10 C.P. 125, 147 on the eve of the coming into force of the Supreme Court of Judicature Act 1873.

My Lords, I will not take up time in repeating here what I myself said in the *Hongkong Fir* case, except to point out that by 1873:

(1) Stipulations as to the time at which a party was to perform a promise on his part were among the contractual stipulations which were not regarded as "conditions precedent" if his failure to perform that promise punctually did not deprive the other party of substantially the whole benefit which it was intended that he should obtain from the contract;

(2) When the delay by one party in performing a particular promise punctually had become so prolonged as to deprive the other party of substantially the whole benefit which it was intended that he should obtain from the contract it did discharge that other party from the obligation to continue to perform any of his own promises which as yet were unperformed;

(3) Similar principles were applicable to determine whether the parties' duties to one another to continue to perform their mutual obligations were discharged by frustration of the adventure that was the object of the contract. A party's ability to perform his promise might depend upon the prior occurrence of an event which neither he nor the other party had promised would occur. The question whether a stipulation as to the time at which the event should occur was of the essence of the contract depended upon whether even a brief postponement of it would deprive one or other of the parties of substantially the whole benefit that it was intended that he should obtain from the contract.

In one respect the Court of Chancery had introduced a refinement in the way it dealt with stipulations as to time in contracts for the sale of land, which had no close counterpart in the rules that had by 1873 been adopted in the courts of common law. Once the time had elapsed that was specified for the performance of an act in a stipulation as to time which was not of the essence of the contract, the party entitled to performance could give to the other party notice calling for performance within a specified period: and provided that the period was considered by the court to be reasonable, the notice had the effect of making it of the essence of the contract that performance should take place within that period. Hence the reference in the statutory provisions that I have cited to time being deemed to "have become" of the essence of the contract.

Both in the Court of Chancery and in the courts of common law the rules that have been developed about particular stipulations not being of the essence of the contract or not being "conditions precedent" applied to synallagmatic contracts only. They did not apply to unilateral or "if contracts," of which the example most germane to the instant appeals is an option. As pointed out by Lord Denning M.R. in *United Dominions Trust (Commercial) Ltd.* v. *Eagle Aircraft Services Ltd.* [1968] 1 W.L.R. 74, 81 where speaking of options to purchase real or personal property or to renew a lease, he said:

A "In point of legal analysis, the grant of an option in such cases, is an irrevocable offer (being supported by consideration so that it cannot be revoked). In order to be turned into a binding contract, the offer must be accepted in exact compliance with its terms. The acceptance must correspond with the offer."

Exact compliance with the terms of the offer in an "if contract" had been required in courts of equity as well as in courts of common law: B see *Weston* v. *Collins* (1865) 12 L.T. 4; *Finch* v. *Underwood* (1876) 2 Ch.D. 310. A rationale of the distinction which was drawn between the two kinds of contracts in courts of equity is that equity was concerned with the performance of contracts into which parties had already entered. It did not force any person to enter into a contract with another.

C Again I will refrain from repeating the more elaborate juristic analysis of the distinction between the two types of contract that I attempted in the *United Dominions Trust* case [1968] 1 W.L.R. 74, 83–84. A more practical business explanation why stipulation as to the time by which an option to acquire an interest in property should be exercised by the grantee must be punctually observed, is that the D grantor, so long as the option remains open, thereby submits to being disabled from disposing of his proprietary interest to anyone other than the grantee, and this without any guarantee that it will be disposed of to the grantee. In accepting such a fetter upon his powers of disposition of his property, the grantor needs to know with certainty the moment when it has come to an end.

My Lords, although a lease is a synallagmatic contract it may also E contain a clause granting to the tenant an option to obtain a renewal of the lease upon the expiration of the term thereby granted. Such a clause provides a classic instance of an option to acquire a leasehold interest in futuro, and it is well established that a stipulation as to the time at which notice to exercise the option must be given is of the essence of the option to renew. Although your Lordships have not been F referred to any direct authority upon the converse case of a "break clause" granting to the tenant an option to determine his interest in the property and his contractual relationship with the landlord prematurely at the end of a stated period of the full term of years granted by the lease, there is a practical business reason for treating time as of the essence of such a clause, which is similar to that applicable to an option to acquire property. The exercise of this option by the tenant G will have the effect of depriving the landlord of the existing source of income from his property and the evident purpose of the stipulation as to notice is to leave him free thereafter to enter into a contract with a new tenant for a tenancy commencing at the date of surrender provided for in the break clause.

The rent review clauses that have given rise to the two instant H appeals, as well as nearly all those which have been considered in the reported cases, if they result in any alteration of the rent previously payable can only have the effect of providing for the payment of a higher rent than would be payable by the tenant if the review clause

had not been brought into operation. So the only party who can benefit from a review of rent under these clauses is the landlord. It is accordingly unlikely that the tenant would take the initiative in obtaining a review of the rent, even where the clause contains provision for his doing so—as it does in the second of the instant appeals.

It was this concentration of initiative and benefit in the landlord that led the Court of Appeal in the second appeal to regard the rent review clause as conferring upon the landlord a unilateral right to bring into existence a new contractual relationship between the parties. This they regarded as sufficiently analogous to an option, to make time of the essence of the occurrence of each one of the events in the time-table laid down in a review clause for the determination of the new rent. For my part, I consider the analogy to be misleading. The determination of the new rent under the procedure stipulated in the rent review clause neither brings into existence a fresh contract between the landlord and the tenant nor does it put an end to one that had existed previously. It is an event upon the occurrence of which the tenant has in his existing contract already accepted an obligation to pay to the landlord the rent so determined for the period to which the rent review relates. The tenant's acceptance of that obligation was an inseverable part of the whole consideration of the landlord's grant of a term of years of the length agreed. Without it, in a period during which inflation was anticipated, the landlord would either have been unwilling to grant a lease for a longer period than up to the first review date or would have demanded a higher rent to be paid throughout the term than that payable before the first review date. By the time of each review of rent the tenant will have already received a substantial part of the whole benefit which it was intended that he should obtain in return for his acceptance of the obligation to pay the higher rent for the succeeding period.

My Lords, I see no relevant difference between the obligation undertaken by a tenant under a rent review clause in a lease and any other obligation in a synallagmatic contract that is expressed to arise upon the occurrence of a described event, where a postponement of that event beyond the time stipulated in the contract is not so prolonged as to deprive the obligor of substantially the whole benefit that it was intended he should obtain by accepting the obligation.

So upon the question of principle which these two appeals were brought to settle, I would hold that 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.

I then turn to the rent review clauses in the instant appeals.

(1) *United Scientific Holdings Ltd.* v. *Burnley Borough Council.*

The lease was a building lease for the term of 99 years from August

31, 1962. By the reddendum the tenant undertook to pay during the first 10 years of the term and "thereafter during the residue of the said term the yearly rent of One thousand pounds plus any additional rent payable under the provisions contained in the schedule hereto." The schedule was as follows:

> "During the year immediately preceding the period of the second 10 years of the said term and during the year immediately preceding each subsequent 10 year period of the said term and during the year immediately preceding the last nine year period of the said term (each of such periods being hereinafter referred to as a 'relevant period') the corporation and the lessee shall agree or failing agreement shall determine by arbitration the sum total of the then current rack rent (which expression 'rack rent' shall for the purposes of this schedule be deemed to mean the full annual value of the property and of all buildings and erections thereon and appurtenances thereto and including all improvements carried out to the same calculated on the basis of all rates taxes repairs and other outgoings being borne wholly by the occupier thereof) reasonably to be expected on the open market for leases of the property and all buildings and erections thereon and one quarter of the sum total so ascertained or One thousand pounds (whichever is the greater) shall be the rate of rent reserved by this lease in respect of the then next succeeding relevant period. All arbitrations under or by virtue of this schedule shall be referred to the decision of a single arbitrator to be agreed by the parties hereto or failing their agreement thereon shall be referred to the decision of a person to be nominated by the President for the time being of the Royal Institute of Chartered Surveyors and such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 1950 or any statutory modification or re-enactment thereof for the time being in force."

The only stipulation as to time is that the rent for each successive period of 10 years of the term commencing on August 25 is to be determined (by agreement or failing agreement by arbitration) "during the year immediately preceding" the 10 year period to which that rent will relate.

If the new rent has not been determined by the stipulated date, what is the benefit that it was intended the tenant should obtain from the contract but of which he will have been deprived by its not being determined until later? The Court of Appeal took the view that it was a detriment to the tenant not to know what his new rent was going to be in advance of the date when it started to accrue, as he might not be able to afford the additional rent and might feel compelled to assign the residue of the term to someone else. For my part, I find this unrealistic, if only because under this particular clause the tenant can initiate the review procedure himself and unless there is some unforeseen delay on the part of the arbitrator, has it in his power to ensure that the new rent is determined before the stipulated date. Apart from this, delay in the determination of the new rent until after the first rent day

following the stipulated date works to the economic benefit of the tenant since until the higher rent has been determined he has the use of the money representing the difference between the former rent and the new rent which he would otherwise have been compelled to pay.

The absence of any serious detriment to the tenant if the determination of the new rent is postponed until some time after the commencement of the 10 year period to which it will relate is to be contrasted with the detriment to the landlord if strict adherence to the date specified in the review clause is to be treated as of the essence of the contract. If it were determined even slightly late the landlord would lose his right to the additional rent for the whole period of 10 years until the next review date.

So far from finding any contra-indications to displace the presumption that strict adherence to the time-table specified in this rent review clause is not of essence of the contract, the considerations that I have mentioned appear to me to reinforce the presumption.

In these circumstances I do not find it necessary to say more about the facts of the case. It is not disputed that if time was not of the essence of the stipulations in the review clause the appellant landlord is entitled to a declaration that upon the true construction of the lease and in the events that have happened the annual rent reserved for the 10 year period starting on August 31, 1972, should be a rent determined in accordance with the review clause.

I would accordingly allow this appeal and so declare.

(2) *Cheapside Land Development Co. Ltd.* v. *Messels Service Co.*

This was a lease for a term of 21 years from April 8, 1968. For the first period of seven years the rent was £117,340 per annum payable in arrear on the usual quarter days. For the second and third periods of seven years the respective rents were to be determined in accordance with the provisions of the second schedule to the lease.

The schedule contained a definition of "the market rent" and defined the "review date" as meaning in respect of the second period April 8, 1975. The provisions relating to the determination of the yearly rent in respect of the second period were as follows:

> "2. In respect of (i) the second period of the said term the yearly rent shall be the sum of One hundred and seventeen thousand three hundred and forty pounds (£117,340) or a sum equal to the market rent (if duly determined in the manner hereinafter set out) whichever shall be the higher.
>
> 3. The market rent may be determined and notified to the lessees in the manner following : (*a*) the proposed rent shall be specified in a notice in writing ('the lessors' notice') served by the lessors or their surveyor on the lessees not more than 12 months nor less than six months prior to the review date. (*b*) the lessees may within one month after service of the lessors' notice of the proposed rent serve on the lessors a counter-notice ('the lessees' notice') either agreeing the proposed rent or specifying the amount of rent which the lessees consider to be the market rent for the period in question. (*c*) in

default of service of the lessees' notice or in default of agreement as to the market rent to be payable for the period in question the rent shall be valued by a Fellow of the Royal Institution of Chartered Surveyors agreed between the lessors and the lessees or in default of agreement to be appointed not earlier than two months after service of the lessors' notice on the application of the lessors by the President for the time being of the said Institution whose valuation shall be made as an expert and not as an arbitrator and shall be final and binding upon the lessors and the lessees and shall be given in writing to the lessors and the lessees not less than 14 days before the review date."

