Michaelmas Term
[2010] UKSC 47
On appeal from: 2009 CSIH 96

JUDGMENT

Multi-Link Leisure Developments Limited (Appellant) *v* North Lanarkshire Council (Respondent) (Scotland)

before

Lord Hope, Deputy President
Lord Rodger
Lady Hale
Lord Clarke
Sir John Dyson, SCJ

JUDGMENT GIVEN ON

17 November 2010

Heard on 12 October 2010

Appellant
Stuart Gale QC
William Frain-Bell
(Instructed by Anderson Fyfe LLP)

Respondent
James Mure QC
James Findlay
(Instructed by Dundas & Wilson CS LLP)

LORD HOPE

1. The issue in this appeal is about the proper construction of an option clause in a lease of land at Cumbernauld. The lease was entered into between the appellants, Multi-Link Leisure Developments Limited, ("the tenants") and the respondents, North Lanarkshire Council, ("the landlords"). It granted to the tenants an option to purchase the leased subjects. This was to be at a price to be determined by the landlords according to an agreed formula if the option to purchase was exercised subsequent to the first year of let. The tenants have exercised the option, but they disagree with the landlords as to the price that must be paid for its exercise according to that formula. They contend that the effect of the option clause is that the price is to be determined without reference to any increase in value that may be attributed to the subjects on the ground that it is likely that planning permission will be granted for housing development. The landlords, on the other hand, contend that the option clause, properly construed, does not envisage that there should be any discount of any element attributable to the potential of the subjects for development.

2. The difference between these two approaches as to the meaning of the option clause is very substantial. The tenants say that the full market value of the subjects, for the purposes of the option clause, is £500,000. They seek declarator that this is the price that is payable for the purchase of the subjects by the tenants to the landlords. The landlords say that the full market value of the subjects, taking account of their potential for development, is £5.3 million and that, as the tenants have exercised the option, this is the price that must be paid. The tenants have refused to pay any more than £500,000, so the answer to the question which approach is right will determine whether the option contract remains in force. The parties are agreed that, if the tenants are right, the contract remains in force and the landlords will require to value the subjects anew on the basis of the construction of the clause contended for by the tenants. They are also agreed that, if the landlords are right, the option is spent and can no longer be exercised during the remaining term of the lease.

The factual background

3. The case was argued in the Court of Session on the basis of the parties' pleadings and various documents which had been lodged in process. No oral evidence was led as to the surrounding circumstances. The only facts that were before the Lord Ordinary were those that could be ascertained from the parties' averments. The argument concentrated for the most part on the wording of the

option clause itself. Reference was also made to some other provisions in the lease which might assist as to the meaning of the option clause.

4. The lease is dated 18 January and 11 February 2000. It was varied by a minute of variation of lease dated 13, 24 and 29 November 2001, by which an error in the extent of the ground leased was corrected and a new plan relative to the lease was substituted. The subjects comprise an area of ground extending to about 34.32 hectares located at East Waterhead Farm about a mile east of the town centre of the Cumbernauld. It had previously been in use for agricultural purposes. In terms of clause 2 of the lease the date of entry was 1 June 1999. The lease was to endure for 50 years until 31 May 2049.

5. Clause 5 of the lease provided for rent reviews every five years. In the event of the parties failing to agree, the amount of the revised rent was to be referred to arbitration. The arbiter was to be instructed to assess the rent on the basis of the open market rent, no account being taken of works effected by the tenants or on their behalf. By clause 9 it was provided that the tenants were to occupy and use the subjects for the development of a pay and play golf course and ancillary activities incidental to that use, and for no other purpose whatever without the prior express written consent of the landlords. It was also provided that if the golf course was not developed within five years of the date of entry, or if the subjects of lease were to cease to be used for that purpose, the lease was to terminate with immediate effect. By clause 12 it was provided that the tenants were bound at their own expense to provide an efficient drainage system for the subjects and to bear the whole expense of maintaining it in efficient working order. It is agreed that a golf course was duly developed within five years of the date of entry, and that the land is still being used as a pay and play golf course.

