[HOUSE OF LORDS]

UNITED SCIENTIFIC HOLDINGS LTD. . . . RESPONDENTS

AND

BURNLEY BOROUGH COUNCIL . . . . . APPELLANTS

CHEAPSIDE LAND DEVELOPMENT CO LTD. AND ANOTHER . . . . . APPELLANTS

AND

MESSELS SERVICE CO. . . . . RESPONDENTS

1977 Jan. 24, 25, 26, 27, 31; Feb. 1; March 23

Lord Diplock, Viscount Dilhorne, Lord Simon of Glaisdale, Lord Salmon and Lord Fraser of Tullybelton

Landlord and Tenant—Rent—Revision—Time limit in rent review clause—Construction—Whether time of essence of contract—Whether landlords entitled to equitable relief—Whether new rent payable retrospectively from the review date—Law of Property Act 1925 (15 & 16 *Geo.* 5, *c.* 20), *s.* 41 [1]

In the absence of any contra-indications in the express words of the lease or in the interrelation of the rent review clause itself and other clauses or in the surrounding circumstances the presumption is that the time-table specified in a rent review clause for completion of the various steps for determining the rent payable in respect of the period following the review date is not of the essence of the contract (post, pp. 930F, 940E–F, 950F–G, 962F).

In the first of these two appeals, which were heard together, the respondents leased adjoining properties from the appellants for 99 years at a rent of £1,000 a year each. A rent review clause provided that, inter alia, during the year preceding the second and each succeeding 10 year period the parties should either agree or determine by arbitration the sum total of the properties' current rack rent and that one quarter of that sum, or £1,000, whichever was the greater, would be the rent of each property for the next 10 years. The first 10 year period ended on August 31, 1972, and by that date the new rent had neither been agreed nor referred to arbitration and the respondents sought a declaration that, since time was of the essence of the contract, the appellants had lost their chance of increasing the rent for the second 10 year period. Pennycuick V.-C. held that although the review clause was expressed merely as a provision for the quantification of additional rent, it constituted a unilateral right to increase the rent vested in the appellants alone; that time was of the essence of the contract and that, since the appellants had not exercised that right promptly in accordance with the requirements of the review clause, the rent reserved for each property would remain at £1,000 for the second 10 year period. On appeal the Court of Appeal dismissed the appeal.

In the second appeal the respondents leased property from

[1] Law of Property Act 1925, s. 41: see post, pp. 926H—927A.

the appellants for a term of 21 years. For the first period of seven years the rent was £117,340 a year. For the second and third periods of seven years the respective rents were to be determined in accordance with a rent review clause which contained a definition of the "market rent" and defined the "review date" as meaning, in respect of the second period, April 8, 1975. The procedure laid down for determining the market rent had to be initiated by a "lessor's notice" specifying the proposed new rent. The notice had to be served between 12 and six months before the review date. The appellants gave the requisite notice in respect of the period starting on April 8, 1975, within the time specified, but no agreement was reached either as to the new rent or upon a valuer to determine it. Accordingly, as provided by the lease the appellants on June 25, 1975, applied for the appointment of a valuer to the President of the R.I.C.S., who was unwilling to comply with that request without a ruling by the court that it was a valid and effective application since the rent review clause stipulated that the valuer must notify both landlord and tenant of his valuation not less than 14 days before the review date. On a summons issued by the appellants, Graham J. held (i) that the time for the service of a lessor's notice was of the essence of the contract, but that that stipulation had been complied with; (ii) that the time for applying for the appointment of a valuer was not of the essence; and (iii) that the market rent as determined by the valuer if higher than £117,340 a year, would be recoverable retrospectively to the review date. On appeal, the Court of Appeal reversed that decision.

On the appellants' appeals:—

Held, allowing both appeals, (1) that there was nothing in either of the leases in question to displace the presumption that strict adherence to the time-tables specified in their respective rent review clauses was not of the essence of the contract, and that therefore the new rents should be determined in accordance with the procedures specified in the respective leases (post, pp. 932C–D, 934C, 940E–F, 950F–G, 953E, 954A–B, 956B, 962F, 963D–F).

Samuel Properties (Developments) Ltd. v. *Hayek* [1972] 1 W.L.R. 1296, C.A. overruled.

Dictum of Lord Parker of Waddington in *Stickney* v. *Keeble* [1915] A.C. 386, 417, H.L.(E.) considered.

Dictum of Templeman J. in *Mount Charlotte Investments Ltd.* v. *Leek and Westbourne Building Society* [1976] 1 All E.R. 890, 892 approved.

Per Lord Diplock and Lord Salmon. The best way of eliminating all uncertainty in future rent review clauses is to state expressly whether or not stipulations as to the time by which any step provided for by the clause is to be taken shall be treated as of the essence (post, pp. 936G–H, 947E–F).

(2) That the rents fixed by the valuations would be payable retrospectively from the respective review dates (post, pp. 934G—935G, 940D, 947B–D, 956H—957A, 964B).

C. H. Bailey Ltd. v. *Memorial Enterprises Ltd.* [1974] 1 W.L.R. 728, C.A. applied.

Observations on the development and fusion of the rules of common law and equity since 1875 (post, pp. 924E—925B, 926H—927C, 936H—937A, 944E—945B, 957G—958A).

Decisions of the Court of Appeal in *United Scientific Holdings Ltd.* v. *Burnley Borough Council* [1976] Ch. 128; [1976] 2 W.L.R. 686; [1976] 2 All E.R. 220 and *Cheapside*

Land Development Co. Ltd. v. *Messels Service Co.*, May 21, 1976; Court of Appeal (Civil Division) Transcript No. 225 of 1976 (unreported) reversed.

The following cases are referred to in their Lordships' opinions:

Accuba Ltd. v. *Allied Shoe Repairs Ltd.* [1975] 1 W.L.R. 1559; [1975] 3 All E.R. 782.

Bailey (C. H.) Ltd. v. *Memorial Enterprises Ltd.* [1974] 1 W.L.R. 728; [1974] 1 All E.R. 1003, C.A.

Boone v. *Eyre* (1779) 1 Hy.Bl. 273n.

Cutter v. *Powell* (1795) 2 Smith L.C. 1.

Essoldo (Bingo) Ltd.'s Underlease, In re (1971) 23 P. & C.R. 1.

Farrell v. *Alexander* [1977] A.C. 59; [1976] 3 W.L.R. 145; [1976] 2 All E.R. 721, H.L.(E.).

Finch v. *Underwood* (1876) 2 Ch.D. 310, C.A.

Greater London Council v. *Connolly* [1970] 2 Q.B. 100; [1970] 2 W.L.R. 658; [1970] 1 All E.R. 870, C.A.

Gregson v. *Riddle* (1784) (unreported); see 7 Ves.Jun. 268–269.

Hongkong Fir Shipping Co. Ltd. v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26; [1962] 2 W.L.R. 474; [1962] 1 All E.R. 474, C.A.

Hughes v. *Metropolitan Railway Co.* (1877) 2 App.Cas. 439, H.L.(E.).

Jackson v. *Union Marine Insurance Co. Ltd.* (1874) L.R. 10 C.P. 125.

Kenilworth Industrial Sites Ltd. v. *E. C. Little & Co. Ltd.* [1974] 1 W.L.R. 1069; [1974] 2 All E.R. 815; [1975] 1 W.L.R. 143; [1975] 1 All E.R. 53, C.A.

Lennon v. *Napper* (1802) 2 Sch. & Lef. 682.

Martindale v. *Smith* (1841) 1 Q.B. 389.

Mount Charlotte Investments Ltd. v. *Leek and Westbourne Building Society* [1976] 1 All E.R. 890.

Parkin v. *Thorold* (1852) 16 Beav. 59.

Peeters v. *Opie* (1671) 2 Wms.Saund. (1871 ed.) 742.

Pordage v. *Cole* (1669) 1 Wms.Saund. (1871 ed.) 548.

Richards (C.) & Son Ltd. v. *Karenita Ltd.* (1971) 221 E.G. 25.

Samuel Properties (Developments) Ltd. v. *Hayek* [1972] 1 W.L.R. 1296; [1972] 3 All E.R. 473, C.A.

Seton v. *Slade* (1802) 7 Ves.Jun. 265.

Smith v. *Hamilton* [1951] Ch. 174; [1950] 2 All E.R. 928.

Stickney v. *Keeble* [1915] A.C. 386, H.L.(E.).

Stylo Shoes Ltd. v. *Wetherall Bond Street W.1 Ltd.* (1974) 237 E.G. 343, C.A.

United Dominions Trust (Commercial) Ltd. v. *Eagle Aircraft Services Ltd.* [1968] 1 W.L.R. 74; [1968] 1 All E.R. 104, C.A.