These provisions contain an elaborate time-table as to what is to be done in various eventualities, not only by the landlord and tenant but also by persons over whom neither has any control—the President of the Royal Institution of Chartered Surveyors and whatever fellow of the Institution may be appointed as valuer.

The procedure for determining the market rent has to be initiated by the landlord: by a "lessor's notice" specifying the rent which he proposes. This must be served between 12 and six months before the review date and constitutes an offer, irrevocable for one month during which the tenant may accept the landlord's proposal or to make a counter-offer. At least two months are to be allowed after service of the lessor's notice for negotiating an agreement as to the rent or upon a F.R.I.C.S. to be appointed to determine the rent as an expert valuer. If these negotiations fail the landlord after the two months have elapsed may apply to the President of the R.I.C.S. to appoint a valuer and the valuer must notify both landlord and tenant of his valuation not less than 14 days before the review date.

In two respects under the terms of the review clause the progress of the procedure for determining the new rent is, or may become, within the exclusive control of the landlord. He alone can initiate the procedure; and he alone can apply to the President of the R.I.C.S. if negotiations with the tenant do not result in an agreement as to the rent or upon the person who is to value it.

The tenant's position under this clause thus differs from that of the tenant under the rent review clause that is the subject of the first appeal inasmuch as he has no right under his contract to initiate the procedure or to apply for the appointment of a valuer if the landlord himself fails to do so within the stipulated times. But this difference has not in my view any significant practical consequences so far as concerns any detriment to the tenant from the landlord's failure to do either of these things within the stipulated times. If the tenant reckons that the advantage of knowing before the review date exactly how much higher his new rent will be outweighs the economic benefit of having the use of the money representing the difference until the new rent has been determined, he has the remedy in his own hands. Quite apart from the fact that he can get a pretty good idea of what the market rent is from his own surveyor or can himself offer to enter into negotiations with the landlord before the stipulated time for serving a lessor's notice has

expired, so soon as that time has elapsed he can give to the landlord notice specifying a period within which he requires the landlord to serve a lessor's notice if he intends the market rent to be determined and payable instead of the former rent for the ensuing seven years. The period so specified, provided that it is reasonable, will become of the essence of the contract. The fact that the tenant had previously pressed the landlord to start negotiations before the end of the period specified in the rent review clause for service of a lessor's notice or that the determination of the rent before the review date was specially important to him, would be relevant facts in determining whether the period specified by the tenant was reasonable (*Stickney* v. *Keeble* [1915] A.C. 386 *per* Lord Parker of Waddington at pp. 418–419); and in view of the ease with which the landlord could comply with the requirement a notice fixing a very short period would no doubt suffice to make time become of the essence.

So here again I find nothing to displace the presumption that strict adherence to the time-table specified in the rent review clause is not of the essence of the contract.

In fact, the landlords did give a lessor's notice in respect of the period starting on April 8, 1975, within the times specified in the contract. Negotiations between the parties followed; but no agreement was reached either as to the new rent or upon a valuer to determine it. The only delay that occurred was in the landlord's application to the President of the R.I.C.S. to appoint a valuer. He did not apply until June 25, 1975. In view of the previous decisions of the courts as to time being of the essence in rent review clauses, the President of the R.I.C.S. was unwilling to comply with this request without a ruling by the court that it was a valid and effective application for the purposes of paragraph 3 (c) of the relevant rent review clause. On June 27, 1975, the landlords issued an originating summons claiming a declaration to this effect and a declaration that the valuation of a fellow of the R.I.C.S. appointed pursuant to the application would be valid and binding on the tenant notwithstanding that it would not be given until after March 27, 1975, i.e. 14 days before the review date.

Graham J. made declarations accordingly. He held, as I think wrongly, that the time for service of a lessor's notice was of the essence of the contract, but this stipulation had been complied with. The time for applying to the President of the R.I.C.S. for the appointment of a valuer he held, as I think rightly, was not of the essence.

Date from which new rent payable

The landlords also sought a declaration that the market rent as determined by the valuer, if higher than £117,340 per annum, would be recoverable with effect from April 8, 1975, i.e., restrospectively to the review date.

Graham J. following the decision of the Court of Appeal in *C. H. Bailey Ltd.* v. *Memorial Enterprises Ltd.* [1974] 1 W.L.R. 728 held that the rent would be payable restrospectively. That case had overruled a decision to the contrary given by Sir John Pennycuick V.-C. in *In re*

Essoldo (Bingo) Ltd.'s Underlease (1971) 23 P. & C.R. 1 upon the ground that the legal nature of rent required that it should be certain at the time when it accrued due, so that a payment for the use of land that was fixed retrospectively could not be "rent."

My Lords, the mediaeval concept of rent as a service rendered by the tenant to the landlord has been displaced by the modern concept of a payment which a tenant is bound by his contract to pay to the landlord for the use of his land. The mediaeval concept has, however, left as its only surviving relic the ancient remedy of distress. To attract the remedy of distress rent must be certain at the time that it falls due. *Ex parte Voisey* (1882) 21 Ch.D. 442 was a case about the validity of a distress for a fluctuating rent and what was said there about the necessity for certainty in the amount payable was in relation to what may be conveniently referred to as "distrainable rent" in order to distinguish it from any other part of the rent (in its modern sense) that the tenant has agreed to pay the landlord for the use of his land, but for which the remedy of distress is not available. In the famous case of *Walsh* v. *Lonsdale* reported in the same volume of the Law Reports (at p. 9) there were two elements in the rent, one part was fixed in advance and was certain at the time that it accrued, the other part was fluctuating and could not be ascertained until the end of the period in respect of which it was payable. The actual decision of the Court of Appeal was that the fixed part or minimum rent could be distrained for, but that the fluctuating part could not. It was taken for granted that the fluctuating amount could be sued for once it had been ascertained.

My Lords, under the rent review clause in the instant case the market rent as determined in accordance with the provisions of the clause if higher than £117,340 per annum is expressed to be payable "in respect of the second period," viz. the seven years starting on April 8, 1975. Until the market rent has been ascertained the landlords can only recover rent at the rate of £117,340 per annum, which corresponds to the minimum rent in *Walsh* v. *Lonsdale*. It is only when the market rent has been determined and turns out to be higher than £117,340 that the landowner can recover on the rent day following such determination the balance that has been accruing since April 8, 1975. Therein lies the economic advantage to the tenant of delay in the determination of the market rent to which I have previously referred.

The Court of Appeal reversed the order made by Graham J. For the reasons I have given, I would restore his order and allow this appeal too.

The previous cases

It may be convenient to conclude by referring briefly to the more important of the previous decisions which should be regarded as overruled or as approved by your Lordships' decision in the two instant appeals.

Samuel Properties (Developments) Ltd. v. *Hayek* [1972] 1 W.L.R. 1296 may be regarded as the origin of the dichotomy between "option" on the one hand and "obligation" or "machinery" on the other: the word option having been used in the lease itself to describe the landlord's

right to require the rent to be reviewed. It should be treated as overruled. There was a complication in that the rent review clause was associated with a break clause which gave to the tenant the right to surrender the residue of the term on any rent review day by giving prior notice. The time-table in the rent review clause for the determination of the new rent was obviously correlated with the time by which the tenant had to give notice of his intention to surrender, so as to enable him to make his decision whether or not to exercise that right in the knowledge of what the new rent would be if he continued in possession after the review date. Had that been all, as it had been in the previous and rightly decided case of *C. Richards & Son Ltd.* v. *Karenita Ltd.* (1971) 221 E.G. 25, it would, I think have been sufficient by necessary implication to make time of the essence of the rent review clause because of its inter-relation with the time by which notice was to be given under the break clause—a time which, for reasons I have given earlier, I consider to be of the essence of the contract.

In *Samuel Properties (Developments) Ltd.* v. *Hayek*, however, the break clause itself contained a provision under which the period during which the tenant could exercise his right to surrender would be extended in the event of the reviewed rent not having been ascertained within the time stipulated in the rent review clause. So the implication that would otherwise have arisen from the association of the rent review clause with a break clause was negatived.

Kenilworth Industrial Sites Ltd. v. *E. C. Little & Co. Ltd.* [1975] 1 W.L.R. 143 is an example of a rent review clause which was treated as falling on the obligation or machinery side of the supposed dichotomy so time was held not to be of the essence. The decision itself was right. A similar decision was reached in *Accuba Ltd.* v. *Allied Shoe Repairs Ltd.* [1975] 1 W.L.R. 1559 by classifying the stipulations as to time as " mere machinery." Again the decision was right though the actual reasoning in both these cases in so far as it was based on the supposed dichotomy should no longer be considered as correct.

The remaining cases to which this House was referred in which time has been held to be of the essence of a rent review clause which was not associated with a break clause should be regarded as overruled.

I would express the hope that your Lordships' decisions in these appeals will reduce the number of occasions on which it will be necessary to have recourse to the courts in order to ascertain whether delay has deprived the landlord of his right to have the rent reviewed under particular rent review clauses. Delays are prone to occur when such clauses provide, as most of them sensibly do, for negotiations to take place between the parties before recourse to independent arbitration or valuation. However, 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 being of the essence.

VISCOUNT DILHORNE. My Lords, I have had the advantage of reading the speeches in draft of my noble and learned friends, Lord Diplock and

A Lord Simon of Glaisdale. I do not think that any useful purpose would be served by my attempting the task they have accomplished so well of tracing the historical development of the common law and equity before and after 1873.

I agree with them in thinking that the effect of section 25 (7) of the Supreme Court of Judicature Act 1873 was that from the time when that Act came into force, stipulations as to time in contracts were to be B treated as they were in courts of equity; and in thinking that the scope of that subsection was not narrowed by the observations of Lord Parker of Waddington in *Stickney* v. *Keeble* [1915] A.C. 386, 417.

In *Parkin* v. *Thorold* (1852) 16 Beav. 59, 65 Sir John Romilly M.R. said that under the doctrine of a court of equity:

> " time is held to be of the essence of the contract . . . only in cases C of direct stipulation, or of necessary implication. The cases of direct stipulation are, where the parties to the contract introduce a clause expressly stating, that time is to be of the essence of the contract. The implication that time was of the essence of the contract is derived from the circumstances of the case . . . It is needless to refer to the authorities, which are numerous, to support these propositions."

D

Section 25 (7) of the Supreme Court Judicature Act 1873 was replaced by section 41 of the Law of Property Act 1925 which was to the same effect.