6. By clause 18.1 the tenants were given an option to purchase the subjects during the currency of the lease. No period of notice was required if the tenants decided to exercise the option to purchase during the first year of the period of let. In that event the option price was to be the sum of £130,000. Thereafter the tenants had to give the landlords not less than twelve months notice in writing prior to the proposed date of entry for the purchase if they wished to exercise it.

7. The dispute between the parties is as to the effect of clause 18.2, which is in these terms:

> "The price to be paid by Multi-Link in terms of this clause ("the option price") shall, if the option to purchase is exercised within the first year of the period of let, be the sum of ONE HUNDRED AND THIRTY THOUSAND POUNDS (£130,000) STERLING. The

> option price, if the option to purchase is exercised subsequent to the first year of let, shall be equal to the full market value of the subjects hereby let as at the date of entry for the proposed purchase (as determined by the landlords) of agricultural land or open space suitable for development as a golf course but, for the avoidance of doubt, shall be not less than the sum of ONE HUNDRED AND THIRTY THOUSAND POUNDS (£130,000) STERLING. In determining the full market value (i) the landlords shall assume (a) that the subjects hereby let are in good and substantial order and repair and that all obligations of the landlords and the tenants under this lease have been complied with, and (b) that the subjects hereby let are ready for occupation, and (ii) the landlords shall disregard (a) any improvements carried out by the tenants during the period of this lease otherwise than in pursuance of an obligation [to] the landlords, and (b) any damage to or destruction of the subjects hereby let."

By clause 18.6 it was provided, for the avoidance of doubt, that the option to purchase was personal to Multi-Link and that it was to be exercisable only so long as they were tenants under the lease.

8. The tenants first expressed an interest in exercising the option to purchase in 2005. On 14 March 2005 their solicitors wrote to the landlords seeking to know the price that they would seek for the subjects. By letter dated 29 June 2005 the landlords proposed a price of £500,000, subject to the tenants entering into a minute of agreement, fortified by a standard security, to the effect that an additional sum, to be agreed, would be payable in the event of a change of use generating a higher value for the land. The tenants were not willing to agree to this proposal. In 2006 the prospect of a change of use generating a higher value was confirmed by the publication in 2006 of the Glasgow and Clyde Valley Joint Structure Plan which identified as one of three priorities for development in the South Cumbernauld Community Growth area, within which the subjects of the lease are situated. In 2008 the North Lanarkshire Finalised Draft Local Plan identified the area as a potential area for housing-led urban expansion. The landlords' position, as explained in their averments, is that it would be unreasonable for them to fail to have regard to this planning background when determining the price payable under clause 18.2.

9. By letter dated 8 October 2007 the tenants' solicitors served on the landlords notice of their decision to exercise the option, with entry one year later on 8 October 2008. They invited the landlords to provide them with their views as to the full market value of the subjects as defined by clause 18.2. By letter dated 4 November 2008 the landlords' solicitors intimated that they fixed the price at £5.3 million. The tenants made further proposals as to the option price, but they were rejected by the landlords. By a letter dated 22 January 2009 the landlords served

formal notice on the tenants requiring them within 28 days to pay £5.3 million in exchange for a valid marketable title, failing which the landlords would be entitled to rescind the contract resulting from the exercise of the option in clause 18. The tenants did not comply with these conditions. So by letter dated 25 February 2009 the landlords served on the tenants a formal notice of rescission of the option contract and the purchase and sale of the subjects resulting from the notice of 8 October 2007.

10. The tenants then raised the present action in which they seek declarator that their option to purchase has not validly been rescinded and that on a proper construction of clause 18.2 the landlords are bound to determine the full market value of the subjects as agricultural land or open space suitable for a golf course, without reference to any increase in value which may be attributable to the fact that is likely that planning permission will be granted for housing development there. The Lord Ordinary, Lord Glennie, held on 31 July 2009 that the obvious meaning of the words used in clause 18.2 was that the full market value was to be assessed by reference only to the use of the subjects as a golf course, and he made the declarations that the tenants had asked for: [2009] CSOH 114, 2009 SLT 1170. The landlords reclaimed, and on 30 December 2009 an Extra Division (Lords Carloway and Hardie and Sir David Edward QC) allowed the reclaiming motion: [2009] CSIH 96, 2010 SC 302. It held that the words "full market value" were to be construed as meaning what they said and that considerations that might be relevant to market value were not to be ignored unless there were express words to that effect: para 28. Decree was pronounced in terms of the conclusion to the landlords' counterclaim. This was to the effect that the contract resulting from the exercise of the option clause had been rescinded, the option was spent and it could not be exercised during the remaining term of the lease.