Volsey, Ex parte (1882) 21 Ch.D. 442, Sir James Bacon and C.A.

Wallis, Son & Wells v. *Pratt & Haynes* [1910] 2 K.B. 1003, C.A.

Walsh v. *Lonsdale* (1882) 21 Ch.D. 9, Fry J. and C.A.

Watts and Attorney-General for British Columbia v. *Watts* [1908] A.C. 573, P.C.

Weston v. *Collins* (1865) 12 L.T. 4.

Wickman Machine Tool Sales Ltd. v. *L. Schuler A.G.* [1974] A.C. 235; [1973] 2 W.L.R. 683; [1973] 2 All E.R. 39, H.L.(E.).

The following additional cases were cited in argument:

Aberfoyle Plantations Ltd. v. *Cheng* [1960] A.C. 115; [1959] 3 W.L.R. 1011; [1959] 3 All E.R. 910, P.C.

Brimnes, The [1975] Q.B. 929; [1974] 3 W.L.R. 613; [1974] 3 All E.R. 88, C.A.

Courtney & Fairbairn Ltd. v. *Tolaini Brothers (Hotels) Ltd.* [1975] 1 W.L.R. 297; [1975] 1 All E.R. 716, C.A.

Cullimore v. *Lyme Regis Corporation* [1962] 1 Q.B. 718; [1961] 3 W.L.R. 1340; [1961] 3 All E.R. 1008.

Davstone (Holdings) Ltd. v. *Al-Rifai* (1976) 32 P. & C.R. 18.

Decro-Wall International S.A. v. *Practitioners in Marketing Ltd.* [1971] 1 W.L.R. 361; [1971] 2 All E.R. 216, C.A.

Dinham v. *Bradford* (1869) L.R. 5 Ch.App. 519.

Fousset v. *27 Welbeck Street Ltd.* [1973] 25 P. & C.R. 277.

Guaranty Trust Co. of New York v. *Hannay & Co.* [1915] 2 K.B. 536, C.A.

Hare v. *Nicoll* [1966] 2 Q.B. 130; [1966] 2 W.L.R. 441; [1966] 1 All E.R. 285, C.A.

Hartley v. *Hymans* [1920] 3 K.B. 475.

Hordern v. *Hordern* [1910] A.C. 465, P.C.

Imperial Life Assurance Co. of Canada v. *Derwent Publications Ltd.* (1972) 227 E.G. 2241.

Lock v. *Bell* [1931] 1 Ch. 35.

Ranelagh (Lord) v. *Melton* (1864) 2 Dr. & Sm. 278.

Reardon Smith Line Ltd. v. *Ministry of Agriculture, Fisheries and Food* [1963] A.C. 691; [1963] 2 W.L.R. 439; [1963] 1 All E.R. 545, H.L.(E.).

Reuter, Hufeland & Co. v. *Sala & Co.* (1879) 4 C.P.D. 239, C.A.

Roberts v. *Berry* (1853) 3 De G.M. & G. 284.

Salt v. *Cooper* (1880) 16 Ch.D. 544, C.A.

Sandwell Park Colliery Co., In re [1929] 1 Ch. 277.

Stewart v. *Great Western Railway Co.* (1865) 2 De G.J. & Sm. 319.

Tilley v. *Thomas* (1867) L.R. 3 Ch.App. 61.

Voisey, Ex parte (1882) 21 Ch.D. 442, C.A.

West Country Cleaners (Falmouth) Ltd. v. *Saly* [1966] 1 W.L.R. 1485; [1966] 3 All E.R. 210, C.A.

Williams v. *Greatrex* [1957] 1 W.L.R. 31; [1956] 3 All E.R. 705, C.A.

APPEALS from the Court of Appeal.

UNITED SCIENTIFIC HOLDINGS LTD. *v.* BURNLEY BOROUGH COUNCIL.

This was an appeal by the appellants, Burnley Borough Council, from an order of the Court of Appeal (Buckley, Roskill and Browne L.JJ.) dated March 1, 1976, dismissing an appeal by the appellants from an order of Pennycuick V.-C. dated May 13, 1974.

The issues which arose on this appeal were:

(1) Whether the rules of equity as to stipulations as to time in a contract were applicable to a rent review clause in a lease; and, if so,

(2) Whether and in what circumstances according to the rules of equity, stipulations as to time in a rent review clause were deemed to be or to have become of the essence of the contract.

The facts are set out in their Lordships' opinions.

H. E. Francis Q.C. and *B. C. Maddocks* for the appellants.

A. J. Balcombe Q.C. and *Benjamin Levy* for the respondents.

CHEAPSIDE LAND DEVELOPMENT CO. LTD. *v.* MESSELS SERVICE CO.

This was an appeal by the appellants, Cheapside Land Development Co. Ltd., from an order of the Court of Appeal (Stamp, Scarman and Goff L.JJ.) dated May 21, 1976, allowing an appeal by the respondents, Messels Service Co. from an order of Graham J. dated January 29, 1976.

The issues raised in this appeal were:

(1) Whether the rules of equity under which stipulations as to time were in certain circumstances treated as not being of the essence of the contract had any application to a contract in which compliance with such a stipulation was expressed to be a condition precedent to the accrual of a legal right.

(2) If those rules were capable of applying to such a contract, whether and in what circumstances stipulations as to time in a rent review clause contained in a lease of commercial premises were deemed to be of the essence of the contract.

The facts are set out in their Lordships' opinions.

N. Browne-Wilkinson Q.C., *Michael Essayan Q.C.* and *N. T. Hague* for the appellants.

A. J. Balcombe Q.C. and *E. G. Nugee* for the respondents.

The appellants in both appeals were heard first.

H. E. Francis Q.C. and *B. C. Maddocks* for Burnley Borough Council. The question is what is the legal significance to be attributed to stipulations as to time in rent review clauses and what effect should the courts and arbitrators give to such clauses. There are only two courses open to this House: (i) to adopt a literal construction of the clause, or (ii) ascertain the substance and purpose of the clause and give it such effect as will fulfil that purpose. Before 1873 courts of equity and courts of common law construed contracts in the same manner. The Court of Chancery, however, did not construe stipulations as to time in always the same way as courts of common law, but it looked to the substance and purpose of the clause. This doctrine was at first applied to mortgages and then to contracts for the sale of land. The approach of equity was clearly stated by Sir John Romilly M.R. in *Parkin* v. *Thorold* (1852) 16 Beav. 59, 65. This approach should be applied to the present case in view of the fact that the rent review clause formed an important part of the consideration for the lease. The appellants concede that this doctrine does not apply in three types of cases: (i) Where there is an express stipulation as to time in the contract; (ii) where the courts may infer from the nature of the contract or the surrounding circumstances that the parties regard time stipulations as of the essence of their bargains: mercantile contracts, options to purchase freeholds or to renew a lease; (iii) where the application of the equitable doctrine would cause injustice to the other party. Apart from the above three categories the equitable doctrine applies to all contracts by virtue of section 41 of the Law of Property Act 1925 which re-enacted section 25 (7) of the Supreme Court of Judicature Act 1873. For a statement of the position in equity: see *Halsbury's Laws of England*, 4th ed., vol. 9 (1974), paras. 481, 482; *Chitty on Contracts*, 23rd ed. (1968), vol. 1, para. 1140; *Snell's Principles of Equity*, 27th ed. (1973),

p. 595 and *Fry on Specific Performance*, 6th ed. (1921), pp. 500–502; paras. 1072, 1075 and 1079. The statements in the textbooks are supported by *Roberts* v. *Berry* (1853) 3 De G.M. & G. 284, 290; *Tilley* v. *Thomas* (1867) L.R. 3 Ch.App. 61, 67, 69; *Lock* v. *Bell* [1931] 1 Ch. 35, 42, 44; *Stickney* v. *Keeble* [1915] A.C. 386, 400, 401, 403, 415.

The present case does not fall within any of the exceptions to the general rule. Plainly exception (i) does not apply. As to exception (ii), there is nothing in the nature of the property which constrains the court to hold that the time requirement of the contract must be applied. This is not a commercial contract. Roskill L.J., below, placed great emphasis on cases relating to commercial contracts. But a case such as *Williams* v. *Greatrex* [1957] 1 W.L.R. 31 which concerned the sale of building plots to a builder is not a mercantile or commercial contract for the purposes of this doctrine of equity as to time. Moreover, in the present case clause 3 of the lease must be read with the schedule and the statement in clause 3 that the rent "during the residue of the said term" shall be "£1,000 plus any additional rent payable under the provisions contained in the schedule hereto" is an elliptical statement and is not correct. The schedule is essential in determining the current rack rent. The terms of the schedule are obligatory on both parties and if the parties cannot agree the rent, it is to be determined by an arbitrator.

