OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

Riverside Housing Association Limited (Appellants)
ν.
White (FC) and another (FC) (Respondents)

Appellate Committee

Lord Hoffmann
Lord Rodger of Earlsferry
Lord Brown of Eaton-under-Heywood
Lord Mance
Lord Neuberger of Abbotsbury

Counsel

Appellants:
Andrew Arden QC
Jonathan Seitler QC
Iain Colville
(Instructed by Bremners)

Respondents:
Jan Luba QC
Michael Barnes QC
Adam Fullwood
(Instructed by Stephensons)

Intervener
Christopher Baker
Tom Leech
(Instructed by Devonshires on behalf of Housing Corporation)

Hearing date:
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HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Riverside Housing Association Limited (Appellants) v. White (FC) and another (FC) (Respondents)

[2007] UKHL 20

LORD HOFFMANN

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Neuberger of Abbotsbury, and for the reasons he gives I too would allow the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

2. I have had the advantage of considering the speech to be delivered by my noble and learned friend, Lord Neuberger of Abbotsbury, in draft. For the reasons he gives I too would allow the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

3. I have had the benefit of reading in draft the opinion of my noble and learned friend Lord Neuberger of Abbotsbury, and for the reasons he gives I too would allow this appeal.
LORD MANCE

My Lords,

4. I have had the benefit of reading in draft the opinion of my noble and learned friend Lord Neuberger of Abbotsbury, and for the reasons he gives I too would allow this appeal.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

5. This appeal raises the question of whether a residential landlord has validly implemented rent review provisions contained in a weekly tenancy. The relevant facts are as follows.

6. The appellant, Riverside Housing Association (Riverside), is a charitable housing association and registered social landlord, with around 20,000 residential tenants. Its tenants participate in the carrying out of its functions; thus, they cooperate in the management of its housing stock through a central tenants’ association, and there is tenant representation on its board of directors. Under the Housing Act 1996, the Housing Corporation (which has intervened on this appeal to support Riverside’s case) has considerable powers over the conduct of registered social landlords. According to the Housing Corporation, 80% of the income of such landlords is from their rent, the balance coming from public funds.

7. The form of tenancy agreement with which this appeal is concerned is apparently applicable to around one quarter of Riverside’s tenants. The tenancy agreement in question is headed “Assured Tenancy Agreement”, and it is an assured tenancy within Part I of the Housing Act 1988. The Tenancy Agreement is divided into six Sections.

8. Section 1 identifies the parties, namely the respondents, Mr and Mrs White, referred to as “the tenant”, Riverside as landlord, and the property the subject of the tenancy, namely 20 Brampton Court, St
Helens, Merseyside. It identifies the weekly rent as £55.49 of which £54.10 is “net rent” and £1.39 is “service charge”. The date of the commencement of the tenancy is stated as 18 November 1996.

9. Section 2 of the tenancy agreement is headed “Riverside’s Duties”, and it is necessary to quote extensively from sub-clauses (6) to (9):

“(6) Net Rent
Riverside may increase the rent by giving the tenant four (4) weeks notice in writing as set out in accordance with the provisions of this Agreement.
The notice will specify the net rent payable and any additional payment for service charges, both of which may be varied each year in accordance with the provisions of this Agreement.

(7) Rent Variation Date
The rent payable will be increased annually with effect from the first Monday of June each year. (This is known as the ‘Rent Variation Date’).

(8) Rent Formula
Riverside will calculate the annual increase in weekly rent by reference to the publication of ‘The General Index of Retail Prices’ and ‘The Index of Average Earnings’ for the twelve (12) month period to the 31st December immediately prior to the next rent variation date.
The increase in weekly rent will be whichever of the following two methods of calculation gives the highest weekly net rent. (This is known as the ‘Rent Formula’).
   i) 2% increase above the ‘The General Index of Retail Prices’
   ii) 2% increase above ‘The Index of Average Earnings’…
If …it is not possible to calculate the annual increase in rent by reference to either or both indices…Riverside will stop using either or both indices to calculate the annual increase in rent under the terms of this rent formula.
Where Riverside stops using either or both indices the next rent payable from the next rent variation date…will be Ten Percent (10%) above the previous weekly net rent.