The option clause

11. The court's task is to ascertain the intention of the parties by examining the words they used and giving them their ordinary meaning in their contractual context. It must start with what it is given by the parties themselves when it is conducting this exercise. Effect is to be given to every word, so far as possible, in the order in which they appear in the clause in question. Words should not be added which are not there, and words which are there should not be changed, taken out or moved from the place in the clause where they have been put by the parties. It may be necessary to do some of these things at a later stage to make sense of the language. But this should not be done until it has become clear that the language the parties actually used creates an ambiguity which cannot be solved otherwise.

12. The option clause can, for the purposes of analysis, be broken down into the following parts:

(1) the opening words, which state that the option price "shall be equal to the full market value of the subjects hereby let";
(2) the direction that the option price is to be determined "as at the date of entry for the proposed purchase";
(3) the words "as determined the landlords" which then follow in parenthesis, indicating by whom the option price as at the date of entry is to be determined;
(4) the direction that the full open market value is to be "of agricultural land or open space suitable for development as a golf course but, for the avoidance of doubt shall be not less than the sum of one hundred and thirty thousand pounds (£130,000) sterling."
(5) the direction that in determining the full market value the landlords "shall assume (a) that the subjects hereby let are in good and substantial order and repair and that all obligations of the landlords and the tenants under this lease have been complied with, and (b) that the subjects hereby let are ready for occupation"; and
(6) the direction that in determining the full market value the landlords "shall disregard (a) any improvements carried out by the tenants during the period of this lease otherwise than in pursuance of an obligation [to] the landlords, and (b) any damage to or destruction of the subjects hereby let". [The word "to" is inserted to make good an obvious omission from this part of the clause as printed in the lease.]

The problem

13. The Lord Ordinary said that there were certain parts of the clause that could safely be disregarded: para 5. He omitted the provision that the option price should be not less than £130,000. He also omitted the reference to the date of entry. It was agreed before him that the words "as determined by the landlords" were misplaced as that they should be in close proximity to the words "full market value". So he decided to omit those words too. This left him with the words in parts (1) and (4) to (6) of the foregoing analysis, less the reference to the figure of £130,000. He then said, in his summary of counsel for the pursuer's argument in para 8, that the valuer was being asked to assume that the purchase was "*for development* as a golf course" [the emphasis is mine]. In para 9 he said that he accepted that the option price was to be equal to the "full market value", but that when one asked oneself "of what" the answer was "the full market value of the subjects for the proposed purchase of land suitable for development as a golf course". He said that this was a clear pointer to the sole use to which the valuer must have regard when assessing the full market value of the subjects. The purpose in inserting in clause 18(2) that "the proposed purchase was *for development* as a golf course", as he saw it, was to restrict the assumed use by reference to which the subjects were to be valued [again, the emphasis is mine]. He found support for this approach in the assumptions set out in part (5) of the foregoing analysis.

14. I have italicised the words "for development" in my quotations from the Lord Ordinary's opinion in the previous paragraph to draw attention to the fact that when he was construing the option clause he departed from the words that the parties themselves had used. The words in the relevant part of the clause, which is part (4) of the foregoing analysis, are "*of* agricultural land or open space *suitable for development* as a golf course" [again, my emphasis]. Taking the words that the parties themselves used, this is a description of the state of the subjects as they are to be taken to be in as at the date of entry. It is not a direction about the purpose for which they are being purchased. If it had been, it would have been an easy step to conclude that the full market value must be taken to be restricted by the assumed use. That is how one would construe the words "open market rent" for the purposes of the rent reviews referred to in clause 5, as the open market rent must be determined by reference to the use of the subjects that is permitted by the lease. In *Arthur Bell & Sons v Assessor for* Fife [1965] RA 535, 540-541 Lord Avonside said, with reference to the estimation of the annual value of subjects under the Valuation and Rating (Scotland) Act 1956, that it was notorious that one must take a building according to its use at the time of the valuation. But the insertion of a description as to the assumed state of the subjects as at the date of entry for the proposed purchase under the option clause does not have that effect. It permits account to be taken of the way land in that state might be expected to be used in the future, including its being used for development. The Lord Ordinary's omission of the words "as at the date of entry for the proposed purchase (as determined by the landlords)" made it easier for him to conclude, wrongly in my opinion, that this was a direction about the purpose for which the subjects were being purchased. These departures from the words the parties themselves used were crucial to the Lord Ordinary's reasoning, and I do not think that his interpretation of the option clause can be accepted.