As to exception (iii) the judgment of the Court of Appeal seems to have attached great importance to two matters: (a) that the rent review clause was for the sole benefit of the landlord. It is conceded that this was true in 1972 but this is not necessarily true for the future. There may be deflation in the future. In 1962, the date at which the clause must be construed, the parties were not to know whether there would be inflation or deflation in the future. (b) That it is of the very greatest importance to the tenant that he should know what the rent is at any particular time: see, for example, *per* Buckley L.J. [1976] Ch. 128, 142H–143B, and also *per* Roskill L.J. at p. 150D–G. But the tenant has the remedy in his own hands. He can refer the matter to arbitration. The tenant did not do so in the present case because his solicitors considered that the clause was void for uncertainty.

C. Richards & Son Ltd. v. *Karenita Ltd.* (1971) 221 E.G. 25 was plainly a case where time was of the essence because of the break clause. By the rent review clause the tenant was enabled to discover what the rent would be if he continued with the tenancy. *Samuel Properties (Developments) Ltd.* v. *Hayek* [1972] 1 W.L.R. 1296 is plainly distinguishable, for the rent review was at the "option of the lessor." As to *Kenilworth Industrial Sites Ltd.* v. *E. C. Little & Co. Ltd.* [1975] 1 W.L.R. 143, the appellants have no quarrel with the actual decision in that case. *Stylo Shoes Ltd.* v. *Wetherall Bond Street W.1 Ltd.* (1974) 237 E.G. 343 is distinguishable, for the landlord had a unilateral right to review the rent. It is a true option case and turns on the language of the particular clause. Alternatively, it was wrongly decided.

The House is asked not to follow slavishly the language of clause 3 of the present lease but to look through the "veil" and ascertain what is the substance and purpose of this clause. If this clause is looked at objectively no injustice is done to the tenant by enforcing the rent review

provision. An essential element of this lease is the rent review clause. Whatever be said about option clauses there is no option in the present clause. The obligation to have a review of the rent is binding on both parties. It is very pertinent to observe that if there had been no rent review clause the tenant would not have been granted this lease which is a very valuable right. *Accuba Ltd.* v. *Allied Shoe Repairs Ltd.* [1975] 1 W.L.R. 1559 is another example of the difference between essence and machinery in construing a clause of this nature. It was rightly decided. The observation of Templeman J. in *Mount Charlotte Investments Ltd.* v. *Leek and Westbourne Building Society* [1976] 1 All E.R. 890, 892, that "The analysis of the option rent review clause is a triumph for theory over realism . . . The concept of the tenant granting the landlord an option and conferring benefits on the landlord does not accord with reality," is very pertinent and is adopted. The issue in that case was different from that in the present, but from his observations in that case it is plain that Templeman J. would have decided the present case as an obligation case and not as an option case. Finally, the House is invited to approve the decision in *C. H. Bailey Ltd.* v. *Memorial Enterprises Ltd.* [1974] 1 W.L.R. 728 and hold that the new rent when ascertained should be payable retrospectively as from the review date.

Maddocks following. (1) It is submitted that the rent review clause is not a clause which operates with a "ratchet" effect. It is conceded that if there is no review the rent falls to £1,000. It is said that this is in the landlord's favour, but if time is of the essence then this is most inequitable. For example, suppose that the rent payable on August 1, 1992, is £10,000 and that on August 1, 2002, the rack rent is £8,000, then if time is of the essence and the landlord fails to ask for a review in time, the rent would fall to £1,000, not £8,000! (2) The equitable doctrine should not be applied in a case not relating to the completion of the contract but to a clause in a continuing contract. There are strong reasons for applying it here where the party bringing proceedings has obtained complete performance, that is, he has been granted the lease which contains substantive continuing provisions. (3) The statements in *Fry on Specific Performance*, 6th ed., paras. 1057, 1077, pages 502, 503, are adopted as part of the argument. (4) Mercantile contracts are in quite a different category from the obligations under consideration here. The tenant is aware of the basis on which the rent is to be determined.

N. Browne-Wilkinson Q.C., *Michael Essayan Q.C.* and *N. T. Hague* for Cheapside Land Development Co. Ltd. There are two questions: (1) The basis of the equitable doctrine of time as of the essence of the contract. (2) The relation of that doctrine to that of fundamental breach. Both doctrines have now come very close to one another: see *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26.

The first case to come before the Court of Appeal was *Samuel Properties (Developments) Ltd.* v. *Hayek* [1972] 1 W.L.R. 1296. In that case the right to review was expressed as an "option" conferred on the landlord and was linked with a right for the tenant to determine the lease. The Court of Appeal held in the special circumstances of the case that the time limit it specified for exercising the "option" was of the essence of the contract. Thereafter the authorities developed on the basis

of a distinction between (a) cases such as *Stylo Shoes Ltd.* v. *Wetherall Bond Street W.1 Ltd.* (1974) 237 E.G. 343 and *Mount Charlotte Investments Ltd.* v. *Leek and Westbourne Building Society* [1976] 1 All E.R. 890 where the rent review clause was construed as conferring a beneficial option on the landlord to increase the rent, and time was held to be of the essence, and (b) cases such as *Kenilworth Industrial Sites Ltd.* v. *E. C. Little & Co. Ltd.* [1974] 1 W.L.R. 1069 where the rent review clause was treated as mere machinery for determining the revised rent, and time was held not to be of the essence.

The dichotomy between "option" and "machinery" provisions was persuasively criticised by Templeman J. in *Mount Charlotte Investments Ltd.* v. *Leek and Westbourne Building Society* [1976] 1 All E.R. 890, 892. It nevertheless continued as the basis for determining whether or not time was of the essence in rent review clauses until the Court of Appeal in the *United Scientific* case rejected the suggested dichotomy and held that time was generally to be considered to be of the essence in all rent review clauses, whether they were expressed in the form of an option or otherwise. The appellants' first contention is that the rule should be exactly the opposite, that is, in general, time is not to be considered of the essence in rent review clauses.

The use of the word "option" is a misnomer in the present type of case. This is an unfortunate concept which has come recently into this branch of law because of the use of the word "option" in the *Samuel Properties* case [1972] 1 W.L.R. 1296. It would have been better if in that case it had stated that the rent could be reviewed at the instance of the landlord.

In the Court of Appeal the appellants argued their case on the basis that they were bound to accept, in view of previous decisions of that court, that (a) a rent review clause was akin to an option conferring a benefit on the landlord, and (b) time was of the essence as regards the exercise of such an option. The appellants nevertheless contended that by giving notice to the respondents by the letter dated September 5, 1974, pursuant to paragraph 3 (a) of Schedule 2 to the lease they had sufficiently exercised the option, and that time was not of the essence as regards the taking of any subsequent steps, such as applying to the President of the R.I.C.S. for the appointment of a Fellow of the Institute to fix the revised rent.

Before this House the appellants' contentions are: (a) That a rent review clause neither is, nor is analogous to, an option and that accordingly the doctrine that time is not of the essence can apply thereto; (b) That the general rule of equity that time is not of the essence normally applies to rent review clauses and applies in the present case; alternatively (c) that even if time was of the essence in relation to the setting in motion of the review process by notice, it is not of the essence of the later steps in the review.

As to (a), the equitable rule that stipulations as to time are not in general deemed to be of the essence of the contract is now of general application: section 41 of the Law of Property Act 1925.

As was stated by the Court of Appeal in the present case, the doctrine that in equity time is not of the essence is founded on the principle that

equity gives relief against the consequences of a failure to perform a contract within the time there specified unless it be inequitable to do so: equity looks to the substance not to the form. The doctrine does not depend upon the proper construction of the contract, or the intention or presumed intention of the parties, as appears to have been the view of Lord Salmon in *Stylo Shoes Ltd.* v. *Wetherall Bond Street W.1 Ltd.*, 237 E.G. 343, 345, and that all the members of the Court of Appeal in the *United Scientific* case assumed (see *per* Buckley L.J. [1976] Ch. 128, 144F, 145B; *per* Roskill L.J. at pp. 146F, 148C; and *per* Browne L.J. at pp. 156D, 157D). It is emphasised that the equitable doctrine that time is not of the essence is not primarily based on the intention of the parties. Equity looked at the type of contract in question and asked could one perform the substance of the bargain between the parties. Nor is it a matter of construction. The question is: What effect is to be given to the language in the circumstances? See *Seton* v. *Slade* (1802) 7 Ves.Jun. 265; *Parkin* v. *Thorold*, 16 Beav. 59; *Roberts* v. *Berry*, 3 De G.M. & G. 284; *Tilley* v. *Thomas* (1867) L.R. 3 Ch.App. 61, 67, 69; *Stickney* v. *Keeble* [1915] A.C. 386, 400, 401, 403, 415, 416.