(9) Independent Expert

Only in the event that ‘The General Retail Price Index’ and ‘The Index of Average Earnings’ remain unavailable or unusable, Riverside will use an equivalent method to calculate annual rent increases which will be independently determined by an Independent Expert to be appointed by the President for the time being of the Royal Institution of Chartered Surveyors.”

10. Section 3 is headed “The Tenants Duties” and it includes, in clause 3(3) the statement that: “The rent week begins on Monday. Regular and prompt payments of rent are to be made weekly in advance.” Section 4 is headed “The Tenants Rights” and Section 5 “Miscellaneous”.

11. Section 6 of the tenancy agreement is headed “General Terms”, and the first three sub- clauses provide:

“(1) Rent

In this Agreement the term ‘Rent’ refers to the weekly sum of rent payable net of other charges due in advance on a Monday.

(2) Rent Variation Date

In this Agreement the term ‘Rent Variation Date’ refers to the annual increase in rent which will occur each year on the first Monday in June with four (4) weeks prior notice.

(3) Rent Formula

In this Agreement the term ‘Rent Formula’ refers to the method of calculation of annual rent increase, as detailed under Riverside’s duties.”

12. For the first few years of the tenancy, the rent was increased by Riverside, as I understand it, with effect from the first Monday in June, with 28 days prior notice. However, in February 2000, Riverside decided not to impose any rent increase on certain categories of its tenants, including the respondents, from June 2000, because of a policy of the Housing Corporation. However, about a year later, Riverside changed its
mind and decided to increase the rent in respect of these categories of tenants.

13. Accordingly, on 12 February 2001, Riverside wrote to the respondents, pointing out that their rent had not been increased in June 2000, and giving them notice that their “total rent will change from 2 April 2001”, and that the new rent would be £60.08 per week, of which £58.69 would be “basic rent” (or, as the tenancy agreement refers to it, “net rent”) and the service charge would be £1.39. The respondents complied with this notice.

14. On 1 February 2002, a similar notice was served increasing the rent to £62.55 per week (of which the net rent was £61.04) from 1 April 2002. The respondents complied with this notice initially, but ceased paying their rent in June 2002, apparently because the local housing authority had suspended payment of Housing Benefit. After arrears had accrued, Riverside and the respondents entered into an agreement, which included a statement that the weekly rent was £62.55, and involved the respondents signing a bankers’ order to the effect that rent would be paid at this rate on a fortnightly basis. Eight such fortnightly payments were paid. Thereafter, the rent again started falling into arrears.

15. On 31 January 2003, Riverside served a further notice purporting to increase the rent from 7 April 2003 to £63.33 per week (of which the net rent was £62.04). Shortly thereafter, on 11 February 2003, Riverside began proceedings in the St Helens County Court, claiming possession against the respondents on the grounds of arrears of rent, calculated in accordance with the notices served on 12 February 2001 and 1 February 2002. Payments of rent were then made by the local housing authority and by the respondents on the basis that the rent was as stated in those notices (and that of 31 January 2003), although the payments did not clear all the arrears.

16. On 11 February 2004, Riverside served a further notice on the respondents stating that the rent would be increased to £65.10 per week (of which the net rent was £64.09), with effect from 5 April 2004. The rent continued to be paid irregularly, but it remained in arrears at all times following the issue of the possession proceedings.
17. In their Defence to the possession claim, the respondents contended that the four notices which I have described ("the four notices") were ineffective, because Riverside only had the right to increase the rent if it served a notice which took effect on the first Monday of June (i.e. on a rent variation date) with 28 days prior notice, and each of the four notices was plainly ineffective because it was served long after the rent variation date, and also because it purported to increase the rent from a day in April.

18. That argument led to the parties agreeing a number of preliminary issues which were determined by His Honour Judge Stewart QC, sitting in the Liverpool County Court. In a clear and careful judgment, following a hearing lasting around three days, he decided that the four notices were valid on the grounds that, although the tenancy agreement required a 28 day notice to be served to take effect on the first Monday of June, time was not of the essence of that date, and accordingly it was open to Riverside to implement the rent review with effect from a different and later date.

