistaken language. As Lord Hoffmann stated, there is no conceptual limit to the amount of red ink and new words that can notionally be used to give effect to what the parties clearly meant.
72. Had the Landlord made any submissions about whether it was clear what the parties meant, if the formula was a mistake, it might have argued that it could not be considered clear what the mistake was if there are two possible and credible alternatives to the mistaken words. That would be a forceful argument, as it was in the Trillium case, if there were a number of genuine alternatives that the parties could have meant. However, where, as here, it is clear from the text of paragraph 3 that it was the current rent that was to be subject to indexation and where the context and inherent probabilities support that as being the likely intent behind the Sixth Schedule, there is no real doubt as to which of the two alternatives the parties meant.
73. I will therefore make a declaration that on its true construction the Sixth Schedule to the Lease means that the rent passing at the end of each complete year of the term is to be increased or decreased on the Review Date in accordance with any proportionate change in the RPI during that year, as measured by the values of the RPI two months before the Review Date and two months before the previous Review Date (or, in the case of the first Review Date, two months before the Term Commencement Date).