If equity does relieve one party from the consequence of his breach of a time provision (that is if time is not of the essence) equity enforces the contract notwithstanding the breach. It is for this reason that the doctrine of time not being of the essence has no application to failure to exercise in due time an option to make a contract: unless the option is duly exercised, there is no contract which equity can enforce. Equity does not make a contract for the parties: it enforces the substance of contracts the parties have made notwithstanding certain breaches. *United Dominions Trust (Commercial) Ltd.* v. *Eagle Aircraft Services Ltd.* [1968] 1 W.L.R. 74, 80, 82, makes plain that in the option situation strictly so called it is only in circumstances where a bilateral obligation arises that the courts can interfere. See also *In re Sandwell Park Colliery Co.* [1929] 1 Ch. 277, 281, *per* Maugham J.

It is incorrect to treat the operation of a rent review clause as equivalent to the creation of a new contract between the parties by the exercise of an option. The essence of a rent review clause is that it forms an integral part of the original contract between the landlord and the tenant, so that any revised rent becoming payable as a result of the rent review clause constitutes rent originally reserved by the lease. If this were not so, any determination of the revised rent would operate in contract only, such rent would not be recoverable by distress or as between the landlord and the tenant's successors in title.

It is incorrect to treat a rent review clause as being analogous to an option or as conferring a unilateral benefit or privilege on the landlord. The reality of the situation is that the landlord would never have allowed the tenant to obtain the security of tenure afforded by a term of years unless the tenant had agreed to a periodic review of rent so as to protect the landlord from the consequences of inflation. As Templeman J. said in *Mount Charlotte Investments Ltd.* v. *Leek and Westbourne Building Society* [1976] 1 All E.R. 890, 892H: "The concept of the tenant granting the landlord an option and conferring benefits on the landlord does

not accord with reality." This is a very powerful statement in support of the appellants' argument.

The terms of the rent review provisions in the present case are not capable of being construed as an option. *Samuel Properties (Developments) Ltd.* v. *Hayek* [1972] 1 W.L.R. 1296 turned on the right to review the rent being expressly stated to be an "option" conferred on the landlord, and on this right being linked with a corresponding right for the tenant to determine the lease. If and to the extent that that case sought to lay down any principle that a rent review clause is always treated as analogous to an option or that time is generally to be treated as of the essence of rent review clauses, that case was wrongly decided. [Reference was made to *Decro-Wall International S.A.* v. *Practitioners in Marketing Ltd.* [1971] 1 W.L.R. 361.]

As to (b), in the eyes of equity it would be inequitable to relieve a party from the consequences of his failure to perform a contractual term (that is, time is of the essence) if, (A) the parties have expressly agreed that time shall be of the essence (see *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (1915) 32 T.L.R. 156); or (B) the nature of the subject matter of the contract is such that one party is substantially prejudiced by the failure of the other to perform the term by the agreed time; or (C) other circumstances render the granting of relief inequitable. As to (A), it is common ground that there was here no express agreement that time was to be of the essence in this case. As to (B) above, the Court of Appeal in the *United Scientific Holdings* case [1976] Ch. 128 placed reliance on the fact that the lease was a commercial document recording a transaction of a commercial nature. This fact does not support the conclusion that time must be considered as of the essence of the rent review provision. Although time is treated as of the essence of some terms of some commercial contracts, there are many cases where time is not so treated. Three examples are (a) payment of money under mercantile contracts; (b) the date for completion of a building contract; and (c) the sale of land (even where the land is commercial property or development land or the like). Moreover, the cases referred to by the Court of Appeal in relation to mercantile contracts are all concerned with the dates of performance, that is, the dates of delivery where it is claimed that time is of the essence.

There are in general no commercial reasons strong enough to render it essential that the revised rent should be determined by the rent review date (or other earliest date provided for its payment). While it is accepted that a failure to have the revised rent determined beforehand may sometimes be capable of being prejudicial to the tenant, such prejudice was unduly overstated by the Court of Appeal in *United Scientific Holdings* [1976] Ch. 128, 142H—143A, *per* Buckley L.J., and at p. 150D, *per* Roskill L.J., for the following reasons: (a) It is far from necessary that the revised rent should be determined beforehand. Commercial men frequently enter into leases with rent review clauses which expressly provide for the retrospective ascertainment of the revised rent, or indeed which contain no time limits of any kind. (Roskill L.J. in *United Scientific Holdings* [1976] Ch. 128, 146D was wrong in stating, "all these rent revision clauses contain in one form or another stipulations as to time

within which certain acts or matters are required to be done.") (b) In practice, the tenant will virtually always have taken beforehand the advice of his own valuers, and will have a very good idea of what the revised rent is likely to be, or at least of the bracket within which it will fall. (c) A tenant who feels prejudiced can request a determination before the rent review date; and after that date, he can make time of the essence by serving a notice on the landlord. (d) The revised rent when ascertained will be payable retrospectively from the date when it first becomes payable: see *C. H. Bailey Ltd.* v. *Memorial Enterprises Ltd.* [1974] 1 W.L.R. 728, which was correctly decided. (e) In the meantime, "The tenant has benefited because he has not had to pay the increased rent, and meanwhile he has had the use of the money, or, if he would have had to borrow it, he has not had to pay interest on it": *per* Lord Denning M.R. in *C. H. Bailey Ltd.* v. *Memorial Enterprises Ltd.* [1974] 1 W.L.R. 728, 732F.

The adverse effects on the tenant of a late ascertainment of the revised rent are not such as to prejudice him substantially. Such adverse effect is small in comparison to the very serious prejudice to the landlord which results from his being deprived of the proper rent for the whole of the rent review period. In the present case there has never been any suggestion that the tenants have been prejudiced by delay in ascertaining the revised rent.

The substance of the transaction constituted by a lease which contains the rent review clause is that the landlord has granted possession of the land for a legal term of years in consideration of a rent which is periodically to be adjusted to reflect the current market value of the land. Where in such a case the landlord has by granting possession fulfilled his part of the bargain, the court should not lightly deprive him of the agreed consideration, namely the payment of a periodically adjustable rent, against which performance has taken place. (Compare *Dinham* v. *Bradford* (1869) L.R. 5 Ch.App. 519, *Hordern* v. *Hordern* [1910] A.C. 465.) Far from it being inequitable to permit the landlord to obtain the market rent, it is inequitable to permit the tenant to enjoy the property at an inadequate rent. This follows from the fact of the continuing relationship between the parties. Thus in the present case in any event the respondents will continue to occupy the premises.

The Court of Appeal stated that to enforce the rent review clause out of time was to "confer on the landlord a wholly new contractual right." But if the landlords are at this stage permitted to have the rent determined, the court is no more conferring a new contractual right than when, at the suit of a party previously in default, it orders specific performance of a contract for sale of land after the date of completion fixed by the contract.

As to the rent review clause cases, *United Scientific Holdings* case [1976] Ch. 128 does not accord with commercial common sense. *C. Richards & Son Ltd.* v. *Karenita Ltd.*, 221 E.G. 25 contained a break clause and the decision is not disputed. *Samuel Properties (Developments) Ltd.* v. *Hayek* [1972] 1 W.L.R. 1296 was not wrongly decided but the decision has been extended to cover situations which it was not intended to apply. *Kenilworth Industrial Sites Ltd.* v. *E. C. Little & Co. Ltd.* [1974] 1 W.L.R.

A 1069 is manifestly good law. *Stylo Shoes Ltd.* v. *Wetherall Bond Street W.1 Ltd.*, 237 E.G. 343, was wrongly decided. Further, it is distinguishable on its facts. The Court of Appeal based its decisions on concessions made by counsel. The lease contained a very confused review clause and therefore the court construed it against the landlord. *Accuba Ltd.* v. *Allied Shoe Repairs Ltd.* [1975] 1 W.L.R. 1559 is a decision based on the dichotomy between option and obligation. The decision was right B but the process through which the court was forced to go through in view of the authorities was unnecessary and wrong. *Mount Charlotte Investments Ltd.* v. *Leek and Westbourne Building Society* [1976] 1 All E.R. 890 was a most reluctant decision. Templeman J. voiced powerful objection to the way in which the law has developed. In the appellants' submission time is not of the essence but there may be special circumstances postulated in the rent review clause which makes time of the C essence, for example, a break clause. In the present case there is no reason for reading a provision that time is of the essence into clause 3 of the Second Schedule to this lease.