19. The respondents appealed to the Court of the Appeal, who allowed their appeal. In agreement with Judge Stewart, the Court of Appeal held that the tenancy agreement envisaged a review taking place on the first Monday in June of each year, but rejected the contention that the principle that time was not of the essence could thereby entitle Riverside to serve a notice seeking to increase the rent on a different and later date. The Court of Appeal also considered and rejected certain further arguments raised by Riverside, namely:

1) That, in accordance with a provision of the tenancy agreement to which I have not referred, there had been an effective agreement between Riverside and relevant representatives of its tenants that the rent variation date would be changed from the first Monday in June to a date in early April each year;

2) That, by paying rent and indeed expressly agreeing to pay rent, in accordance with the terms of the first three of the four notices, the respondents had effectively agreed those notices and indeed any future similar notices, such as the fourth of the four notices, were valid;

3) That, in all the circumstances, the respondents were estopped from denying the validity of the four notices on the ground that they specified a date in
early April of each year as the date on which the rent payable would be increased.

20. In your Lordships’ House, all these arguments were very fully and impressively discussed in the parties’ respective written cases and, at least in relation to some of the points, in the written case of the intervener, the Housing Corporation.

21. Your Lordships first heard argument on the issues of (1) whether time was of the essence in respect of the review date in the tenancy agreement, and (2) whether, as a matter of interpretation of the tenancy agreement, it was open to Riverside to serve a notice increasing the rent with effect from a later date than the first Monday in June. For reasons which I will shortly give, your Lordships decided that (1) the Court of Appeal was right to reject the contention that the presumption that time is not of the essence was of any assistance to Riverside, in the present case, but (2) in disagreement with the Court of Appeal, on the correct interpretation of the tenancy agreement, it was open to Riverside to increase the rent with effect from any date later than the first Monday in June in any particular year, provided it first gave 28 days notice. In those circumstances, your Lordships decided that it would be inappropriate to consider the other arguments, which had been disposed of adversely to Riverside by the Court of Appeal, on the ground that they were academic.

22. I now turn to consider the meaning of the rent review provisions in the tenancy agreement, and in particular whether, properly construed, they only entitle Riverside to an increase in the rent in any 12-month period if it serves a notice at least 28 days before the first Monday in June to take effect on that day, as the Court of Appeal concluded.

23. The first issue argued before your Lordships was whether time was of the essence of the requirement that the rent be reviewed with effect from the first Monday of June in each year as stated in clauses 2(7) and 6(2). Although I shall therefore deal with that point first, it seems to me that raising it as the first argument involves putting the cart before the horse: until one has decided what the tenancy agreement means, and in particular whether it does indeed require a rent review notice to take effect on the first Monday in June and on no other date, it is simply inappropriate to consider whether or not time is of the essence of that date.
24. However, on the assumption that the tenancy agreement does identify the first Monday in June as the date on which payment of the reviewed rent must start, it seems to me that Riverside’s argument that time is not of the essence of that date is misconceived. If the tenancy agreement does indeed provide, as a matter of construction, that the only date on which the rent can be increased is the first Monday in June of each year, then it appears to me to be quite impermissible to contend that, simply because of the principle that equity does not normally regard time limits as being essential, one can, indeed one must, interpret the rent review provisions so as to enable Riverside to review the rent on some different date.

25. In this connection, the case upon which Mr Andrew Arden QC, who appeared for Riverside, relied, United Scientific Holdings Limited v Burnley Borough Council [1978] AC 904 is simply inapplicable. As Lord Fraser of Tullybelton (with whom Lord Russell of Killowen and Lord Keith of Kinkel agreed) explained in Raineri v Miles [1981] AC 1050, 1092G:

“The actual decision in the United Scientific Holdings case [1978] AC 904 depended upon treating the fact that strict adherence to the timetable was not of the essence of the contract as equivalent to its not being a condition precedent to enforcing the rent review clause. No doubt that may mean that the law has developed somewhat since the Act of 1873, as indeed Lord Diplock had stressed earlier in his speech, but it did not involve approval for the proposition that failure to adhere to the timetable was not a breach of the contract.”