I agree too that the law in relation to such stipulations in contracts is correctly stated in *Halsbury's Laws of England*, 4th ed., vol. 9 (1974), para. 481: see also *Fry on Specific Performance*, 6th ed. (1921), p. 502.

E In the *Burnley* appeal, Buckley L.J. was prepared to assume that the equitable rules that time was not of the essence of the contract unless that was expressly provided in the contract or the circumstances and nature of the contract were such that that intention was to be imputed to the parties, applied to all kinds of contracts; and Roskill L.J. said [1976] Ch. 128, 147, that the right question to ask was whether:

F > " upon the true construction of the particular clause, did the parties intend that the particular stipulations as to time must be strictly adhered to or not; or if, as happens in so many cases, the parties have not expressly dealt with this question, must there be imputed to the parties an intention that the particular stipulations as to time must be strictly adhered to or not? "

G The Court of Appeal in that appeal held that such an intention was to be imputed in relation to the time stipulation then under consideration. The leases granted by the Burnley Corporation were for 99 years at a minimum rent of £1,000 a year payable half yearly in arrear " plus any additional rent payable under the provisions " in a schedule to one of the two leases. That schedule provided that the rent should be reviewed H during the year preceding the second and every subsequent 10 year period of the term and during the year preceding the final nine years. The parties were to agree the then current rack rent, and in default of agreement that was to be determined by arbitration. One quarter of the rack

rent or £1,000 whichever was the greater, was to be the rent under each lease for the ensuing period.

The parties to these leases thus agreed that there should be rent reviews at fixed intervals. Leases which so provide are in my opinion to be distinguished from those which provide for a rent review only if one is initiated by the lessor.

Importance appears to have been attached in the Court of Appeal to a rent review only operating to the financial advantage of the lessor. In fact in the *Burnley* case the rent review might operate to reduce the rent for one 10 year period below that payable in the preceding 10 years if the current rack rent fell. But I do not think it true to say that a rent review clause, if its operation can only lead to an increase in rent, only operates to the financial advantage of the lessor. If he is not prepared to agree to the inclusion of such a clause in the lease, a tenant may find a landlord unwilling to let except at a higher rent than he would demand if there was a review clause, in order to secure some protection against the effect of inflation during the currency of the lease. Indeed, in the absence of a review clause, the tenant may find a landlord unwilling to let for the term he desires.

I do not myself think it of any significance in considering whether time was of the essence in relation to a stipulation if a rent review could only lead to an increase in rent, for I do not think that the likely result of a rent review is any ground for imputing to the parties an intention that time should be of the essence. In the *Burnley* case the clause was clearly intended to secure that the ground rent should be kept in line with the current rack rent and in the *Cheapside* case, that the rent should be brought up to the current market rent. In neither case could the lessor impose any rent he wished.

The Court of Appeal in the *Burnley* case thought that such an intention was to be imputed on account of the commercial character of the leases. My noble and learned friend Lord Diplock has demonstrated that it does not suffice to attach that label to infer that time is of the essence.

The parties in the *Burnley* case undoubtedly desired that the review should be completed in the year preceding the commencement of a 10 year period and of the final nine years but I do not see any reason for imputing to them an intention that time should be of the essence, an intention that there should be no change in the rent for the next 10 years if the current rack rent was determined, it might be only a day, after the expiry of that year. They would naturally seek to reach agreement as to the current rack rent. Negotiations between them might take some time. Failing agreement, they were to agree upon an arbitrator. Failing agreement as to an arbitrator, they had to secure the nomination of one by the President of the Royal Institution of Chartered Surveyors and then there would be the arbitration. After the hearing some time might elapse before the arbitrator made his award. For circumstances beyond the lessors' control delivery of the award might be delayed beyond the year. It is most unlikely in these circumstances that the lessors, if they had been asked at the time the

A leases were entered into to agree that time should be of the essence, would ever have agreed to that and I see no reason for imputing to them an intention which no reasonable landlord would have had.

Importance was attached in the Court of Appeal to the tenant knowing, before the new period started, what was to be the rent for that period. I do not think that much, if any, importance should be attached to this for the tenant could easily find out what approximately B the current rack rent for the properties might be.

In my opinion the imputation of any such intention to the parties to a lease containing a review clause intended to operate at stated periods is unwarranted.

The *Cheapside* appeal is more complicated. There the lease provided that if there was to be a rent review, it had to be initiated by the lessors. C They had to serve a notice on the lessees stating the proposed rent "not more than 12 months nor less than six months prior to the review date," those dates being April 8, 1975, and April 8, 1982.

I do not consider it to be an incorrect use of the English language to say that under this lease the lessors had an option. But it was an option of a very different character from an option to purchase property. It was an option to initiate machinery not to secure or to extend an D interest in land, but merely to secure a variation of a term of the lease. For the reasons given by my noble and learned friend, Lord Simon of Glaisdale, it should not be equated with an option to purchase.

In this appeal the lessors gave a notice in accordance with the requirements of the lease and so in this appeal no question arises as to whether time was of the essence in relation to the giving of the E lessors' notice. Until that notice was given, the lessees would not know that there was to be a rent review. Until then they need not concern themselves about the current market rent nor need they incur expense in obtaining advice with regard thereto. If the parties when they entered into the lease had been asked whether they thought it essential that the lessors' notice should be given within the stipulated period, I think that F they would have answered in the affirmative. I recognise of course that this would mean that if the notice was served a day late, the consequences to the lessors would be serious but it lay entirely within the lessors' power to serve the notice within that period whereas it does not lie within their power to secure that a valuation made by a valuer was made within the time stipulated.

While, as I have said, the question whether time was of the essence G in relation to the lessors' notice does not have to be decided in this appeal, I differ from my colleagues in that I think that where a rent review has to be initiated by a lessor and is not automatic, then time is of the essence when it is provided that that notice initiating the review has to be given by a certain date.

Under the lease in the *Cheapside* case the lessees could serve a H counter notice on the lessors within one month after service of the lessors' notice. They did not do so. If the market rent was not agreed, it was to be valued by a fellow of the Royal Institution of Chartered Surveyors agreed on by the parties. If they did not agree on one, then

one was to be appointed by the President of the Royal Institution of Chartered Surveyors "not earlier than two months after service of the lessors' notice on the application of the lessors." The clause did not provide that the application had to be made before a certain date. The schedule to the lease also provided that that valuation should be given "to the lessors and the lessees not less than 14 days before the review date."

The question for decision in this appeal is whether this time stipulation was of the essence. There was no valuation not less than 14 days before April 8, 1975, and it is now consequently contended that the rent cannot be reviewed.

Again it is clear that both parties desired that the valuation should, if they failed to agree the market rent, be received by them not less than 14 days before any increased rent became payable but again I see no reason for imputing to them the intention that if that did not happen, no rent review should take place even if the valuation was received only one day late with the consequence that for the next seven years the lessees would continue to enjoy the occupation of the property at a rent which might be considerably less than the market rent. In relation to this stipulation in my opinion the claim that time was of the essence fails.

I agree with what my noble and learned friend Lord Diplock has said with regard to the dates from which the revised rents would be payable and with his observations on the earlier cases.

For the reasons I have stated, in my opinion these appeals should be allowed.

LORD SIMON OF GLAISDALE.

I.

My Lords, I have had the privilege of reading in draft the speech delivered by my noble and learned friend on the Woolsack. I agree with his arguments culminating in the propositions that, in general, in modern English law time is prima facie not of the essence of a contract, and that there is nothing in the two leases the subject of the instant appeals which rebuts that presumption so as to make the stipulations as to time essential to the operation of their rent review clauses.

The respective outlooks of the old common law and equity on contractual stipulations as to time diverged owing to their different historical developments. Where A sought in a court of common law to enforce against B a promise which B had made to him, A had to aver and prove that he had himself performed so far as he could (and, as to the rest, was ready and willing to perform) his reciprocal obligations: see notes to *Peeters* v. *Opie* (1671) 2 Wms.Saund. (1871 ed.), 742, 743, 744; *cf. Pordage* v. *Cole* (1669) 1 Wms.Saund. (1871 ed.) 548, 551, 552, 556; notes to *Cutter* v. *Powell* (1795) 2 Smith L.C. 1. It followed that if A's reciprocal obligation was to be performed by a certain stipulated time, A had to aver and prove that such stipulation as to time had been observed. It was thus that it came to be held that at common law time was (as the expression went) of the "essence" of a contract—in effect,

timeous performance was a condition precedent to enforcement of reciprocal obligations. So it was that Sir John Romilly M.R. came to say in *Parkin* v. *Thorold* (1852) 16 Beav. 59, 65:

> "At law, time is always of the essence of the contract. When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it."

In point of fact, during the 19th century the attitude of the common law courts as to time of performance became less rigid. Thus, in *Martindale* v. *Smith* (1841) 1 Q.B. 389, 395, Lord Denman C.J. said: "In a sale of chattels, time is not of the essence of the contract, unless it is made so by express agreement. . . ." But this went further than the development of the law justified or the peculiar facts of that case necessitated. The true development of the common law as to the sale of chattels did not go beyond its codification in section 10 (1) of the Sale of Goods Act 1893:

> "Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract."

(And even that provision must be read in the light of section 28 of the Act, whereby payment and delivery are concurrent conditions.) So it remains true that, as stated in *Halsbury's Laws of England,* 4th ed., vol. 9, para. 481, p. 337:

> "At common law stipulations as to time in a contract were as a general rule, and particularly in the case of contracts for the sale of land, considered to be of the essence of the contract, even if they were not expressed to be so, and were construed as conditions precedent; . . ."