If, contrary to the appellants' submission, time is to be treated as of the essence as regards the giving of notice under paragraph 3 (a) of Schedule 2 to the lease, it does not follow that time was of the essence D as regards the taking of any subsequent steps for the determination of the revised rent, such as applying to the President of the R.I.C.S. for the appointment of an expert to determine such rent, or the giving of the valuation of the expert to the parties. Once an "option" has been exercised, time is not of the essence of the contract thereby produced. Time was not of the essence as regards the provision in paragraph E 3 (c) of Schedule 2 to the lease that the expert should give his valuation to the parties not less than fourteen days before the review date, because neither the appellants nor the respondents could by their own acts ensure that the expert complied with this time limit. Paragraph 3 (c) of Schedule 2 necessarily contemplates two acts because (as the Court of Appeal pointed out) "manifestly the request for a reference under that clause must precede F the notification of its result." It follows, as the Court of Appeal indeed recognised, that if time is of the essence of the later of these acts, time must also necessarily be considered to be of the essence of the first act. It is wrong to hold that time is of the essence of a time limit which is neither expressly stipulated in the contract nor capable of being fixed with certainty by necessary implication. In *Davstone (Holding) Ltd.* v. *Al-Rifai* (1976) 32 P. & C.R. 18, 30, Goulding J. correctly analysed the G process applicable in these cases.

A. J. Balcombe Q.C., *Benjamin Levy* and *E. G. Nugee* for the respondents. If the language of the clauses in these two leases is considered without taking into consideration any doctrines of equity there can be but one answer to these appeals—there never was a due determination in these cases. The landlord's case in both these appeals depends upon an H invocation of the rules of equity, reliance being placed on the provisions of section 41 of the Law of Property Act 1925 which replaced section 25 (7) of the Supreme Court of Judicature Act 1873. In determining the effect of section 41 of the Act of 1925 it is necessary to consider earlier

decisions, in particular the statement of Lord Parker of Waddington in *Stickney* v. *Keeble* [1915] A.C. 386, 417: A

> "If since the Judicature Acts the court is asked to disregard a stipulation as to time in an action for common law relief, and it be established that equity would not under the then existing circumstances have prior to the Act granted specific performance or restrained the action, the section can, in my opinion, have no application, otherwise the stipulation in question would not, as provided B in the section, receive the same effect as it would prior to the Act have received in equity."

That is exactly the position here. What the landlords are seeking is increased rent and that is a common law claim. The question therefore is whether in exercising that common law right equity would have before 1875 interfered. To the same effect are the observations of Maugham J. C in *Lock* v. *Bell* [1931] 1 Ch. 35, 43. Stated shortly the proposition is that at the present time no court will intervene in a case where equity would not have intervened before 1875. The principle here is that equity will not assist a party to perfect an inchoate right. Thus in the *United Scientific Holdings* case all that the parties do is to agree to agree a rent. But a court will not enforce an agreement to agree, nor is this the type of D case in which the court will grant specific performance. It will not grant specific performance to appoint an arbitrator.

It is emphasised that neither at the present time nor before 1875 was there scope for the intervention of equity in this type of case. Here what the landlords are seeking is the relief of equity to create a right, but neither by way of forfeiture, distraint or trespass was there before 1875 scope for equity to intervene. Here there are actions for declaratory E judgments but a declaratory judgment cannot create substantive rights. As to declaratory relief, see *Guaranty Trust Co. of New York* v. *Hannay & Co.* [1915] 2 K.B. 536, 557, 571. [Reference was made to *Snell's Principles of Equity*, 27th ed., p. 13.]

The right to increase the rent is in every case a unilateral right or "if" right and there is no place for equitable intervention until all steps F have been taken to create a bilateral obligation at which date the increased rent becomes payable.

Before 1875 equity could grant its own discretionary remedies, for example, specific performance: see *Seton* v. *Slade*, 7 Ves.Jun. 265. It would also restrain a person from bringing an action at law by common injunction or restrain a person from raising an inequitable defence: see *Stewart* v. *Great Western Railway Co.* (1865) 2 De G.J. & Sm. 319. What G equity could not do was to create a legal right where none existed at law. The first case to establish this doctrine was *Lord Ranelagh* v. *Melton* (1864) 2 Dr. & Sm. 278.

It is emphasised that the principle for which the respondents contend is: Where there is a unilateral contract it cannot be turned into a bilateral contract unless and until all conditions precedent have been satisfied. H Reliance is placed on *Weston* v. *Collins* (1865) 12 L.T. 4, for the statement of principle which is applicable here. The statement of Maugham J. in *In re Sandwell Park Colliery Co.* [1929] 1 Ch. 277, 282, that in a

conditional contract or a unilateral contract equitable doctrines as to time do not apply was approved in *Aberfoyle Plantations Ltd.* v. *Cheng* [1960] A.C. 115, 125, 126. The question then arises whether the above principle applies where there is a unilateral obligation or right contained in a bilateral contract.

Reliance is placed on *Hare* v. *Nicoll* [1966] 2 Q.B. 130 in support of two propositions: (i) Equity does not create legal rights; (ii) Even if equity could intervene it would not do so in this type of case. [Reference was made to *West Country Cleaners (Falmouth) Ltd.* v. *Saly* [1966] 1 W.L.R. 1485.]

If the House were to state that in an option to renew, unless the strict requirements thereof are complied with it cannot be exercised, nevertheless in a rent review clause stipulations as to time need not be strictly complied with, the House would be drawing unhappy and subtle distinctions where the same principles ought to be applied and the law ought to be certain. The observations of Diplock L.J. in *United Dominions Trust (Commercial) Ltd.* v. *Eagle Aircraft Services Ltd.* [1968] 1 W.L.R. 74, 84c et seq. are adopted.

In the *Cheapside* case, without all the sub-conditions in the rent review clause being satisfied the right to operate the clause does not arise. In the *United Scientific* case, although the rent review clause is expressed as an obligation it is not one of the kind which equity will enforce. The concept of an agreement to agree is not one of which the courts will take cognisance: *Courtney & Fairbairn Ltd.* v. *Tolaini Brothers (Hotels) Ltd.* [1975] 1 W.L.R. 297. It is not part of the respondent's case that the principles of equity and common law were frozen in 1875. It is conceded that both common law and equity were free to develop after that date, but it is the respondent's contention that the Judicature Acts effected a fusion of administration rather than of principles: see *Salt* v. *Cooper* (1880) 16 Ch.D. 544, 549, *per* Jessel M.R. and *Snell's Principles of Equity*, 27th ed., p. 17. Since 1874 the courts cannot apply equitable principles in cases where equity was never concerned before that date. As has been well said the two streams of jurisdiction though they run in the same channel do not mingle their waters.

These are not cases where by notice the tenant can make time of the essence. The history of the doctrine of time being of the essence in relation to sales of land is to be found in *Stickney* v. *Keeble* [1915] A.C. 386, 418. None of what was stated in that case on that question is relevant here where there were no mutual obligations between the parties. In the case of the "if" type of obligation specific performance could never be obtained by the other party serving a notice making time of the essence. Further, in the option cases strictly so called there is no room for a notice to make time of the essence for the party in question is under no necessity to exercise it. Moreover, even if the clause is in the form of a mutual obligation it is of its nature unilateral in character.

Even if there had been scope for equity to intervene nevertheless this is a type of case, commercial in character, where equity would not intervene. In *Reuter, Hufeland & Co.* v. *Sala & Co.* (1879) 4 C.P.D. 239, 249, Cotton L.J. stated that it was dangerous to apply the equitable doctrine that time is not of the essence to a commercial contract. This

was followed in *Hartley* v. *Hymans* [1920] 3 K.B. 475 and was extended in *Lock* v. *Bell* [1931] 1 Ch. 35 and *Hare* v. *Nicoll* [1966] 2 Q.B. 130. The Court of Appeal were right in the *Burnley* case in stating that in general time is of the essence in cases of a commercial character. The courts will not declare otiose the careful time table drafted by the parties. The judgments of the Court of Appeal in both the *United Scientific* and *Cheapside* cases are adopted. It is to be noted that they came before two differently constituted Courts of Appeal.

C. Richards & Son Ltd. v. *Karenita Ltd.* (1971) 221 E.G. 25 was an "if" type of clause and there was also a break clause. *In re Essoldo (Bingo) Ltd.'s Underlease* (1971) 23 P. & C.R. 1 was (a) an example of a case where there were no time limits for "the pulling of the trigger"; (b) Pennycuick V.-C. held that the rent was not payable retrospectively. As to *Samuel Properties (Developments) Ltd.* v. *Hayek* [1972] 1 W.L.R. 1296, the existence of a break clause was not fundamental to the decision as has been contended by the present appellants: see pp. 1299H, 1300G, 1302B–D. In *Imperial Life Assurance Co. of Canada* v. *Derwent Publications Ltd.* (1972) 227 E.G. 2241, 2245–2247, Whitford J. held that the time schedule was to be observed. That was not an "option" but an automatic revision case. There was an attempt at "a re-writing of the bargain between the parties." Those words apply to the present appellants.