Although the decision in the United Scientific Holdings case did involve a development, in what some regarded as a controversial way, of the equitable principle that time limits should not normally be regarded as being of the essence, neither the decision nor the reasoning give any support to the proposition that the court can rewrite a tenancy agreement, which provides for an increase in rent from a specified date, so as to enable the rent to be increased from a different date. As Sir Peter Gibson put it in paragraph 40 in his judgment in the Court of Appeal:

“All that [clause 2 (7)] has done is to identify the rent variation date. It contains no obligation on Riverside to do
something by a particular time and there is therefore no failure against which equity would relieve on the basis that the time provision was non-essential.”

26. With that, I turn to what is in my view a much more formidable and serious point, namely whether the Court of Appeal and Judge Stewart were right to conclude that the only date on which Riverside could seek to increase the rent payable under the tenancy agreement in any particular year was the first Monday in June. In that connection, it seems to me that there are three possible interpretations of the rent review provisions, and those interpretations are as follows:

1) Riverside can only increase the rent payable in any year on the first Monday in June and, in order to do that, it must give at least 28 days’ prior notice;

2) Riverside can only increase the rent in any year on the first Monday in June, but the requirement that it gives 28 days’ notice is not essential, and accordingly it can give late notice to increase the rent on that date;

3) Riverside can only increase the rent once in any year from the first Monday in June, and it can exercise the right to do so on any date from and including the first Monday in June, provided it gives 28 days’ prior notice.

27. The first two possible interpretations accord with what those familiar with commercial rent review clauses would expect. A moveable rent review date, as contemplated by the third interpretation, although not unknown, is pretty unusual in the context of commercial leases. A fixed rent review date, in respect to which the landlord has to serve notice, is very familiar; and the normal principle is that time is not of the essence for the serving of the notice, as decided in United Scientific Holdings [1978] AC 904. Consequently, the second interpretation would be the most common outcome in a commercial context, although cases where time is of the essence, so that the first interpretation would apply, are by no means uncommon in the field of commercial leases. However, there are three very important features of the present case which distinguish it from the type of rent review clause with which the courts became very familiar in the last quarter of the 20th century.
28. First, this is not a rent review clause which has been entered into in the normal commercial context. As I have mentioned, the landlord is a charity and a registered social landlord and it is publicly funded. Its tenants will be relatively poorly off individuals, no doubt normally with limited, if any, experience of interpreting legal documents. In these circumstances, I think it would be surprising, although of course by no means impossible, if it transpired that the first or second interpretation was correct.

29. If the first interpretation was correct, it would mean that Riverside, a partially publicly funded charitable body, with tenants on its board, which could be expected to act responsibly and considerately, would be absolutely prevented from enjoying a cost of living increase in rent for a whole year, simply because, for instance, it missed serving an appropriate notice by one day. Of course, it is not uncommon, perhaps particularly in the context of a landlord and tenant relationship, for time limits for notices, which have financial consequences for the parties, to be strict. However, even in the field of commercial rent review clauses, where the identity and relationship of the parties would normally render such a Draconian result less surprising than in this case, there is a presumption which can be fairly characterised as strong, that time is not of the essence for the service of notices in relation to rent reviews.