15. The Extra Division, for its part, based its conclusion as to the meaning of the option clause on the weight which is said should be given to the words "full market value": paras 27, 28. The problem with this approach, however, is that it pays no regard to the words which follow, especially to the assumptions and disregards in parts (5) and (6) of the foregoing analysis. Had the words "full market value" stood alone, it would have been plain that the value was to be determined by reference to the uses to which the land was reasonably capable of being put in the future: *Raja Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302, 313; see also *Griffiths v WE & DT Cave Ltd* (1998) 78 P&CR 8, 14. It is the words which follow that give rise to difficulty, when an attempt is made to construe the clause as a whole.

16. Parts (1) to (4), taken by themselves and read according to the words used, tell the valuer what the subjects are to be assumed to be and how they are to be valued. The subjects are assumed to be agricultural land or open space suitable for use as a golf course, and they are to be valued at their full market value. This

approach to the option price makes commercial sense. The assumption describes the land as it was at the date of entry to the lease. But once the option is exercised all restrictions on the use of the land fly off. The tenants will become the owners of the land. They will be free to sell it on to a third party at its full market value or to use it themselves for any use whatever that will get planning permission. Both parties to the lease, if they had applied business commonsense, would have been aware of the advantages that ownership would confer on the tenant in the event of the option clause being exercised. This suggests that, if it had been their intention to restrict the option price to the value of the subjects as a golf course and to exclude any value attributable to their potential for development, they would have said so.

17. The problem, however, is that they then added the assumptions and disregards set out in parts (5) and (6). Their function is not hard to understand if the full market value is to be determined simply on the basis that the subjects are to be assumed to be agricultural land or open space suitable for development as a golf course. What they require the valuer to do is to make further assumptions which tend to indicate that he is to value the subjects strictly according to their actual state and existing use as at the date of entry for the proposed purchase, disregarding tenants' improvements and any damage to or destruction of the subjects. Yet these assumptions and disregards are introduced by the words "in determining the full market value", which in themselves contain no hint of any restriction on the nature of the market to which the valuer may look when he is conducting this exercise. This part of the clause looks as if it has been borrowed from a different lease without regard to the context. But the words are there as part of the option clause. So it is not possible simply to ignore them.

18. Lord Rodger says that it is helpful to start with the assumptions and disregards that the landlords are to apply when determining the full market value: para 28. I do not disagree with this approach, which is both logical and helpful. Of course, it all depends on what the question is that one is trying to answer. If this was a case where there was no question of any development value, the assumptions and disregards would indeed be central to a proper understanding of the approach to value. Contrary to what the landlord's valuer in this case thought, and the parties accepted in the Inner House, they do not indicate that all capital expenditure by the tenants is to be disregarded. The disregard extends only to improvements carried out by the tenants otherwise than in pursuance of an obligation to the landlords. But the inquiry cannot end there. As the valuer himself said at the end of para 3.0 of his report, use as a golf course might not represent the full market value in view of the planning assumptions that he addressed in para 4.0. Development value was likely to completely eclipse any value that might be attributed to the subjects in their existing use. The question whether the planning assumptions can be taken into account too is the crucial question in this case. The

assumptions and disregards do not mention this point, so one has to look at the whole clause to see what it means.