The attitude of equity, on the other hand, was deeply influenced by its handling of mortgages and sales of land. Up to the end of 1925 the normal method by which a mortgage of the fee simple was created was for A, the mortgagor, to convey the legal fee simple to B, the mortgagee, together with a covenant to repay the loan (the obtaining of which was the object of the transaction) in, say, six months' time, with a proviso that, if the loan were repaid at such date, B would re-convey the legal estate. In the eyes of the common law B was the owner of the legal estate from the date of the conveyance; and, failing repayment within six months, became the absolute and indefeasible owner. But it was a maxim of the Court of Chancery that "equity looks to the intent rather than to the form." If A failed to repay B's loan by the stipulated date, the Court of Chancery would examine the transaction to see if it was really only what it purported to be—a sale of property with a collateral option to re-purchase—or was in reality a pledge of property to secure a loan. And, on ascertaining that it was the latter, the Court of Chancery would compel B to re-convey the

land to A on his repaying the money within a reasonable time (though late) with interest to the date of repayment. The stipulation as to time was in consequence not regarded as an essential term. A

So again with equity's handling of sales of land. A contracted to convey Blackacre to B, various dates leading to and including completion being stipulated. It was another maxim of the Court of Chancery that "equity regards that as done which ought to be done." The conveyance ought to be completed in accordance with the contract. So the equitable estate in Blackacre passed from A to B on the making of the contract, notwithstanding that the passing of the now bare legal estate from A to B had to await completion of the conveyance. The Court of Chancery then applied the other maxim about looking to the intent rather than the form. The beneficial estate had already passed with the making of the contract. It followed that the stipulated time for completion of the conveyance was formal only. The Court of Chancery would therefore decree specific performance of the conveyance notwithstanding that various steps leading to completion had not been observed timeously, provided that B had been guilty of no such delay as to make it unreasonable for him to call on A to complete out of time or that it would otherwise be unfair to A. Once again, the upshot was that stipulations as to time of performance turned out to be unessential in the eyes of equity. B C D

The self-conscious differentiation in approach of the common law and equity appears from a much-cited judgment of Lord Redesdale L.C. in *Lennon* v. *Napper* (1802) 2 Sch. & Lef. 682, 684–685:

> "Courts of equity have therefore enforced contracts specifically, where no action for damages could be maintained; for at law, the party plaintiff must have strictly performed his part, and the inconvenience of insisting upon that in all cases, was sufficient to require the interference of courts of equity. They dispense with that which would make compliance with what the law requires oppressive: and in various cases of such contracts, they are in the constant habit of relieving the man who has acted fairly, though negligently. Thus in the case of an estate sold by auction, there is a condition to forfeit the deposit, if the purchase be not completed within a certain time; yet the court is in the constant habit of relieving against the lapse of time: and so in the case of mortgages, and, in many instances, relief is given against mere lapse of time, where lapse of time is not essential to the substance of the contract." E F G

So strongly was the attitude of the Court of Chancery conditioned by such transactions that Lord Thurlow could hold that in equity time would not be of the essence of a contract even though expressly declared to be so: *Gregson* v. *Riddle* (1784), cited in *Seton* v. *Slade* (1802) 7 Ves. Jun. 265, 268, 269, where Lord Eldon L.C. was still prepared to leave the point open (p. 275), though inclining to the view that express words could make time of the essence (p. 270). Lord Eldon's view was to prevail. Just as the courts of common law resiled from the extreme position which was the logical conclusion of Serjeant Williams' doctrine H

(with its effect that time was always of the essence of a contract), so the Court of Chancery abandoned Lord Thurlow's contrary extreme. The passage that I cited above from Sir John Romilly M.R. in *Parkin* v. *Thorold*, 16 Beav. 59, 65, after referring to Lord Thurlow's view as "exploded," concludes: ". . . time is held to be of the essence of the contract in equity, only in cases of direct stipulation, or of necessary implication."

So by 1873 the two systems had evolved into a situation whereby in the courts of common law stipulations as to time were prima facie regarded as of the essence of a contract, while in the Court of Chancery stipulations as to time were prima facie regarded as not essential. Thus, though the gap had narrowed, what Lord Eldon L.C. had said in the Court of Chancery in *Seton* v. *Slade* (at p. 273) was still true: "To say, time is regarded in this court, as at law, is quite impossible." No doubt further evolution would have taken place in each system, and they would probably have further converged. But before any such further development could take place, both systems had to be brought together (also with those applied in Doctors' Commons) in a single code to be administered in one Supreme Court of Judicature. This involved determining which system should prevail in those respects where they were at variance. Those that were in legislative contemplation were resolved in section 25 (1) to (10) of the Supreme Court of Judicature Act 1873. But it was envisaged (correctly as it proved) that there might be other respects not within the immediate contemplation of Parliament where the rules of common law and equity diverged. So subsection (11) provided:

> "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."

One of the contemplated differences between the rules of common law and equity was with regard to contractual stipulations as to time. That difference was resolved in favour of equity by section 25 (7), replaced by section 41 of the consolidating Law of Property Act 1925, which is the provision that falls for construction in the instant appeals (*Farrell* v. *Alexander* [1977] A.C. 59):

> "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."

This can only be interpreted by bearing in mind that the object of section 25 of the Supreme Court of Judicature Act 1873 was to reconcile the differences between common law and equity so that the two systems (together with the admiralty, testamentary and matrimonial) could form a single coherent code. This merely reinforces the plain and ordinary sense of the words. I cannot read section 41 of the Law of Property Act as meaning other than that, whenever contractual stipulations as to time fall for consideration in any court, they shall not be construed

as essential, except where equity would before 1875 have so construed them—i.e., only when the strict observance of the stipulated time for performance was a matter of express agreement or of necessary implication.

In my view the modern law in the case of contracts of all types is correctly summarised in *Halsbury's Laws of England*, 4th ed., vol. 9, para. 481, p. 338:

> "Time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; . . ."

I agree with the analysis made by my noble and learned friend on the Woolsack of *Stickney* v. *Keeble* [1915] A.C. 386; and that, correctly understood, there is nothing in that case which imposes any historically-founded complication or modification on the law as stated in *Halsbury*. Its true basis is that the law will not help a party to gain an advantage from a contract which he has himself put it of his own power to perform, unless his own expression of intention not to perform was in consequence of a fundamental breach by the other party (see p. 416). It was to the attempt to outflank this basic rule by arguing that under section 25 (7) of the Act of 1873 it was only necessary to consider the situation at the institution of the suit that the remarks of Lord Parker of Waddington on p. 417 were directed.

I would, however, venture to add the following comments:

(1) It is often useful to trace the history of a legal doctrine—indeed, I have myself, in deference to the learned arguments with which your Lordships have been favoured, tried to do so in the instant appeals. Such an historical exploration will frequently lead back into a time when common law and equity were separate systems administered in separate courts. But since 1875 there has been one fused system administered in one Supreme Court of Judicature and in one subordinate system of county courts. In 1690 a parliamentary Bill was introduced to give courts of common law power to issue writs of prohibition to prevent encroachment by the Court of Chancery on their own jurisdiction, and also to prevent any court of equity from entertaining a suit for which a proper remedy lay at common law (*Potter, An Historical Introduction to English Law and its Institutions*, 2nd ed. (1943), p. 143; 4th ed. (1958), p. 160). This attempt failing, the courts of common law and the Court of Chancery settled down to co-exist, rivalry decreasing and complications becoming gradually ironed out. In a number of respects the evolution of the one system was influenced by the other. This convergence and dovetailing was, I think, the first reason for tardiness in recognising how revolutionary was the change made by the Supreme Court of Judicature Act 1873 and how truly it brought about a "fusion" of common law and equity. A second reason was no doubt that the Supreme Court of Judicature continued for administrative convenience to sit in separate common law and Chancery Divisions. A third reason might have been that lawyers trained in

systems which look to precedent and thus foster conservatism tended to minimise the change which had been made. But, after a century, Professor Ashburner's vivid metaphor of two streams flowing into one channel must have a different conclusion. It may take time before the waters of two confluent streams are thoroughly intermixed; but a period has to come when the process is complete. However, lest we might be beguiled by metaphor, an actual instance ought to be cited. The doctrine of equitable estoppel can be traced back to or near its equitable source in *Hughes* v. *Metropolitan Railway Co.* (1877) 2 App.Cas. 439. But since 1945 the doctrine has permeated the whole of our law, not least that part of it which would formerly have fallen within the purview of courts of common law.

(2) Discussion of stipulations as to time has generally turned on the historic distinction between time being or not being of the "essence" of a contract; and that distinction, which is reflected in section 41, is all that is required to dispose of these appeals. But the fused law has continued to evolve since 1875; and it has developed a more sophisticated approach to contractual terms: see *Wallis, Son & Wells* v. *Pratt & Haynes* [1910] 2 K.B. 1003, 1012; *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26, especially the judgment of Diplock L.J.; *Wickman Machine Tool Sales Ltd.* v. *L. Schuler A.G.* [1974] A.C. 235, 264–265. The law may well come to inquire whether a contractual stipulation as to time is (a) so fundamental to the efficacy of the contract that any breach discharges the other party from his contractual obligations ("essence"), or (b) such that a serious breach discharges the other party, a less serious breach giving a right to damages (if any) (or interest), or (c) such that no breach does more than give a right to damages (if any) (or interest) ("non-essential"). If this sort of analysis falls to be made, I see no reason why any type of contract should, because of its nature, be excluded.

(3) The law does not purport to bring parties into a relationship of contractual obligation which they themselves have failed to create. This is the true ground of decision in those cases where a stipulation as to time is contained in an option. An option is a type of unilateral contract. When, as is usual, it is supported by consideration it constitutes an irrevocable offer which turns into a bilateral contract by an acceptance in strict compliance with its terms: see Lord Denning M.R. in *United Dominions Trust (Commercial) Ltd.* v. *Eagle Aircraft Services Ltd.* [1968] 1 W.L.R. 74, 81c. It is apt to be misleading to say that time is of the essence of an option, since that may give the impression of a bilateral contractual term. The legal reality is that this type of unilateral contract never matures into a bilateral contract at all unless the option is exercised in time. But, as Diplock L.J. pointed out in the *United Dominions Trust* case (p. 84G), it is quite possible to have this sort of unilateral obligation in an otherwise bilateral contract. An option in a lease to terminate or to renew the tenancy or to purchase the reversion will be such a term. In each such case the parties, on the exercise of the option, are brought into a new legal relationship. It was argued on behalf of the tenants in the instant appeals that the rent review clauses

were also such unilateral terms. I cannot agree. The operation of the rent review clauses does not at all change the relationship of the parties, which remains that of landlord and tenant throughout the currency of the lease whether or not the machinery of the rent review clauses is operated. It was envisaged from the outset that the rent would be reviewed during the currency of the leases: the clauses merely provided machinery for determination of the new rent, which in more stable conditions might have been stipulated in advance. Moreover, the clauses went to the very basis of the consideration moving from the landlords: in a period of inflation the latter would not have granted leases for such long terms without inclusion of rent review clauses—and certainly the initial rent would in each case have been much higher without those clauses. To put it the other way round, the rent review clauses were integral parts of the consideration moving from the tenants, whereby they acquired a long term of years at an initial rent lower than it would otherwise have been. Rent review clauses cannot be considered as severable terms of unilateral obligation. However, where a rent review clause is associated with a true option (a "break" clause, for example), it is a strong indication that time is intended to be of the essence of the rent review clause—if not absolutely, at least to the extent that the tenant will reasonably expect to know what new rent he will have to pay before the time comes for him to elect whether to terminate or renew the tenancy (cf. *Samuel Properties (Developments) Ltd.* v. *Hayek* [1972] 1 W.L.R. 1296). That situation stands in significant contrast with those in the instant appeals.