As to *C. H. Bailey Ltd.* v. *Memorial Enterprises Ltd.* [1974] 1 W.L.R. 728, the backdating of the rent was decided on the point that the contract was commercial in character. Lord Denning M.R. emphasised, at p. 732, that the time and manner of the payment was to be ascertained according to the true construction of the contract, and not by reference to outdated relics of medieval law. Rent review clauses are commercial contracts binding parties strictly to their timing. In *Kenilworth Industrial Sites Ltd.* v. *E. C. Little & Co. Ltd.* [1974] 1 W.L.R. 1069 Megarry J. dealt with the question of repugnancy and held that, where no rent was reserved beyond the first five years of a lease, there was no question of the lease being rent free from there on; that there was no repugnancy between the review clause and the proviso thereto and that, since the clause was mere machinery for fixing the rent for the second and subsequent periods of five years, framed as an obligation and not as an option, the rule for options requiring strict compliance with conditions did not apply. In *Fousset* v. *27 Welbeck Street Ltd.* (1973) 25 P. & C.R. 277, Pennycuick V.-C.'s decision on the construction of the review clause is difficult to reconcile with the subsequent decision in *Bailey's* case [1974] 1 W.L.R. 728, 730, 731, 732. As to *Stylo Shoes Ltd.* v. *Wetherall Bond Street W.1 Ltd.*, 237 E.G. 343, 345, the observations of Lord Salmon support the respondent's argument. The observance of time limits protects tenants against a sudden demand for increased rent where the landlord has failed to follow the prescribed time procedure.

In *Accuba Ltd.* v. *Allied Shoe Repairs Ltd.* [1975] 1 W.L.R. 1559 the fact that the landlord could obtain a review although he was 18 months out of time depended on two errors made by Goff J.: (i) He relied on the *Essoldo* case, 23 P. & C.R. 1, but in that case there was no time limit prescribed for the appointment of a surveyor; (ii) As Roskill L.J. observed in the *United Scientific* case [1976] Ch. 128, 153 the judge

A adopted a hard and fast distinction between "option" cases and "obligation" cases and elevated that phrase of Megarry J., in *Kenilworth* [1974] 1 W.L.R. 1069, entirely correct in its context, to a rule of law. In *Mount Charlotte Investments Ltd.* v. *Leek & Westbourne Building Society* [1976] 1 All E.R. 890, 892, Templeman J. was right to view with disfavour the dichotomy which had grown up in the cases between option and obligation rent revision clauses. As regards *Davstone Holdings Ltd.* B v. *Al-Rifai*, 32 P. & C.R. 18 the rent review clause there can be analysed as a single condition precedent.

In the *United Scientific* case [1976] Ch. 128 reliance is placed in particular on the observations of Buckley L.J. at pp. 142H—143C, 144F—145B, of Roskill L.J. at pp. 146E–F, 149A–B, 150B–G, 151A–B, and of Browne L.J. at pp. 155D–F, 156D–E.

C Third parties can be affected by a rent review clause, in particular the original lessee where there has been an assignment, and this affords another reason why time limits should be strictly observed for there could well be circumstances where an assignee might be forced into bankruptcy. *Williams* v. *Greatrex* [1957] 1 W.L.R. 31 affords an object lesson of what would happen if time was not of the essence in rent review clauses.

D If the above contentions be wrong then the question arises which was not open in the courts below, namely, whether the rent review clause can have retrospective effect. Rent is not simply a contractual agreement for the payment of money: see *Halsbury's Laws of England*, 3rd ed., vol. 23 (1958), pp. 536, 538, paras. 1193, 1196. The possibility of distraining is the mark of rent and it has to be certain: *Ex parte Voisey* (1882) 21 Ch.D. 442, 455, 458. Until the rent has been determined by the arbitrator it E cannot be certain and therefore it cannot be rent in the strict sense and therefore the rent review clause cannot be operated retrospectively. This proposition is supported by *Greater London Council* v. *Connolly* [1970] 2 Q.B. 100, 108, 111, and the *Essoldo* case, 23 P. & C.R. 1, 4, 5. As to *C. H. Bailey Ltd.* v. *Memorial Enterprises Ltd.* [1974] 1 W.L.R. 728 there were no possible grounds for Lord Denning M.R. there distinguish- F ing as he did the *Greater London Council* case [1970] 2 Q.B. 100. The idea that rent must be certain is with reference to rent reserved in leases (terms for years): see *Foa's General Law of Landlord and Tenant*, 8th ed. (1957), p. 101. . [Reference was also made to section 205 (1), (xxiii) of the Law of Property Act 1925 and section 3 of the Law of Property Act 1969.]

Levy following, in the *United Scientific* case. Leases of residential G property are not of a commercial nature in view of legislation affecting residential premises—the Rent Acts. It is leases of business premises where the parties are at arm's length which are commercial in character. On the question of time being of the essence, compare the time provisions in the Landlord and Tenant Act 1954. [Reference was made to *Samuel Properties (Developments) Ltd.* v. *Hayek* [1972] 1 W.L.R. 1296, H 1302B.]

This rent review clause enables the landlord to obtain a benefit if the market value of the property rises.

Nugee following in the *Cheapside* case. The source of the statement

that since the Judicature Acts "the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters," is *Ashburner's Principles of Equity*, 2nd ed. (1933), p. 18, reproducing 1st ed. (1902) p. 23. Reliance was placed on *Snell's Principles of Equity*, 27th ed., p. 595, but the passage in question is confined in its ambit by the opening words of para. 7. Reference was also made to *Fry on Specific Performance*, 6th ed., p. 500, para. 1072, again that passage is limited in its ambit by the opening words of the chapter in para. 1071, p. 500. *Halsbury's Laws of England*, 4th ed., vol. 9, para. 481, states the law too widely. It is correctly stated in *Halsbury*, 3rd ed., vol. 8 (1954), para. 280, p. 164. There is no justification for the change in language in the 4th edition for there are no intervening cases to entail any change in the statement of the law. The passage in the 4th edition is directly contrary to what was stated by Lord Parker of Waddington in *Stickney* v. *Keeble* [1915] A.C. 386, 417. Apart from the above statement in *Halsbury*, 4th ed., none of the textbooks states that the equitable doctrine applies outside the field in which it was applied before 1875. The comment on the decision of the Court of Appeal in the *Burnley* case to be found in 92 L.Q.R. 324 is adopted as part of this argument.

As to the *Hongkong Fir* case [1962] 2 Q.B. 26, it cannot be applied unless it can be shown to be a case of similar character which it is not. Mr. Browne-Wilkinson Q.C. is attempting to apply to unilateral obligations a principle hitherto only applicable to synallagmatic obligations. The present is a *United Dominions Trust* case [1968] 1 W.L.R. 74 and not a *Hongkong Fir* case [1962] 2 Q.B. 26. Lord Devlin's observations on options in *Reardon Smith Line Ltd.* v. *Ministry of Agriculture, Fisheries and Food* [1963] A.C. 691, 729–731, are prayed in aid as being applicable to the present option. It is a business option that the landlord had here and its exercise must be communicated to the tenant within the time prescribed.

It has not been disputed that section 41 of the Law of Property Act 1925 has to be construed in the same manner as section 25 (7) of the Supreme Court of Judicature Act 1873 and therefore the principles laid down by Lord Parker of Waddington in *Stickney* v. *Keeble* [1915] A.C. 386, 417, apply to section 41 of the Act of 1925. It is to be noted that the provisions of section 25 of the Judicature Act 1873 which relate to property are to be found in the Law of Property Act 1925 whilst those relating to the administration of justice appear in the Supreme Court of Judicature (Consolidation) Act 1925. The respondents' contention is not that law and equity were frozen in 1875 but that equitable principles will only be developed within the field to which they were applied before 1875. The statements in *Halsbury's Laws of England*, 1st ed., vol. 7 (1909), p. 413 and 2nd ed., vol. 7, p. 192 are in the same language as is to be found in *Halsbury*, 3rd ed., vol. 8, p. 164. It is emphasised that there is no reported decision which would support the change of language to be found in *Halsbury*, 4th ed., vol. 9, para. 481.

The principles adumbrated in *Cullimore* v. *Lyme Regis Corporation* [1962] 1 Q.B. 718, 726 et. seq. are applicable to the arbitration provision in the rent review clause in the *Cheapside* case for (i) it is a power

A and prima facie mandatory; (ii) if directory, there must be substantial compliance if the time provisions are to be overlooked.