The solution

19. I do not think that it is possible to reconcile the assumptions and disregards with the earlier parts of the option clause. They seem to me to be approaching the question of value on different bases. The assumptions and disregards are designed to settle the basis for a purchase of subjects in their existing use. The earlier parts of the clause are designed to settle the price for the purchase of subjects that will have a value in the open market that takes account of their potential for development. In this situation the solution must be found by recognising the poor quality of the drafting and trying to give a sensible meaning to the clause as a whole which takes account of the factual background known to the parties at the time when the lease was entered into.

20. Support for this approach is to be found in the following passage from the judgment of Lord Bridge of Harwich in *Mitsui Construction Co v Attorney-General of Hong Kong* (1986) 33 BLR 1, 14, where he said:

> "The poorer the quality of the drafting, the less willing any court should be to be driven by semantic niceties to attribute to the parties an improbable and un-businesslike intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis."

In *Ravennavi SpA v New Century Shipbuilding Co Ltd* [2007] 2 Lloyds Rep 24, para 12 Moore Bick LJ said:

> "Unless the dispute concerns a detailed document of a complex nature that can properly be assumed to have been carefully drafted to ensure that its provisions dovetail neatly, detailed linguistic analysis is unlikely to yield a reliable answer. It is far preferable, in my view, to read the words in question fairly as a whole in the context of the document as a whole and in the light of the commercial and factual background known to both parties in order to ascertain what they were intending to achieve."

21. It has, of course, long been recognised that the commercial or business object of the provision in question may be relevant: *Prenn v Simmonds* [1971] 1 WLR 1381, 1385 per Lord Wilberforce; see also *Aberdeen City Council v Stewart Milne Group Ltd* [2010] CSIH 81, para 11, although I think that the way this issue should be approached is less clearly explained in the 19th century Scottish cases referred to by the Extra Division in that paragraph (*Mackenzie v Liddell* 1883 10 R 705, *Bank of Scotland v Stewart* 1891 18 R 957, *Jacobs v Scott & Co* 1899 2 F (HL) 70). In *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201, Lord Diplock said that if detailed and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must yield to business commonsense; see also *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 913 where Lord Hoffmann included this as the fifth of his common sense principles. In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 771 Lord Steyn, making the same point, said that words are to be interpreted in the way in which a reasonable commercial person would construe them, and that the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language; see also *Bank of Scotland v Dunedin Property Investment Co Ltd* 1998 SC 657, 661 per Lord President Rodger. In *Deutsche Genossenschaftsbank v Burnhope* [1995] 1 WLR 1580, 1587, however, Lord Steyn reminded us that our law of construction is based on an objective theory, and he emphasised the objective nature of the exercise of searching for meaning of language in its contractual setting:

> "The court must not try to [divine] the purpose of the contract by speculating about the real intention of the parties. It may only be inferred from the language used by the parties, judged against the objective contextual background."

22. What then of the objective commercial background in this case? The landlords are a local authority. They were under a statutory duty not to dispose of land for a consideration less than the best that could reasonably be obtained: Local Government (Scotland) Act 1973, section 74(2). The tenants are a commercial organisation. They are in business to make money. They undertook to use the subjects during the period of the lease for the development of a pay and play golf course and for no other purpose without the prior express written consent of the landlords. But a successful exercise of the option would transfer to them all the rights of ownership, which they could be expected to turn to their financial advantage if the opportunity of doing so were to present itself. The land itself was in use as grazing land when the lease was entered into. It was situated about a mile from the town centre and the lease was entered into for a period of fifty years. It can be inferred from the price that was agreed for the exercise of the option within the first twelve months that at that stage there was no evidence that it had any hope value and that it was thought to be suitable only for recreational activities. But

much can change within a period of fifty years, and there has been no indication that there were any planning constraints such as a designation of the land as part of a green belt that would inhibit its potential for development.