(4) Time is often spoken of as being "made of the essence of the contract by notice"—a concept which is reflected in the words "or to have become" in section 41 of the Law of Property Act 1925. Nevertheless, the phrase is misleading. In equity, and now in the fused system, performance had or has, in the absence of time being made of the essence, to be within a reasonable time. What is reasonable time is a question of fact to be determined in the light of all the circumstances. After the lapse of a reasonable time the promisee could and can give notice fixing a time for performance. This must itself be reasonable, notwithstanding that ex hypothesi a reasonable time for performance has already elapsed in the view of the promisee. The notice operates as evidence that the promisee considers that a reasonable time for performance has elapsed by the date of the notice and as evidence of the date by which the promisee now considers it reasonable for the contractual obligation to be performed. The promisor is put upon notice of these matters. It is only in this sense that time is made of the essence of a contract in which it was previously non-essential. The promisee is really saying, "Unless you perform by such-and-such a date, I shall treat your failure as a repudiation of the contract." The court may still find that the notice stipulating a date for performance was given prematurely, and/or that the date fixed for performance was unreasonably soon in all the circumstances. The fact that the parties have been in negotiation will be a weighty factor in the court's determination. For the foregoing, see *Smith* v. *Hamilton* [1951] Ch. 174. To say that "time can be made

A of the essence of a contract by notice," except in the limited sense indicated above, would be to permit one party to the contract unilaterally by notice to introduce a new term into it.

(5) I agree with the analysis of the reported cases on rent review clauses made by my noble and learned friend on the Woolsack and with his conclusions upon them.

B

II.

I turn therefore to the second main issue in these appeals—namely, how far a rent review clause activated out of the stipulated time can operate retrospectively. In my view, rent today means the contractual money payment made by a tenant to his landlord in consideration for the use of the latter's land. I respectfully agree with the decision of C the Court of Appeal in *C. H. Bailey Ltd.* v. *Memorial Enterprises Ltd.* [1974] 1 W.L.R. 728. Left to myself I would doubt the value of a subsisting distinction between "contractual rent" and "distrainable rent," and still more that "rent" can bear these different meanings, with different legal consequences, in one and the same document. But I recognise that the judgment of Cotton L.J. in *Walsh* v. *Lonsdale* (1882) D 21 Ch.D. 9, 16, 17 (albeit tentative and interlocutory) is authority in favour of the contrary view. It is not necessary to decide the point for the purpose of the instant appeals. I therefore concur in the orders proposed by my noble and learned friend on the Woolsack.

LORD SALMON. My Lords, these two appeals raise important questions as to what principle should be applied in deciding whether provisions as E to time in rent revision clauses should or should not be construed as being of the essence of the contract. Such clauses could easily be drafted so that they state expressly whether time is or is not to be treated as of the essence. So drafted they would present no difficulty. Unfortunately they rarely are. They should be, for if they were, a great deal of expensive litigation would be avoided. If, e.g., the parties to the present appeals F had expressly stated whether or not they intended the provisos as to time in the rent revision clauses to be of the essence, there would have been no litigation between them let alone litigation fought up to your Lordships' House for the purpose of deciding what the rent revision clauses mean.

I would add that a well-advised landlord is hardly likely to agree a rent revision clause which laid down that its provisions as to time were G of the essence of the contract. Were he to do so, it would mean that should he take any step later than the time specified in the clause then however slight the delay and however little it affected the tenant, he would lose the benefit of the clause for the next five, seven or ten years whatever the intervals for revision might be. In such circumstances he might be left with a rent for that period of perhaps a half or even a H third of the then fair market rent. It is much more likely that the landlord would insist on a clause such as the one in *Kenilworth Industrial Sites Ltd.* v. *E. C. Little & Co. Ltd.* [1975] 1 W.L.R. 143 which provided that a failure to comply strictly with the time limits contained in the

clause would not deprive the landlord of his right to have an increased rent determined by arbitration unless he had been guilty of an unreasonable delay which had prejudicially affected the tenant.

In a period of acute inflation, such as we have experienced for the last 20 years or so, and may well continue to experience for many years to come, what is a fair market rent at the date when a lease is granted will probably become wholly uneconomic within a few years. Tenants who are anxious for security of tenure require a term of reasonable duration, often 21 years or more. Landlords, on the other hand, are unwilling to grant such leases unless they contain rent revision clauses which will enable the rent to be raised at regular intervals to what is then the fair market rent of the property demised. Accordingly, it has become the practice for all long leases to contain a rent revision clause providing for a revision of the rent every so many years. Leases used to provide for such a revision to be made every 10 years. Now the period is normally every seven and not infrequently every five years. To my mind, it is totally unrealistic to regard such clauses as conferring a privilege upon the landlord or as imposing a burden upon the tenant. Both the landlord and the tenant recognise the obvious, viz., that such clauses are fair and reasonable for each of them. I do not agree with what has been said in some of the authorities, namely, that a rent revision clause is for the benefit of the landlord alone and not at all for the benefit of the tenant. It is plainly for the benefit of both of them. It is for the benefit of the tenant because without such a clause he would never get the long lease which he requires; and under modern conditions, it would be grossly unfair that he should. It is for the benefit of the landlord because it ensures that for the duration of the lease he will receive a fair rent instead of a rent far below the market value of the property which he demises. Accordingly the landlord and the tenant by agreement in their lease provide that at stated intervals during the term, the rent should be brought up to what is then the fair market rent. The revision clause itself lays down the administrative procedure or machinery by which the fair market rent shall be ascertained. Sometimes this procedure or machinery is quite simple as in *United Scientific Holdings Ltd.* v. *Burnley Borough Council* (which I shall call the first appeal). Sometimes it is somewhat complicated as in *Cheapside Land Development Co. Ltd.* v. *Messels Service Co.* (which I will call the second appeal).

In the first appeal the lease was a building lease for a term of 99 years from August 31, 1962. Being a building lease, the rent was fixed at one quarter of the then rack rent being calculated at the rate of £900 a year until August 31, 1972, and thereafter during the residue of the term at the rate of £1,000 a year "plus any additional rent payable under the provisions contained in the schedule hereto." The schedule was the rent revision clause and provided, so far as relevant, that in the year preceding the tenth year of the lease and every successive tenth year the then current rack rent reasonably to be expected on the open market should be agreed or, failing agreement, determined by arbitration "and one quarter of the sum total so ascertained or £1,000 (whichever

A is the greater) shall be the rate of rent reserved by (the) lease in respect of the then next succeeding (10 years)."

I recognise that there is no provision for the rent to be revised downwards and that this appears to be to the disadvantage of the tenant. In practice, however, this is hardly a serious disadvantage for rents have steadily increased over a very long period and show no signs of ceasing to do so. It is, I think, hardly feasible that in the *Burnley Corporation* case B the fair market rent will ever fall below £1,000 a year.

Negotiations were opened by a letter of May 10, 1972, from the estate agents for the tenants to the landlords saying that they had been instructed to enter into negotiation to agree the new rent for the period August 31, 1972, to August 31, 1982. It seems plain from this letter that the tenants recognised that the rack rent reasonably to be expected on the C open market had risen and that it should be possible to agree what the new rent should be for the coming 10 year period. The landlords' representative then asked the estate agents to supply particulars of the rents reserved by the underleases: this the estate agents agreed to do. There were nine underleases at the time, producing a total rental of some £12,500 a year but these particulars were never supplied to the landlords although they were obviously of considerable importance in calculating D the new rent. On August 21, 1972, the tenants' solicitors wrote to the landlords saying that the rent revision clause was "not susceptible of any legally enforceable meaning and . . . void accordingly." Further correspondence passed between the parties and finally, after August 31, the tenants issued an originating summons to decide the question whether from the period of August 31, 1972, until August 31, 1982, the rent should remain at the figure at which it was fixed on August 31, 1962, E or should be increased to a quarter of the fair market rent notwithstanding that this figure had not been agreed or determined by arbitration before August 31, 1972.

Both parties had had an equal opportunity and indeed obligation of ascertaining the fair market rent by referring the matter to arbitration well before the date in question. Neither did so. It has been argued that F the rent revision clause was solely for the benefit of the landlord. For the reasons stated earlier in this speech I cannot accept this argument. Without the clause the tenant would never have obtained his 99 years' building lease and I can see nothing unfair to the tenant or generous to the landlord in providing that the one should pay and the other receive the fair market rent for the property during the whole of the term for which it was demised. G

Equity and the common law were fused by the Supreme Court of Judicature Act 1873. Section 25 (7) of that Act provides:

> "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 H have heretofore received in equity."

This section is now replaced and re-enacted in different language by section 41 of the Law of Property Act 1925.

The equitable principles governing the construction and effect of stipulations in contracts as to time are correctly set out in *Fry on Specific Performance*, 6th ed. (1921), p. 502, para. 1075:

> "Time is originally of the essence of the contract, in the view of a Court of Equity, whenever it appears to have been part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract. As this intention may either be separately expressed, or may be implied from the nature or structure of the contract, it follows that time may be originally of the essence of a contract, as to any one or more of its terms, either by virtue of an express condition in the contract itself making it so, or by reason of its being implied. . . ."

Under the lease dated August 31, 1962, both the landlords and the tenants were enabled and indeed obliged by the language of the rent revision clause to ensure that the rent for the period from August 31, 1972, to August 31, 1982, should be determined before August 31, 1972. Neither did so and I find it impossible to hold that the clause was intended by either party to imply that the time provision in that clause was of the essence of the contract. It was in my opinion merely administrative machinery for carrying out the parties' agreement that the rent should be revised so that it should correspond with the current open market rent.

I recognise that the lease relates to what could be fairly described as a commercial transaction. In commercial transactions, provisions as to time are usually but not always regarded as being of the essence of the contract. They are certainly so regarded where the subject matter of the contract is the acquisition of a wasting asset or of a perishable commodity or is something likely to change rapidly in value. In such cases if, e.g., the seller fails to deliver within the time specified in the contract, the buyer may well be seriously prejudiced. The time provision in a rent revision clause of the present kind, even in a lease concerning a commercial transaction, is however different in character and I regard it as not being of the essence of the contract unless it is made so expressly or by necessary implication. In the present case it is certainly not made so expressly nor, in my view, by implication. Nor is there anything to suggest that the tenant would be prejudiced by determination of the rent for the period from August 31, 1972, to August 31, 1982, being postponed until after August 31, 1972.

At first instance, Sir John Pennycuick V.-C. held that the rent revision clause was on the same footing as an option conferred on the landlord and that if the landlord failed to exercise his rights within the time specified in the option, he lost them. Sir John Pennycuick V.-C. relied strongly upon the judgment of Russell L.J. in *Samuel Properties (Developments) Ltd.* v. *Hayek* [1972] 1 W.L.R. 1296, when he said, at p. 1302:

> "It was argued that there was a distinction (as to time limits) between options to determine, or to renew, or to acquire the

A reversion, and a right such as the present. I do not see why this should be so."

I am afraid that I do for the following reasons: Options to determine or to renew are not agreements to determine or renew. They are no more than irrevocable offers (kept open for good consideration) to do so providing the tenant complies with certain conditions usually before a certain date. If the tenant complies with the conditions in time he B thereby accepts the offer. The offer plus the acceptance constitutes a fresh agreement determining or renewing the lease as the case may be (see the *United Dominion Trust* case [1968] 1 W.L.R. 74, Lord Denning M.R. at p. 81). The same is true, mutatis mutandis, of an option to acquire the reversion. Neither equity nor the common law would ever intervene to make a contract for the parties. Anything which falls C short of a complete acceptance of the offer is of no effect except sometimes as a counter-offer.