Conveyancers would be placed in a very difficult position if the appellants' argument be accepted, for their task is to attain precision and to remove uncertainties. For precedents of rent review clause which were current at the date of the making of the *Cheapside* lease, see the *Encyclopaedia of Forms and Precedents*, 4th ed., vol. XI, pp. 300, 301, B paras. 8, 10, p. 617; vol. XII, pp. 747, 761, 841, 973. There was no shortage of precedents available if the parties had intended that the landlord should be entitled to an increased rent whether or not he obtained a valuation before March 25, 1975.

In a case where the rent started at £117,000, one should assume that the parties deliberately agreed upon the present clause for the protection of the tenant as a matter of hard commercial bargaining. If equity C could ever relieve against a failure to exercise a unilateral right in time, or the common law could ever treat such a failure as non-fundamental, this is the last type of case in which it should do so. Reliance is placed on *The Brimnes* [1975] Q.B. 929, 952, 958, 971, for the correct approach to the construction of the present leases. At the present time there are only two fields in which time is not of the essence, namely, mortgages D and contracts for the sale of land. In both there is well-tried machinery for making time of the essence, of a kind that would be quite inappropriate for a rent review clause, which is in its nature unilateral. At the moment conveyancers know where they stand on the drafting and interpretation of rent review clauses. It would cause great uncertainty in thousands of cases if the equitable doctrine was extended to them.

Francis Q.C. in reply. The appellants find great difficulty in sub- E mitting that the language of section 41 of the Law of Property Act 1925 is different from section 25 (7) of the Supreme Court of Judicature Act 1875, but it is not conceded that the equitable doctrine of time is not of the essence is confined to cases where equity granted specific performance nor does *Stickney* v. *Keeble* [1915] A.C. 386 so decide. See also *Fry on Specific Performance*, 6th ed., para. 1073.

F Lord Parker of Waddington's observations in *Stickney* v. *Keeble* [1915] A.C. 396, 417, must be considered in relation to the very limited context of that decision. Lord Parker's observations were directed to the argument of the respondents in that case and in relation to a contract for the sale of land. Even at common law the time limit in this case would not be considered essential as going to the root of the matter. This is not in form or substance an option case.

G *Browne-Wilkinson Q.C.* in reply. Mr. Francis Q.C.'s observations on *Stickney* v. *Keeble* are adopted. It is to be noted that the present respondents' contention based on *Stickney* v. *Keeble* has become wider and wider as the case has progressed.

The respondents are suggesting that if A agrees with B to do something within a specific time then if A defaults equity will intervene to H assist B. But equity will not assist if there is no default. Equity, and indeed, the common law, has been developing over the last hundred years and although the two streams since 1874 do not intermingle but flow in separate channels nevertheless they are not frozen.

As to *Samuel Properties (Developments) Ltd.* v. *Hayek* [1972] 1 W.L.R. 1296, although there was a break clause in that lease Mr. Balcombe Q.C. is right in pointing out that it was not the determining feature in that case. It is suggested that the express words of the option were the grounds of the decision and if it goes wider than that then it was wrongly decided.

What sum is payable and when it is payable are questions of construction, but it is said that because the word "rent" is a term of art it cannot be made retrospective beyond the date of quantification. It is important therefore to discover the ambit of the decision in *C. H. Bailey Ltd.* v. *Memorial Enterprises Ltd.* [1974] 1 W.L.R. 728, 731, 742, if Lord Denning M.R. is right in his approach to the question of construction. In modern law the word "rent" has two meanings: (i) It is a payment issuing out of land recoverable by distraint; (ii) A contractual monetary obligation payment of which is a condition of enjoying possession of the property in question. On the construction of the present clause the new rent is payable as from the review date. For the historical background: see *Foa's General Law of Landlord and Tenant*, 8th ed., pp. 100, 101, para. 163 and *Holdsworth, A History of English Law*, vol. VII, pp. 262–273. It is conceded that in order to recover the rent it had to be by way of distraint: see *Ex parte Voisey*, 21 Ch.D. 442. It is obvious in that case that one cannot recover by distraint something which has not been quantified. Non constat that one cannot recover a sum due by contract when subsequently quantified. The observations of Cotton L.J. in *Walsh* v. *Lonsdale* (1882) 21 Ch.D. 9, 16, are invoked as a parallel to the present case.

As to *Greater London Council* v. *Connolly* [1970] 2 Q.B. 100, 109, 112, it is important to discover what the Court of Appeal had to decide in that case. In the result it will be found that the Court of Appeal did not have to decide what was decided in the *Bailey* case [1974] 1 W.L.R. 728. The *Bailey* case is good law and should be adopted. The proper construction of a lease should not be fettered by a single concept of rent namely, the medieval concept.

Balcombe Q.C. in rejoinder. As to *Walsh* v. *Lonsdale*, 21 Ch.D. 9, see *Foa's General Law of Landlord and Tenant*, 8th ed., p. 485, para. 763.

To be a true lease there must be a rent for which there can be a distraint. The word "rent" is a term of art and must bear the same meaning throughout the lease.

Their Lordships took time for consideration.

March 23, 1977. LORD DIPLOCK. My Lords, during the last two decades since inflation, particularly in the property market, has been rife, it has been usual to include in leases for a term of years, except when the term is very short, a clause providing for the annual rent to be reviewed at fixed intervals during the term and for the market rent current at each review date if it be higher, to be substituted for the rent previously payable. The wording of such clauses varies; there are several different ones now included in the books of precedents; but a feature common to nearly all of them is that not only do they specify a procedure for the

determination of the revised rent by agreement between the parties or, failing that, by an independent valuer or arbitrator, but they also set out a time-table for taking some or all of the steps in that procedure which, if followed, would enable the revised rent to be settled not later than the review date.

The question in both of these appeals, which have been heard together, is whether a failure to keep strictly to the time-table laid down in the review clause deprives the landlord of his right to have the rent reviewed and consequently of his right to receive an increased rent during the period that will elapse until the next review date.

On a number of occasions during the last five years the question whether time was of the essence in a whole variety of rent review clauses has come before the High Court and the Court of Appeal. Until the judgments of the Court of Appeal in the instant cases the answers given seem to turn upon fine distinctions between the wording of particular clauses so as to classify them, either on the one hand as conferring upon the landlord a unilateral "option" for the exercise of which time was of the essence, or on the other as merely laying down the machinery for the performance of mutual "obligations" by the tenant as well as by the landlord, in which case time was not of the essence.

The suggested dichotomy between the so-called "option" clauses and "obligation" or "machinery" clauses was discarded in each of the instant appeals by Courts of Appeal of different composition. In the first appeal *United Scientific Holdings Ltd.* v. *Burnley Borough Council* [1976] Ch. 128, Buckley, Roskill and Browne L.JJ. in separate judgments held that the commercial character of the contract contained in a lease incorporating a rent review clause raised the presumption that the parties intended time to be of the essence of the contract in respect of each step required to be taken by the landlord in order to obtain a determination of any increased rent under a rent review clause. In the second appeal, Stamp, Scarman and Goff L.JJ. joined in a single judgment in which they also held that prima facie time was of the essence in a rent review clause, but they preferred to do so not upon the ground of the presumed intentions of the parties, but upon the ground that in its legal nature a rent review clause is a grant of a unilateral right to the landlord and that equity would not have granted relief to the grantee of such a right for failure to perform any of the conditions of the grant timeously.

It is not disputed that the parties to a lease may provide expressly that time is or time is not of the essence of the contract in respect of all or any of the steps required to be taken by the landlord to obtain the determination of an increased rent, and that if they do so the court will give effect to their expressed intention. But many rent review cases that are now maturing do not contain express provision in these terms. What the Court of Appeal have decided is that the commercial nature of the contract and/or the legal nature of the right granted to the landlord by a rent review clause raises a presumption that time specified in such a clause for anything that needs to be done by him is of the essence; and that this presumption will prevail unless there are strong contra-indications in the actual wording of the clause. They found no sufficient

contra-indications in the rent review clauses which are in question in the instant appeals.

My Lords, the reason why these two appeals have been heard together in the House although the two rent review clauses that are in question differ widely in their wording, is to obtain a ruling whether the presumption as to the construction and effect of rent review clauses is as the Court of Appeal held it to be, or whether it is the contrary presumption, viz. that time is not of the essence. I propose accordingly to deal first with that question as a matter of legal principle before turning to the precise terms of the rent review clauses involved in the two appeals.