23. The land has now been identified as lying within a potential area for housing-led urban expansion. If the tenants are right, acquiring the land at a price which ignores its potential for development will provide them with a very substantial windfall at the expense of the landlords. This was something that the wording of the option clause might have been expected to guard against. The tenants, on the other hand, did not ensure that the opportunity to obtain a windfall in circumstances such as have now arisen was expressly provided for. I do not think that the assumptions and disregards at the end of the option clause, which sit uneasily with the clause when read as a whole, carry sufficient weight to overcome the message conveyed by its opening words by attributing to them the meaning that the tenants contend for. They indicate that the parties were agreed that the option price was to be determined by the full market value of the land as described, taking full account of its potential, if any, for development. That is what reasonable commercial men would have agreed to when the lease was entered into, if they had applied their minds to the benefits that would accrue to the tenants if they were to exercise the option to purchase. I would hold that it must be taken to be what the parties agreed to in this case.

Conclusion

24. Although I prefer not to endorse the Extra Division's reasoning, I consider that it arrived at the right result. I would dismiss the appeal and affirm the Extra Division's interlocutor.

LORD RODGER

25. Lord Hope has set out the background and the wording of the clause which the Court has to interpret. I can accordingly explain my approach very briefly.

26. As their name suggests, Multi-Link Leisure Developments ("Multi-Link") are a commercial company operating in the leisure field. They leased land near Cumbernauld from the North Lanarkshire Council to construct a golf course. This was a commercial venture: the course was to be a pay and play course. In these circumstances it is appropriate to treat the lease as a commercial agreement which is to be construed accordingly. It is therefore noteworthy that Multi-Link's interpretation of the disputed clause of the lease produces a result – whether or not appropriately described as "a windfall" – which it seems unlikely that the parties to

a commercial agreement would ever have intended: that Multi-Link should be able to buy the land for a sum that takes no account of its (substantial) hope value. That result is even more surprising when the clause provides that, in the circumstances which have occurred, the price is to be "the full market value" of the subjects.

27. Nevertheless, something has gone wrong with the drafting of the relevant clause, Clause 18.2. So no construction is ever going to produce perfect harmony among all its elements. The Lord Ordinary proceeded by stripping out various pieces of the text, including the reference to the date of entry. As a result he produced a version which included the phrase "for the proposed purchase … of agricultural land or open space suitable for development as a golf course": *Multi-Link Leisure Developments Ltd v North Lanarkshire Council* 2009 SLT 1170, 1172, para 5. But, as Sir John Dyson pointed out in the course of argument, words in Clause 18.1 ("prior to the proposed date of entry for the purchase") show that the words "for the proposed purchase" in Clause 18.2 are actually part of the description of the date of entry, which the Lord Ordinary had omitted. It is therefore not easy to use them to construct the phrase to which the Lord Ordinary attached so much importance.

28. When translating a document written in a foreign language, it often makes sense to start with the parts whose meaning is clear and then to use those parts to unravel the meaning of the parts which are more difficult to understand. The same applies to interpreting contracts or statutes. Here, since their meaning is not really in doubt, I find it helpful to start with the assumptions and disregards that the landlords are to apply when determining the full market value.

29. First, the landlords are to assume that the subjects are in good and substantial order and repair and that all the obligations of the landlords and tenants under the lease have been complied with. Since more than five years have passed, this means, in particular, that the landlords are to proceed on the basis that the golf course, which the tenants were obliged to construct in terms of Clause 9, has indeed been constructed and is in good order and repair. In fact, the golf course has been duly created. So Multi-Link are to pay for the golf course on the assumption that it is in good condition.

30. The Extra Division, who did not refer to this part of Clause 18.2, proceeded on the basis that, in assessing the full market value, the landlords were to ignore anything done by the tenants to develop the golf course: *Multi-Link Leisure Developments Ltd v North Lanarkshire Council* 2010 SC 302, para 26. This was understandable, since, curiously enough, it was the basis upon which both parties proceeded in the Inner House and – in the face of some resistance – in this Court. Nevertheless, I am quite unable to approach the interpretation of the clause on that

basis since it is inconsistent with the specific direction in the later part of the clause.