I do not regard the leases in either of the present appeals, nor in *Samuel Properties (Developments) Ltd* v. *Hayek* [1972] 1 W.L.R. 1296 (to which I shall return), as vesting any option in the landlord to have the rent revised. In my opinion each lease constitutes, amongst other D things, an agreement between the parties that, at stated intervals, the rents shall be revised so as to bring them into line with the then open market rent. The rent revision clauses specify the machinery or guidelines for ascertaining the open market rent. These provisions as to time are not, in my opinion, mandatory or inflexible; they are only directory. Nevertheless any unreasonable delay caused by the landlords and which is to the tenants' prejudice would prevent the rent being E revised after the review date.

As far as the first appeal is concerned, I do not understand how, on the facts I have related the delay could properly be said to have been caused by the landlords rather than by the tenants. The lease not only enabled but put an obligation on the tenants as well as on the landlords to have the rent ascertained by arbitration in default of agreement. In F these circumstances it hardly lies in the tenants' mouth to complain of the delay. Nor is there any evidence that they have been prejudiced by the delay for which they appear, if anything, to have been more responsible than the landlords.

In *Samuel Properties (Developments) Ltd.* v. *Hayek* the rent revision clause which laid down the procedure for having the open market rental value ascertained at the end of the seventh and fourteenth years G of the term and the rent then being raised to that level, was dressed up to look like an option. Indeed the word "option" appeared in the clause. But, for the reasons I have already stated, I do not think that it was a real option in the sense that any option to renew or determine a lease is an option. The clause required the landlord to give notice to the tenants six months prior to the expiry of the seventh year if H he required the rent to be raised to the open market rental value. If within one month of the notice, the parties failed to agree the open market rental value this figure was to be determined by a valuer appointed by the President of the Royal Institution of Chartered

Surveyors. But the date by which this determination was to be made was not specified. The landlord gave his notice about one month late. The Court of Appeal held that time was of the essence and that the landlord was precluded from putting the rent revision clause into operation. Clause 5 of the lease so far as relevant gave the tenant a true option to determine the lease at the end of the seventh year of the term by giving the landlords at least one quarter's notice in writing. This break clause was obviously inserted to protect the tenant should he not wish to pay the increased rent during the next seven year period of the term.

The proviso to the break clause strongly suggests however that the time provisions relating to rent revision were not of the essence of the contract. It reads:

> "Provided always that if one quarter before the expiration of the first seven . . . years of the term . . . the reviewed rent . . . shall not have been reviewed then the right of the lessee to terminate as herein provided shall be extended until the expiration of one month from the date of the notification of the reviewed rent to the lessee."

There is nothing in the proviso nor in any other part of the lease to suggest that the new rent may not be determined by the valuer and notification of this rent may not reach the lessee until after the expiration of the first seven year period. In my view *Samuel Properties (Developments) Ltd.* v. *Hayek* [1972] 1 W.L.R. 1296 was wrongly decided and should be overruled.

In *Mount Charlotte Investments Ltd.* v. *Leek and Westbourne Building Society* [1976] 1 All E.R. 890, 892 Templeman J. stated rightly that:

> "The authorities disclose that there are at least two kinds of rent revision clauses. The first kind has been analysed as 'an option to the landlord to obtain a higher rent' and in that case if the landlord does not comply with any time limits provided for the exercise of the option then he wholly fails. The time limits are said to be mandatory. The second kind of clause has been analysed as 'creating an obligation on the landlords'—or sometimes the tenants as well—'to take the steps necessary to determine what the rent is going to be.' If in the obligation cases the time limits prescribed by the document are not complied with, then the court construes those time limits as being purely directory, and, provided that the tenant has not been prejudiced by any delay, then the rent is fixed after the time limits have expired."

Buckley and Roskill L.JJ. in their judgments in the first appeal expressed no enthusiasm for the dichotomy between so-called option and obligation rent revision clauses. Indeed, they considered it to be unsound. I agree with this view. They based their judgments upon wider grounds to which I shall return. They both however stated that they did not dissent from the narrower ground upon which Pennycuick V.-C. decided the case, namely that the rent revision clause "is for the benefit of the

landlord solely . . . (and is) on the same footing as an option." For the reasons I have already given I am unable to accept the grounds upon which Pennycuick V.-C. based his judgment.

After the passage from Templeman J.'s judgment which I have quoted, he added:

> "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."

Templeman J. was however obliged by authorities then binding on him to give judgment for the tenants—I think reluctantly. For the reasons which I have already given I entirely agree with and gratefully adopt his trenchant criticism of the analysis of the so-called option rent revision clause.

I also agree with Buckley L.J. when he says, [1976] Ch. 128, 145:

> "In each class of case" [the so-called option cases and the obligation cases] "the circumstances and the nature of the contractual term should be considered in order to ascertain whether it is reasonable to impute to the parties an intention that time shall be of the essence, an important circumstance being the practical operation of the clause and its impact on the parties."

I am afraid, however, that for the reasons I have already stated, I cannot agree that the circumstances or nature of the contractual terms in the *Burnley* case support the implication that the parties intended to make time of the essence. I recognise that it would probably be convenient for both parties to know the amount of the revised rent before it comes into operation. In my view, however, this by itself is not enough to enable the respondents to succeed.

Buckley L.J. relied on my judgment in the Court of Appeal in *Stylo Shoes Ltd.* v. *Wetherall Bond Street W.1 Ltd.* (1974) 237 E.G. 343. In that case the rent revision clause required the landlords, in the event of the revised rent not being agreed with the tenants, to apply not less than three months before the review date to the President of the Royal Institution of Chartered Surveyors to nominate an arbitrator to determine the revised rent. It does not appear from the report for how long the landlords delayed in making the application nor whether or to what extent the delay prejudiced the tenants. This was a case in which the landlords alone were to initiate the procedure for revising the rent and is perhaps more akin to the second than to the first appeal. However this may be, unless the facts in that case did reveal some unreasonably long delay which caused prejudice to the tenants then it was wrongly decided. I certainly do not think that any member of the court was purporting to lay down any principle to the effect that provisions as to time in rent revision clauses were generally to be considered as of the essence of the contract. If the *Stylo Shoes* case, 237 E.G. 343 is to be regarded as a so-called option case then the court was bound by its own decisions in *Samuel Properties (Developments) Ltd.*

v. *Hayek* [1972] 1 W.L.R. 1296 with which I do not agree and consider should be overruled for the reasons which I have already indicated.

Most of what I have said applies as much to the *Cheapside Land Development Co. Ltd.* appeal as it does to the *Burnley Corporation* appeal but there are substantial differences between the two relating both to their respective leases and facts. In the *Cheapside Land Development* appeal (the second appeal), by a lease dated March 13, 1968, the landlords demised to the tenants parts of a building known as Winchester House, Old Broad Street, in the City of London for a term of 21 years from April 8, 1968 at a yearly rent:

> "(a) In respect of the period of the said term commencing on April 8, 1968 . . . and ending on April 8, 1975, the yearly sum of £117,340 . . . (b) In respect of each of the following periods respectively of the said term, that is to say (i) the period commencing on April 8, 1975 and ending on April 8, 1982 . . . and (ii) the period commencing on April 8, 1982 and ending on April 8, 1989 . . . the respective rents to be determined in accordance with the provisions in the Second Schedule hereto."

The second schedule contains the rent revision provisions. Clause 1, paragraph (a) defines "the market rent" and paragraph (b) defines "the review date" as April 8, 1975 and April 8, 1982, for the second and third periods respectively. Clauses 2 and 3 read:

> "2. In respect of (i) the second period of the said term the yearly rent shall be the sum of . . . (£117,340) or a sum equal to the market rent (if duly determined in the manner hereinafter set out) whichever shall be the higher. 3. The market rent may be determined and notified to the lessees in the manner following: (a) the proposed rent shall be specified in a notice in writing ('the lessors' notice') served by the lessors . . . on the lessees not more than 12 months nor less than six months prior to the review date; (b) the lessees may within one month after service of the lessors' notice of the proposed rent serve on the lessors a counter notice ('the lessees' notice') either agreeing the proposed rent or specifying the amount of rent which the lessees consider to be the market rent for the period in question; (c) in default of service of the lessees' notice or in default of agreement as to the market rent to be payable for the period in question the rent shall be valued by a Fellow of the Royal Institution of Chartered Surveyors agreed between the lessors and the lessees or in default of agreement to be appointed not earlier than two months after service of the lessors' notice on application of the lessors by the President . . . of the said Institution whose valuation shall be . . . final and binding upon the lessors and lessees and shall be given in writing to the lessors and the lessees not less than 14 days before the review date."

On September 5, 1974 (seven months before the review date), the lessors served on the lessees their notice under clause 3 (a) of the second schedule in which they proposed the annual sum of £800,000 as the market rent for the period from April 8, 1975, to April 8, 1982. The lessees did not serve any counter notice under clause 3 (b) of the second

schedule, but protracted negotiations took place between the parties continuing after April 8, 1975, in an attempt, which proved unsuccessful, to agree the market rent for the period in question. Finally on June 25, 1975, the lessors wrote to the Royal Institution of Chartered Surveyors asking for the President to appoint a Fellow to determine the market rent but pointing out that an issue likely to be litigated had arisen between the parties as to whether the lessors were entitled to a review. The President thought it better to wait until the issue had been resolved before making any appointment.

On June 27, 1975, the lessors issued an originating summons which claimed the following relief:

> (1) A declaration that their application of June 25, 1975, to the President of the R.I.C.S. was a valid and effective application for the purposes of paragraph 3 (c) of the second schedule. (2) A declaration that a valuation by the fellow of the R.I.C.S. appointed pursuant to the application would be valid and binding as to the market rent for the second period notwithstanding that such valuation would not be given until after March 25, 1975 and (3) A declaration that such market rent (if higher than £117,000 per annum) would be recoverable as rent with effect from April 8, 1975.

My Lords, the parties are bound by the lease to pay during the period commencing on April 8, 1975, and ending on April 8, 1982, the yearly rent of £117,340 or the market rent "if duly determined in the manner hereinafter set out" (i.e. in the second schedule) "whichever shall be the higher." I do not consider that an agreement between the parties or a determination by a Fellow of the Royal Institution of Chartered Surveyors as to the amount of the market rent adds any new contractual term. It merely quantifies the rent which the lessees are bound by the lease to pay during the period in question. The words "if duly determined in the manner hereinafter set out" in my view do no more than indicate the procedure to be followed in determining the market rent. I cannot accept that if the time limits set out in the procedural directions are not strictly adhered to, the lessors are automatically deprived of their right to be paid the market rent. There is certainly no express condition that unless the time scale is strictly observed the lessors shall lose these rights. Nor is there anything from which such a condition could be implied. Indeed all the implications are to the contrary. We know that the lessors' notice was served seven months before the review date and therefore complied with the provision that it should be served not more than 12 months nor less than six months before that date. Suppose it had been served a week or so longer than the maximum or less than the minimum period, it is, to my mind, incredible that the parties could have intended that this should deprive the lessors of the market rent for the next seven year period. The same is true about the provisions that in default of agreement between the parties as to the market rent or as to which Fellow of the Royal Institution of Chartered Surveyors should value it, a Fellow should be appointed by the President of the Institution not earlier than two months after

service of the lessees' notice. Suppose the Fellow had been appointed seven weeks after service of the lessors' notice, could this vitiate his valuation and deprive the lessors of the market rent? Again, if the valuation was made and given in writing to the lessors and lessees 12 days before the review date when what I regard as the procedural directions in the lease say that it should be given not less than 14 days before the review date, could this deprive the lessors of the market rent for the next seven years? The answer to these last two questions is obviously no. To hold that time is of the essence of any of the provisions in the second schedule would, in my respectful view, make complete nonsense of it.