30. It would seem to me even more surprising if the second interpretation were correct. It would mean that Riverside could serve a notice long after the first Monday in June retrospectively implementing a rent review with effect from that date, thereby rendering a tenant liable for a potentially large sum of money. In the context of commercial rent reviews, that may not be a particularly surprising result. Not least because, as Lord Diplock pointed out in *United Scientific Holdings* [1978] AC 904, once the date for service of the notice has passed, it is open to the tenant to make time of the essence by serving a notice himself (see at 933H – 934A). However, the notion that the sort of tenant who would be occupying Riverside’s residential properties would be aware of such a right appears to me to be fanciful. Further, as pointed out by Mr Jan Luba QC, who appeared for the respondents, one of the purposes of the 28 day notice in clause 2(6) is to enable a tenant who is unhappy with the increase to serve a 28-day notice to quit to end his tenancy (see section 5(1) of the Protection from Eviction Act 1977): that purpose would be nugatory if the rent could be increased retrospectively.
31. On the other hand, the notion of a moveable rent review date, whereby Riverside can increase the rent once at any time during a year from the first Monday in June, provided it first gives 28 days notice, appears sensible and fair. If Riverside does not serve the notice in early May, then the tenant has the benefit of a later review of the rent, but Riverside will not lose the right to review the rent altogether. While Riverside will not lose the right to review the rent altogether, there would be no question of the tenant suffering liability for a retrospective increase in the rent. Mr Luba suggested that such an interpretation could work unfairly on an assignee of the tenant, who might be taken by surprise by a late increase in the rent, but that cannot be a good point: it involves relying on alleged unfairness to someone who has made, on this hypothesis, an unjustified assumption based on a misinterpretation of the tenancy agreement.

32. The second factor which is unusual about the rent review clause in the present case, when compared with those in commercial leases, is that the level of reviewed rent is unaffected by the date from which it takes effect. The overwhelming majority of rent review clauses in commercial leases provide for the reviewed rent to be fixed by reference to values as at the date from which the reviewed rent is payable, i.e. from the review date. Accordingly, the notion of a shifting review date which arose when the landlord choose, would seem pretty penal from the point of view of the tenant. In a rising market, the landlord could delay the review date to take advantage of the change in values (albeit at the expense of delaying the review), and the tenant could do nothing about it. In the present case however, it seems to be clear that if Riverside were to be able to delay the review date to some time after the first Monday in June, it would obtain no such advantage at the tenant’s expense: the basis upon which the delayed rent review would be assessed, in accordance with clause 2(8), would be precisely the same basis as if the review took effect from the first Monday in June, namely by reference to the increase in the cost of living over the calendar year preceding that first Monday in June.

33. Thirdly, the drafting of the rent review provisions in the present case is wholly different from that contained in any rent review clause, which has, so far as I am aware, come before the court. Of course, these rent review provisions, like any other contractual term, have to be interpreted by reference to the particular words used in their particular context. The point worth emphasising in the present instance, however, is that the whole structure and drafting of the rent review provisions is quite different from that which one would expect to find in any
34. With those observations, I turn to consider the central issue, namely the effect of the words used in this tenancy agreement, and in particular those I have quoted from clause 2(6) to (9) and clause 6(1) to (3). In this connection, it seems to me that the essential, crucially operative, provisions are clauses 2(6) and (7) which actually define how the rent is to be reviewed. Clause 2(8) provides the rent review formula, and clause 2(9) a procedural fallback. The function of clauses 6(1) to (3) is frankly a little obscure. While clause 6(1) appears to be a helpful definition, the way in which the expression “rent” is used throughout the tenancy agreement, either on its own or preceded by a word such as “net” or “gross”, appears somewhat haphazard. Clause 6(2) is bemusing for two reasons: First it defines an expression, “rent variation date”, which seems to have already been defined in clause 2(7); secondly, it defines the expression, which is clearly a date, by reference to “the annual increase in rent”, which is most certainly not. As to clause 6(3) it seems to me, once again, to be surplusage, as “Rent Formula” is already defined in clause 2(8). However, when construing what I regard as the crucially operative two clauses, one must, of course, take into account these other five clauses, as the tenancy agreement must be construed as a whole.