31. The suggestion seemed to be that the words "of agricultural land or open space suitable for development as a golf course" meant that the landlords were to value the subjects as if the golf course had not been developed and that this was justified because, otherwise, Multi-Link would be paying twice over for the development of the course. But that approach is utterly inconsistent with the assumption that is spelled out in the later part of the clause. And that assumption itself is entirely consistent with Clause 21, which provides that, at the expiry or termination of the lease, the tenants are to yield up the subjects "with any buildings and others thereon well and substantially maintained in accordance with the obligations hereinbefore specified and that without any compensation being paid therefor." Since, on its expiry or termination, Multi-Link are not to be paid for the buildings etc which they may have constructed in accordance with their obligations under the lease, it would make no sense whatever if they could buy the subjects under the option without paying for the same buildings etc. In effect, the cost of constructing the golf course in terms of Clause 9 is treated as part of the consideration which Multi-Link provide in return for the lease of the land. Therefore, as the assumption makes clear, if Multi-Link want to buy a completed golf course, they have to pay for it.

32. On the other hand, the landlords are to disregard any improvements which the tenants may have carried out "otherwise than in pursuance of an obligation [to] the landlords". Again, this makes sense, since those improvements form no part of the consideration for the lease. So, having paid to make these improvements which they were not obliged to make, the tenants should not have to pay again if they buy the land.

33. In my view the problematical words "of agricultural land or open space suitable for development as a golf course" cannot be construed in a manner that is inconsistent with the clear directions as to the assumptions which the landlords are to adopt in assessing the full market value. In the circumstances of this case they have to value the golf course which has been laid out and they have to do so on the basis that it is in good and substantial order and repair. If Multi-Link have carried out other improvements which they were not obliged to carry out, these are to be ignored.

34. If the landlords proceed in this way, they will comply with the instructions in the clause. And, if there were no other elements in the picture, no doubt they would be able to assess what someone wanting to buy a golf course would pay for this course in this area. But the instructions in the clause do not tell the landlords to ignore any other factor which might be relevant to the value of the golf course.

And there is indeed a further, very significant, factor: in 2006 the Glasgow and Clyde Valley Joint Structure Plan identified the area where the land lies as a community growth area for an indicative capacity of 2,000 houses. In addition, in 2008 the final draft of the relevant Local Plan identified that community growth area as a suitable location for medium-term housing development.

35. Obviously, these changes mean that the possible purchasers of the golf course would now include developers who were interested in acquiring the land, not as a golf course, but as a site for a possible housing development. So the potential value of the golf course on the open market will have increased accordingly.

36. Multi-Link contend, however, that the words "of agricultural land or open space suitable for development as a golf course" show that this factor and this increase in value are to be ignored. The valuation is to proceed on the basis that the land is to be used as a golf course and nothing else. Given that – apart from planning considerations – there is no limit on the use to which the land could be put if Multi-Link successfully exercised their option to purchase it, that would be a highly unusual and artificial approach to valuation – far less to determining "the full market value" of the land. Construing Clause 18.2 as a whole and as part of a commercial agreement, I am satisfied that the words in question are not to be interpreted as requiring the landlords to adopt this unusual approach and to ignore the hope value. Had the parties intended the landlords to assume that the land was to be used only as a golf course, I would have expected to find that assumption included among the others at the end of the clause. For these reasons the landlords are entitled to have regard to the hope value of the golf course when assessing its full market value.

37. Although my reasoning is different, I agree with the result reached by the Extra Division. I would accordingly dismiss the appeal. It will be up to the parties to work out how, if at all, they are to arrange for the lease to be terminated and the hope value to be unlocked.

LADY HALE

38. We are required to construe the following words:

> "The Option price, if the Option to purchase is exercised subsequent to the first year of let, shall be equal to the full market value of the subjects hereby let as at the date of entry for the proposed purchase (as determined by the Landlords) *of agricultural land or open space*

> *suitable for development as a golf course* but, for the avoidance of doubt, shall be not less than the sum of ONE HUNDRED AND THIRTY THOUSAND POUNDS (£130,000) STERLING. In determining the full market value (i) the Landlords shall assume (a) that the subjects hereby let are in good and substantial order and repair and that all obligations of the Landlords and the Tenants under this Lease have been complied with, and (b) that the subjects hereby let are ready for occupation, and (ii) the Landlords shall disregard (a) any improvements carried out by the Tenants during the period of this Lease otherwise than in pursuance of an obligation the Landlords, and (b) any damage to or destruction of the subjects hereby let." (emphasis supplied)

39. The puzzle is what those italicised words are meant to mean. There are at least four possible meanings of the term taken as a whole: (i) the value of the land as agricultural land or open space suitable for development as a golf course, without any hope value; (ii) the same but with any hope value; (iii) the value of the land with the golf course which has now been constructed on it, without any hope value; and (iv) the same but with any hope value.