I certainly agree that if the lessors had been guilty of unreasonable delay which had caused prejudice or hardship to the lessees they would have forfeited their rights to be paid the market rent from April 8, 1975, to April 8, 1982. But there is not a spark of evidence that the lessees have suffered any prejudice or hardship on account of the lessors not applying to the President of the R.I.C.S. to appoint a valuer until June 25, 1975. On the contrary, the lessees will have had the use of the difference between the market rent and £117,340 since April 1975. Even if the value of the market rent is only half or even one quarter of the sum indicated in the lessors' notice, at the prevailing rates of interest the lessees should be substantially better off than if they had had to pay out the market rent from the review date.

I therefore conclude that the lessors are entitled to have the market rent determined by a fellow of the R.I.C.S. to be appointed by the President of the Institution in accordance with the lessor's written request of June 25, 1975. Under the terms of the lease, the market rent, if it exceeds £117,340 a year, is clearly payable as from April 8, 1975. Until the market rent is determined, the lessees will go on paying rent at the rate of £117,340 a year. After its determination (if it exceeds the present figure) the lessees will have to pay the balance which has been accruing and of which they have enjoyed the benefit since April 8, 1975. It used to be thought that rent was a special thing in English law. It could be distrained for; it issued out of land and had to be certain at the time when it became payable; and therefore it could not be ascertained or determined retrospectively (see *In re Essoldo (Bingo) Ltd.'s Underlease*, 23 P. & C.R. 1). That case however was overruled by *C. H. Bailey Ltd.* v. *Memorial Enterprises Ltd.* [1974] 1 W.L.R. 728. At p. 732 Lord Denning M.R. quoted with approval from *Holdsworth, A History of English Law*, vol. VII (1900), p. 262:

> ". . . in modern law, rent is not conceived of as a thing, but rather as a payment which a tenant is bound by his contract to make to his landlord for the use of the land."

Lord Denning M.R. went on to say:

> " The time and manner of the payment is to be ascertained according to the true construction of the contract, and not by reference to outdated relics of mediaeval law "

—a passage with which I entirely agree and gratefully adopt. Accordingly I am of the opinion that the lessors were entitled to all the declarations

for which they asked and which were granted to them by Graham J. whose order was reversed in the Court of Appeal and should be restored.

My Lords, for these reasons I would allow both these appeals.

LORD FRASER OF TULLYBELTON. My Lords, these appeals raise the question of what is the legal significance to be attached to stipulations as to time in a rent review clause in a lease. The appeals were heard together and the primary argument on both sides treated the question as one that was susceptible of a general answer, but it is proper to recall that the application of any general rule may always be excluded if the intention to do so is expressed or clearly implied. Rent review clauses take many forms, and it is not possible, even if it were desirable, to state any rule as to the effect of stipulations as to time that will apply to all such clauses.

The Law of Property Act 1925, section 41, provides:

> "Stipulation 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."

That section appears to state that the rules of equity shall apply to stipulations in contracts of all sorts. I say "appears to" because it was strongly argued on the part of the respondents (the tenants) in both the instant appeals that only the uninstructed would accept the section at its face value, and that it ought to be read in a much more restricted sense, so as to limit its application to the circumstances in which the rules of equity would have applied before the Supreme Court of Judicature Act 1873. In support of that argument reliance was placed on the speech of Lord Parker of Waddington in *Stickney* v. *Keeble* [1915] A.C. 386, 417–418, referring to section 25 (7) of the Supreme Court of Judicature Act 1873 which was the predecessor of section 41 of the Act of 1925. But I am satisfied that Lord Parker was not intending in the passage referred to to limit the application of section 25 (7) in the way suggested; he was merely explaining his rejection of the argument which he summarised at p. 417.

My Lords, I am not qualified to explore the history of the two streams of English jurisdiction, legal and equitable, which formerly flowed in separate channels. But since the Supreme Court of Judicature Act 1873 they have at least shared the same channel, and I gratefully adopt the reasons given by my noble and learned friends Lord Diplock and Lord Simon of Glaisdale for thinking that they have now merged into a single stream. Consequently rules of equity, so called because they are as a matter of history derived from equity are now simply part of the corpus of English law and as such they are free to develop like other parts of that law. Neither section 41 of the Law of Property Act 1925 nor section 27 (5) of the Supreme Court of Judicature Act 1873 contains any negative provision against the development or extension of equitable principles, and the effect of those sections is quite different from the incorporation into the law of a colony of the law of England

as it stood at some specified date—see for example *Watts and Attorney-General for British Columbia* v. *Watts* [1908] A.C. 573. I consider that section 41 should now be taken to mean what it appears to say and that the law is correctly summarised in the following passage from *Halsbury's Laws of England*, 4th ed., vol. 9, para. 481:

> "The modern law, in the case of contracts of all types, may be summarised as follows. Time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or (3) a party who has been subject to unreasonable delay gives notice to the party in default making time of the essence."

See also *Chitty on Contracts*, 23rd ed. (1968), vol. I, paras. 1140–1141, and *Fry on Specific Performance*, 6th ed., para. 1073.

Clearly neither the first nor the third of these exceptions is applicable to either of the instant appeals. The question is whether the nature of the subject matter or the surrounding circumstances of rent review clauses as a class show that all or any stipulations as to time in such clauses normally fall within the second exception. Rent review clauses have only become common in comparatively recent years, certainly since the last war, and their main purpose is to protect the revenues of landlords from the effects of inflation. From the landlord's point of view a rent review clause is an important, almost indispensable, term of the contract if he is to agree to a lease for a long period, during which inflation may well continue. The clause is also in a less direct way of benefit to the tenant, because, without it, he would not normally be able to get the security of tenure which is afforded by a long lease, except perhaps by paying a rent which in the early years of the lease would be far above the current market level. The rent review clause has thus become a convenient device to facilitate the granting of long leases in an inflationary age, and its main purpose is the same whatever the exact machinery specified in a particular clause. I note in passing that in the *Cheapside* appeal the lease was for 21 years and in the *Burnley* appeal the lease was for 99 years. It will, I suppose, generally be convenient to both parties to have the amount of the rent which will be due from and after the review date ascertained before that date arrives, but if the rent can be fixed later with retrospective effect to the review date (as I think it can, for reasons to be stated below) then it will not normally be essential to have it ascertained before the review date. The substantial purpose of the clause will be satisfied if the reviewed rent is ascertained reasonably soon after the review date. At a time when rents are fluctuating it may be difficult to assess in advance what the market rent will be at a future date. Indeed, in strict theory such an assessment in advance cannot be more than a forecast. There may be therefore good practical reasons for leaving the ascertainment of the reviewed rent until after the review date.

It was argued on behalf of the respondents in both the instant appeals

A that tenants would be seriously prejudiced if the new rent were not ascertained before the review date because they would not know the amount of their liability for the future. This argument carried considerable weight with the Court of Appeal in the *Burnley* case. But I think, with respect, that the prejudice likely to be caused to the tenant by the rent not being ascertained until after the review date has been exaggerated and that the likely prejudice to the landlord has been B understated. In time of inflation it is to be expected that the landlord will call for a review on every occasion where he is entitled to do so, especially if (as in both the instant appeals) a review cannot lead to the rent being reduced below the level that would prevail if there were no review. So far as the tenant is concerned, he will of course want to know the amount of his liability but he will normally be able with the C aid of skilled advice to arrive at a reasonably close estimate of the current market rent. So far as the landlord is concerned, he may be very seriously prejudiced by delay in ascertaining the reviewed rent if, as is usual, it is higher than the former rent, because he will be unable to collect the reviewed rent until it has been ascertained, and any delay will keep him out of his money representing the difference between it and the former rent. Conversely the tenant will have the use of the money until D the reviewed rent has been ascertained. This is strikingly illustrated in the *Cheapside* appeal where the landlord has claimed an increase of over £480,000 per annum in the rent, and loss of interest on a sum of that order even for a short time is obviously a serious matter.

As the substance of a review clause is, in my opinion, to provide machinery for ascertaining the market rent from time to time, at the E intervals agreed in the interests of both parties, rather than to confer a benefit on the landlord, it seems to me that stipulations as to time ought not to be strictly enforced unless there is something in a particular clause to indicate that time is of the essence in that case. Until the decision in the *Burnley* case the reported cases fell into two classes. One class consisted of those where the review clause was regarded as F machinery and where time limits were held to be merely directory. The other class consisted of cases where the clause was in a form which gave the landlord a unilateral right or option to call for a review, and in that class time limits were held to be mandatory and inflexible. This dichotomy created a danger of distinctions being drawn on narrow and somewhat artificial grounds, as Buckley L.J. pointed out in *Burnley* [1976] Ch. 128, 138E. The review clause in that case might well have G been regarded as falling within the former class, but the Court of Appeal rejected any rigid division into two classes, and held that the time limits in the clause ought, in accordance with what they regarded as the probable intention of the parties, to be strictly enforced. The lease there provided that after the end of the first 10 year period, which was on August 31, 1972, the yearly rent should be " £1,000 plus any additional H rent payable under the provisions contained in the schedule hereto. . . ." The schedule does not exactly fit that provision as it does not provide for an additional rent but provides that the rent after the first 10 years shall be either £1,000 or another figure whichever is the higher, but no point

was made of the difference between the lease and the schedule. The schedule provides that "during the year immediately preceding" the period of the second 10 years, and immediately preceding each subsequent 10 year period, the landlord and the tenant

> "shall agree or failing agreement shall determine by arbitration the sum total of the current rack rent . . . and" (it being a building lease) "one quarter of the sum total so ascertained or £1,000 (whichever is the greater) shall be the rate of rent reserved"

for the next 10 year period. There is provision for the arbitrator to be nominated, failing agreement between the parties, by the President of the Royal Institution of Chartered Surveyors and it is left open to either party to request the President to make a nomination. If the stipulation in the schedule requiring the rack rent to be ascertained "during the year" is to be strictly enforced the result would be that if, owing to some accident for which the landlord was not responsible or to the illness or dilatoriness of the arbitrator, the rack rent had not been ascertained until a month or even a day after the end of the year, the review would be abortive and the former rent would continue in force for another 10 years. That result would seem to be inequitable and I do not believe that the parties can have intended it, yet it would follow from the decision of the Court of Appeal that time was of the essence, and that, because the new rent had neither been agreed nor determined by arbitration (nor even referred to arbitration) by the end of the tenth year, no review could now be made. For the reasons I have stated I am unable to agree with that decision.