I shall have to examine rather more closely what are the legal consequences of "time being of the essence" and time not being of the essence; but I do not think that the question of principle involved in these appeals can be solved by classifying the contract of tenancy as being of a commercial character. In some stipulations in commercial contracts as to the time when something must be done by one of the parties or some event must occur, time is of the essence; in others it is not. In commercial contracts for the sale of goods prima facie a stipulated time of delivery is of the essence, but prima facie a stipulated time of payment is not (Sale of Goods Act 1893, section 10 (1)); in a charterparty a stipulated time of payment of hire is of the essence. Moreover a contract of tenancy of business premises would not appear to be more of a commercial character than a contract for sale of those premises. Nevertheless, the latter provides a classic example of a contract in which stipulations as to the time when the various steps to complete the purchase are to be taken are not regarded as of the essence of the contract.

In the arguments developed before this House the commercial character of the contract of tenancy has played a relatively minor role. Counsel for all the parties have sought to concentrate your Lordships' attention upon the "rules of equity" and, in particular, upon the auxiliary jurisdiction formerly exercised by the Court of Chancery to grant relief against the strict enforcement in a court of law of a contractual stipulation as to time.

My Lords, if by "rules of equity" is meant that body of substantive and adjectival law that, prior to 1875, was administered by the Court of Chancery but not by courts of common law, to speak of the rules of equity as being part of the law of England in 1977 is about as meaningful as to speak similarly of the Statutes of Uses or of Quia Emptores. Historically all three have in their time played an important part in the development of the corpus juris into what it is today; but to perpetuate a dichotomy between rules of equity and rules of common law which it was a major purpose of the Supreme Court of Judicature Act 1873 to do away with, is, in my view, conducive to erroneous conclusions as to the ways in which the law of England has developed in the last hundred years.

Your Lordships have been referred to the vivid phrase traceable to the first edition of *Ashburner, Principles of Equity* where, in speaking in 1902 of the effect of the Supreme Court of Judicature Act he says (p. 23) "the two streams of jurisdiction" (sc. law and equity)—"though they

run in the same channel, run side by side and do not mingle their waters." My Lords, by 1977 this metaphor has in my view become both mischievous and deceptive. The innate conservatism of English lawyers may have made them slow to recognise that by the Supreme Court of Judicature Act 1873 the two systems of substantive and adjectival law formerly administered by courts of law and Courts of Chancery (as well as those administered by courts of admiralty, probate and matrimonial causes), were fused. As at the confluence of the Rhône and Saône, it may be possible for a short distance to discern the source from which each part of the combined stream came, but there comes a point at which this ceases to be possible. If Professor Ashburner's fluvial metaphor is to be retained at all, the waters of the confluent streams of law and equity have surely mingled now.

Section 25 of the Supreme Court of Judicature Act 1873 took occasion of the union of the several courts whose jurisdiction was thereby transferred to the High Court of Justice, to amend and declare the law to be thereafter administered in England as to several matters. Ten matters were particularly mentioned in subsections (1) to (10). Among them subsection (7) was as follows:

> "Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity."

Subsection (11) contained the final provision:

> "Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."

The first thing to be observed about each of these subsections is that they are concerned with matters in which before the unifying Act came into force there had been a variance between the ways in which they were dealt with in courts of law and courts of equity respectively. Outside the field of mortgages and contracts for the sale of land, there were other kinds of contracts in which by 1875 some stipulations as to time were not treated in courts of law as being "conditions precedent"—which was then the common lawyer's way of saying that the particular stipulation as to time was not of the essence of the contract. For instance, that the time of payment in a contract for the sale of goods is not of the essence of the contract unless it is made so by express agreement, was well established in the courts of law 30 years before the Supreme Court of Judicature Act 1873 and 50 years before the Sale of Goods Act 1893: *Martindale* v. *Smith* (1841) 1 Q.B. 389. This was symptomatic of the growing tendency in the courts of common law to adopt a more rational classification of contractual stipulations and the consequences of their non-performance than that into which the rules of pleading peculiar to the old forms of action had led them. With the effect that courts of law gave to those stipulations as to time that they did not regard as being

of the essence of the contract, courts of equity before 1873 had no occasion to interfere by way of equitable relief. Such stipulations were unaffected by section 25 of the Supreme Court of Judicature Act 1873. Nor did the coming into force of that Act bring to a sudden halt the whole process of development of the substantive law of England that had been so notable an achievement of the preceding decades. Yet that is what it would have done as respects the law of contract if thereafter whenever the effect of a contractual stipulation as to time or otherwise was in question it were necessary to inquire whether or not a court of equity would have granted relief against its treatment as a "condition precedent" in a court of law before 1875.

The contention on behalf of the respondents that this is what your Lordships ought to do placed great reliance upon some observations of Lord Parker of Waddington in *Stickney* v. *Keeble* [1915] A.C. 386, 417 where in an action by a purchaser of land for the return of his deposit Lord Parker of Waddington said:

> "If since the Judicature Acts the court is asked to disregard a stipulation as to time in an action for common law relief, and it be established that equity would not under the then existing circumstances have prior to the Act granted specific performance or restrained the action, the section can, in my opinion, have no application, otherwise the stipulation in question would not, as provided in the section, receive the same effect as it would prior to the Act have received in equity."

Lord Parker of Waddington's observations were made in relation to a contract for the sale of land of which the purchaser alleged, successfully in the result, that the time by which the vendor had to make title had become of the essence as the result of a notice served by the purchaser. He claimed from the vendor the return of his deposit. The vendor resisted this upon the ground that the time for completion specified in the purchaser's notice was unreasonably short and accordingly had not become of the essence of the contract. This meant that he was claiming to be still entitled to insist upon the purchaser's completing the purchase. Shortly after action brought, however, he had sold the property to a third party and so disabled himself by the time of the hearing from completing the contract with the purchaser. This would have disqualified him from relief in the Court of Chancery before 1873 against the purchaser's claim for the return of his deposit. What Lord Parker of Waddington said was in answer to an argument for the vendor that the effect of section 25 (7) was to require the court to look only to the position at the date of the issue of the writ in the action and to ignore anything that had happened afterwards. He was not dealing with the general question of what stipulations as to time are to be regarded as being of the essence of the contract.

In 1925 section 25 (7) of the Supreme Court of Judicature Act 1873 was replaced by section 41 of the Law of Property Act 1925. The wording differs slightly:

> "Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the

essence of the contract, are also construed and have effect at law in accordance with the same rules."

The Law of Property Act 1925 was a consolidation Act. It re-states the law as it had been declared in 1873 but substitutes a reference to "rules of equity" for the reference to a court of equity which had been abolished as a separate court more than 50 years before. I have already commented upon the danger of treating the use of this expression today as anything more than an indication of the source to which a current rule of the substantive or adjectival law of England can be traced. The change in wording in the substituted section does not in my view make any difference to its substance. It makes it clear that there should continue to be, as there had been since 1875, only one set of rules for judges to apply in determining whether a particular stipulation as to time or otherwise was of the essence of a contract. It places no ban upon further development of the rules by judicial decision.

My Lords, the rules of equity, to the extent that the Court of Chancery had developed them up to 1873 as a system distinct from rules of common law, did not regard stipulations in contracts as to the time by which various steps should be taken by the parties as being of the essence of the contract unless the express words of the contract, the nature of its subject matter or the surrounding circumstances made it inequitable not to treat the failure of one party to comply exactly with the stipulation as relieving the other party from the duty to perform his obligations under the contract. The Court of Chancery had reached this position in relation to contracts for the sale of land by the extension by Lord Eldon L.C. of the earlier doctrine that a stipulation as to the time of repayment by the mortgagor under a legal mortgage was not of the essence of the contract so as to entitle the mortgagee to refuse to reconvey the property if payment with interest was tendered after the stipulated date was passed: *Seton* v. *Slade* (1802) 7 Ves.Jun. 265.

Contemporaneously with this development of the rules of equity by the Court of Chancery, the courts of common law were in process of developing for themselves a not dissimilar rule in relation to stipulations as to time in other contracts, but were reaching their solution by a different route. They did so by a growing recognition of exceptions to the rule which had been fostered in the early part of the 18th century by the necessity for the plaintiff under the then current rules of pleading to aver performance or willingness or ability to perform all stipulations on his part in the precise words in which they were expressed in the contract. This rule treated all promises by each party to a contract as "conditions precedent" to all promises of the other: with the result that any departure from the promised manner of performance, however slight that departure might have been, discharged the other party from the obligation to continue to perform any of his own promises. The history of the development by common law courts of exceptions to this rule is traced in the judgments of the Court of Appeal in *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26 from its origin in *Boone* v. *Eyre*, 1 Hy.Bl. 723n. in 1779 to the judgment of Bramwell B. in *Jackson* v. *Union Marine Insurance Co. Ltd.* (1874) L.R.