35. On a fair reading, I consider that the combined effect of the centrally relevant clauses 2(6) and 2(7) amounts to this. Riverside is entitled to increase the rent once a year on 28 days notice, which notice can take effect any time on or after the first Monday in June. In this connection, it seems to me that clause 2(6) imposes one condition, namely that Riverside must give the tenant four weeks notice before the reviewed rent becomes payable, and that clause 2(7) imposes another condition, in that it provides that the reviewed rent cannot become payable earlier than the first Monday in June. It is true that the words “with effect from…” could be taken as meaning “with immediate effect from…” but they can mean “on or at any time after…” As usual, it all depends on context. If I were to say to a friend that I would be arriving for dinner “with effect from” 8 o’clock, the natural meaning would be not that I would be arriving at 8 pm precisely, but that I would be arriving at or some time after 8 pm (albeit that, because I was coming for dinner, there would presumably be an implied term that I would be arriving before, say, 9.30 pm at the latest).
36. The contention that a late notice would not deprive Riverside of the right to a rent review is also supported by the statement that the rent “will be increased” in clause 2(7). Of course, the words could mean “may be increased” but that is not their primary meaning. The notion that the date on which a rent increase takes effect does not have to be the first Monday in June is further reinforced, in my view, by the fact that there is nothing in clause 2(6) to indicate that the four weeks notice referred to has to expire by any particular date.

37. There is nothing in clause 2(8) which assists much, save that the use again of the word “will”, which, as mentioned, suggests that the parties anticipated that there would be a review of the rent; this tends to undermine the interpretation advanced by the respondents, which would have the effect of depriving Riverside of an annual rent review altogether if it fails to serve the notice in time.

38. Clause 2(9) seems to me to provide some support for the view that the parties cannot have envisaged that, if Riverside failed to serve a notice by early May in any year, it would lose the right to review the rent for that year. If clause 2(9) came into play, the independent expert might need a substantial amount of time to determine the appropriate rent increase. He would not be under the control of the parties, and there would therefore be an obvious risk that, through no fault of Riverside, or indeed of anyone else, the level of reviewed rent would not have been determined by early May, as a result of which it would be impossible for Riverside to serve a notice in time. Although a small point, I think it is significant and casts doubt on the view that Riverside would lose the right to review the rent for the year if it did not serve its notice by early May.

39. Clauses 6(1) and 6(3) do not seem to me to take matters any further in the present connection. Clause 6(2), however, is of some relevance. Particularly in the light of its very unsatisfactory drafting, to which I have already made reference, I consider that the clause is perfectly capable of meaning that two conditions have to be satisfied before Riverside can have an increase in rent in any particular twelve months, namely the arrival of the first Monday in June and the expiry of at least four weeks following the service of an appropriate notice. Quite apart from the fact that it purports to define a date by reference to an increase, it refers to a date which “will” occur each year, and that date is “the first Monday in June with four weeks prior notice”. If four weeks prior notice is not given, then, if one reads the clause absolutely literally, the date does not exist, and yet the word “will” indicates that the date must exist. In my opinion, by far the most satisfactory way of solving this dilemma is by interpreting clause 6(3), consistently with the natural
meaning of the earlier clauses 2(6) and 2(7), that is to say on the basis that it identifies two cumulative requirements, both of which have to be satisfied before Riverside is entitled to review the rent in any particular twelve month period.

40. It is for these reasons that your Lordships decided that the four notices were valid and that in those circumstances it was unnecessary to hear argument on the other issues.

41. That leaves the question of costs. Although the issue on which Riverside has won was not in the forefront of the case before us or, it would appear, in the forefront of its case in the Court of Appeal, it was always a point which, in one form or another, Riverside was running. It may seem a little harsh on the respondents, and indeed the Community Legal Service, which has funded the respondents’ case throughout, that they should be ordered to pay, not only the respondents’ costs, but also Riverside’s costs in relation to all the issues which were argued at first instance and in the Court of Appeal in relation to which full written cases have been prepared for your Lordships’ House. However, as I see it, that is the inevitable consequence of allowing the appeal on what should always have been the primary basis upon which Riverside’s case was put, namely that the four notices were valid in that they complied with the requirements of the tenancy agreement under which they were served. The fact that wisdom of hindsight now suggests that the parties might usefully have agreed that this point should proceed as a preliminary issue does not persuade me that the respondents should not be ordered to pay all Riverside’s costs. First, bitter experience in other cases renders it difficult to criticise parties for not having agreed to have a preliminary issue. Secondly, it was no more Riverside’s fault than that of the respondents that all issues were determined at one hearing at first instance and in the Court of Appeal.

42. In these circumstances, I would allow this appeal and would order the respondents to pay Riverside’s costs.