A more difficult question is raised in cases where the clause is in a form giving the landlord the sole right to initiate a review provided he does so by a certain time. Provisions of this sort are conveniently described as "triggering" provisions. A typical triggering provision is found in the *Cheapside* case, in paragraph 3 (a) of the second schedule to the lease. The lease was for 21 years from April 8, 1968, and it provided for review dates on April 8, 1975, and April 8, 1982. Paragraph 2 of the second schedule provides in effect that after each of the review dates "the market rent (if duly determined in the manner hereinafter set out)" shall be payable. Paragraph 3 of the schedule provides:

> "The market rent may be determined and notified to the lessees in the manner following: (a) the proposed rent shall be specified in a notice in writing ('the lessors' notice') served by the lessors or their surveyor on the lessees not more than 12 months nor less than six months prior to the review date."

Failing agreement there was provision for arbitration. The words that I have quoted, read literally, lay down two conditions precedent for the market rent being payable, namely, (1) that the market rent shall have been "duly determined" in the manner specified in the schedule and (2) that the lessors shall have served the lessors' notice not less than six months before the review date. In fact the lessors (appellants) did serve the lessors' notice in the time so the second condition was satisfied,

A but the first was not. After the lessors' notice had been served negotiations between the parties followed. No counter notice was served by the lessees but that was immaterial as the schedule provided that, in default of the service of the lessees' notice or in default of agreement as to the market rent, the market rent was to be valued by a Fellow of the R.I.C.S. to be appointed by the President "on the application of the lessors." No time limit for the application to the President or for the appointment of the B valuer was stated, but, as the valuation had to be made not less than 14 days before the review date, it was implied that the application and the appointment must be made in reasonable time to enable that to be done. In fact, the lessors did not apply to the President until more than two months after the review date and the President declined to make the appointment until its validity had been decided by the court. Hence C these proceedings.

The landlord's right to operate the trigger and his right to apply to the President are both unilateral rights. The former might be described as an option. The latter would not I think normally be so described but, in my opinion, it is for the present purpose indistinguishable from the former in that both are unilateral rights which the landlord is under no obligation to exercise. It was argued on behalf of the tenants that the D rules of equity have never applied to options, that the landlord's rights were options, and that the stipulations as to time must therefore be strictly applied. That was the argument which had prevailed in the Court of Appeal in *Samuel Properties (Developments) Ltd.* v. *Hayek* [1972] 1 W.L.R. 1296, 1302 where Russell L.J. said:

> ". . . the right or privilege of exacting an additional rent was con- E ferred by the bargain between the parties as an express option which would be effective if a condition precedent was complied with: it could be equated with an offer by the lessee to pay an increased rent only in certain circumstances which it lay in the power of the lessor unilaterally to bring about, which offer was not accepted in those terms. It was argued that there was a distinction (as to time limits) between F options to determine, or to renew, or to acquire the reversion, and a right such as the present. I do not see why this should be so."

In that case the word "option" was used in the lease ("the yearly rent . . . shall be subject to review at the option of the lessors in the seventh and fourteenth years . . ."). That argument is one which, in my respectful opinion, concentrates too exclusively on the words of G the clause and pays insufficient attention to its substantial purpose. The right to initiate a rent review, even if it is described as an option, is in my opinion materially different from a true option, whether granted by one clause in a larger contract or by a separate offer. Options to purchase property or to renew a lease are both true options and their important characteristic for the present purpose is that, if they are exer- H cised, they create a new contract between the parties. But when a rent review clause is operated it merely varies one term in a continuing contract. The term is one which the parties have agreed from the beginning is to be variable and the review clause merely provides the machinery for

effecting the variation. Review clauses are also different in this respect from a tenant's option to break a lease; that, if exercised, will put an end to the contract and release both parties from their contractual obligations. There is a good reason why time limits should be strictly enforced in relation to an option to purchase or renew a lease, because so long as it remains open the grantor is not free to dispose of his property elsewhere, although the grantee is under no obligation to him. Similarly where a tenant has an option to break his lease, he can break it or not as he chooses, but the landlord is not free to let his property to anyone else until the time for exercising the tenant's option has expired. It is fair and reasonable, and in accordance with what I would take to be the intention of the parties, that the time limit of the restriction on the grantor should be strictly enforced. That however does not apply in relation to a rent review clause in a continuing lease.

It was also argued on behalf of the tenants that the lessors in a case such as *Cheapside* are not under any obligation to initiate a review and that there is therefore no room for applying the equitable rule so as to release them from the consequences of failure to perform an obligation. But the equitable rule originated in relieving a mortgagor from the consequence of failure to redeem his property by the stipulated date although he had no obligation to do so. The mortgagor, like the landlord here, had a unilateral right which might be described as an option, yet he was able to rely on the equitable rule to relieve him from the consequences of failure to exercise his right in time. There seems no reason in principle why the landlord should not be able to do the same and in my opinion he can. If a tenant felt himself prejudiced by the landlord's delay in serving a triggering notice, it would be open to him after the time for serving it had expired, to give notice prescribing a further time within which the triggering notice must be served. Provided that the further time was reasonable, he could thus make time of the essence.

For these reasons I am of the opinion that the equitable rule against treating time as of the essence of a contract is applicable to rent review clauses unless there is some special reason for excluding its application to a particular clause. The rule would of course be excluded if the review clause expressly stated that time was to be of the essence. It would also be excluded if the context clearly indicated that that was the intention of the parties—as for instance where the tenant had a right to break the lease by notice given by a specified date which was later than the last date for serving the landlord's trigger notice. The tenant's notice to terminate the contract would be one where the time limit was mandatory, and the necessary implication is that the time limit for giving the landlords notice of review must also be mandatory. An example of such interlocked provisions is to be found in *C. Richards & Son Ltd.* v. *Karenita Ltd.* (1971) 221 E.G. 25 where the decision that time was of the essence of the landlord's notice could be supported on this ground, although not, as I think, on the ground on which it was actually rested. The case of *Samuel Properties (Developments) Ltd.* v. *Hayek* [1972] 1 W.L.R. 1296 is not in this class because, although there

A was a tenant's break clause, the time allowed to the tenant for giving notice was automatically extended until one month after the notification of the reviewed rent to the lessee.

Apart from the cases I have already mentioned there are three other reported cases to which I wish to refer briefly. *Stylo Shoes Ltd.* v. *Wetherall Bond Street W.1 Ltd.*, 237 E.G. 343 was a decision on a clause described by Salmon L.J. as very ill drafted and it should perhaps B be regarded as one limited to its own facts, but in so far as it proceeded upon the basis of the review clause giving an option to the landlord I am unable to agree with it. The decision in *Mount Charlotte Investments Ltd.* v. *Leek and Westbourne Building Society* [1976] 1 All E.R. 890 was reached with evident reluctance by Templeman J. only because he felt bound by authority to hold that time was of the essence and it C should in my opinion be treated as erroneous. I agree with the learned judge's observation at p. 892G that "the analysis of the option rent review clause is a triumph for theory over realism." In *Kenilworth Industrial Sites Ltd.* v. *E. C. Little & Co. Ltd.* [1974] 1 W.L.R. 1069 there was an express provision that any failure to give or receive the landlord's notice to agree the rent for the next five year period "shall not render void the right of the landlord hereunder to require the agreement or D determination as aforesaid of a new rent," and that was construed as applying to a failure to give notice within the time limit fixed by the lease. The decision that time was not of the essence seems to me, if I may say so, obviously right. But the case was probably the origin of the dichotomy, which I regard as unfortunate, between review clauses which confer an option and those which merely provide machinery, and I E would hope that that dichotomy will now be forgotten.

The result is that in my opinion the landlords in both the instant appeals are entitled to have the rents reviewed notwithstanding that the times for review have expired. If so, the question arises whether the rents fixed by the reviews, assuming that they are higher than the basic rents, will take effect retrospectively from the review dates in the F leases, that is from April 8, 1975, in *Cheapside* and from August 31, 1972, in *Burnley*, or only from the dates on which the new rents are ascertained. The main argument against retrospection was based upon the proposition that rent must be certain in amount at the time when it is payable, and that a payment which is uncertain because it depends on the result of an arbitration or valuation could not be rent: see *In re Essoldo (Bingo) Ltd.'s Underlease*, 23 P. & C.R. 1 and *Greater London Council* v. *Connolly* G [1970] 2 Q.B. 100. That proposition applies to rent in the strict sense, that is rent which can be recovered by distraining, but the word "rent" in modern usage can and often does mean simply a sum of money which the tenant has contracted to pay to the landlords for the use of the premises let: see *Foa's General Law of Landlord and Tenant*, 8th ed. (1957), H p. 101:

> "prima facie rent is the monetary compensation payable by the tenant in consideration for the grant, however it be described or allocated. It is submitted that nevertheless the landlord's common

law right to levy distress is confined to rent in its mediaeval or strict sense." A

The question in each case is to determine the sense in which the word is used. If it is used not in the strict sense but in the sense merely of the contractual sum due, then it need not be certain at the date on which it becomes payable: *C. H. Bailey Ltd.* v. *Memorial Enterprises Ltd.* [1974] 1 W.L.R. 728. In the present case where the rents are for large commercial premises I see no reason why the prima facie meaning of rent as contractual rent should not prevail as it seems unlikely that the landlord had in view the use of distraint against the tenant. I would therefore hold that the rents fixed by the valuation will be payable retrospectively from the respective review dates. B

I would allow both appeals. In *Burnley* I would answer questions A (ii) and B (i) (a) in the affirmative. In *Cheapside* I would restore the order of Graham J. C

Appeals allowed

Solicitors in the first appeal: *Turner Peacock*; *Fremont & Co.*

Solicitors in the second appeal: *Stephenson Harwood & Tatham*; *Travers Smith, Braithwaite & Co.* D

J. A. G.

E

[HOUSE OF LORDS]

ANDERSON . . . . . APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS . . . RESPONDENT F

[ON APPEAL FROM REG. *v.* ANDERSON (KEITH)]

1977 Nov. 14, 15 — Ormrod L.J., Thompson and Jupp JJ.

1978 April 25; May 25 — Lord Wilberforce, Lord Diplock, Lord Salmon, Lord Fraser of Tullybelton and Lord Keith of Kinkel G

Crime — Criminal bankruptcy order — Offences taken into consideration—Minimum limit of loss or damage—Loss through offences tried below limit — Other offences taken into consideration — No consent by accused — Loss in respect of "offences . . . which the court takes into consideration in determining . . . sentence"—Powers of Criminal Courts Act 1973 (*c.* 62), *s.* 39 (1) (2) H

By section 39 of the Powers of Criminal Courts Act 1973:

"(1) Where a person is convicted of an offence . . . and