40. The appellant tenants argued primarily for (i) but would accept (iii) as second best. Their point was that it is otherwise difficult to ascribe any meaning at all to the italicised words and that (iii) would mean that they had to pay twice for the golf course. But their main aim was to avoid having to pay any hope value. The Lord Ordinary opted for (iii) on the basis that the assumptions required the valuer to assume that the golf course had indeed been constructed but the italicised words restricted the possible uses to which the valuer had to have regard. The respondent landlords argued for (ii) before the Inner House and the Inner House agreed with them. The reality is that it made no difference whether the right answer was (ii) or (iv) because in either case the contract to purchase had been validly rescinded and the option was now spent.

41. I do not regard the tenants' position as quite as fanciful as others might. Local authorities are not commercial organisations. They are there to serve the local population, not to make money. In 1999, it appears that no-one was thinking about the potential for residential development. The Council, no doubt conscious of their responsibility to provide facilities for healthy recreation for the inhabitants of Cumbernauld, wanted a pay and play golf course which all could enjoy. The tenants were prepared to take the commercial risk of developing the land as a golf course. The Council were happy to tie up the land for that purpose for fifty years. On the Lord Ordinary's view of the matter, if the option were exercised they would not only have had the course built but would also have been paid for it. Had it not been for the possibilities opened up by the regional development plan, that might have seemed a good deal to them. As things now stand, unless the parties

can come to some sensible agreement to unlock both the land and its development value, the Council are going to be no better off than they were at the outset.

42. All of that is by the by. We have to try and make sense of the words the parties used. The problem with the italicised words is that they begin with "of" with no clear indication of what they belong to. It would be ungrammatical to link them to "full market value" as that is already followed by another genitive. It appears, therefore, that they must be linked to "the proposed purchase" but there is no need for them there and indeed they are now inaccurate as a statement of fact. Faced with that conundrum, I have found comfort in Lord Rodger's approach: construe the words you can understand and see where that takes you. Even here we have to insert the word "to" between "obligation" and "Landlords" in disregard (ii)(a). But after that the assumptions clearly take us at least as far as solution (iii). The valuer is to assume that the Tenant has complied with the obligation to build the golf course: assumption (i)(a). That improvement is not to be disregarded: cf disregard (ii)(a).

43. By itself, that does not tell us whether the answer is (iii) or (iv). But it does tell us that the italicised words do not mean that the land is to be valued as if the golf course had never been built. This also suggests that they are not meant to limit the ordinary meaning of "full market value". This is reinforced by their grammatical ineptitude: if they were meant to limit it, they would have come immediately after "full market value" and been preceded by "as" rather than "of". Finally, if the parties had meant anything other than the ordinary sense of "full market value" they could so easily have used a different phrase.

44. Thus, by a route mapped out by Lord Rodger, I too arrive at the conclusion that this appeal should be dismissed.

LORD CLARKE

45. I agree that this appeal should be dismissed. I detect no difference between the principles applicable to the construction of a lease in Scotland and in England. The true construction of clause 18.2 of the lease depends upon the language of the clause construed in the context of the lease as a whole, which must in turn be considered having regard to its surrounding circumstances or factual matrix. I do not think that the parties can have given express consideration to the question that has arisen in this case. If they had, they would surely have expressly provided that, if the tenants exercised the option to purchase in clause 18 of the lease, they must pay the full market value of the land as described, taking full account of its potential, if any, for development. Any other conclusion would flout business

commonsense because it would give the tenants an unwarranted windfall. Applying the principles stated by Lord Hope in his para 20, I would construe the reference to "full market value" in clause 18.2 of the lease as meaning the full market value of the land, including its potential development value.

SIR JOHN DYSON SCJ

46. I agree that this appeal should be dismissed. To the extent that there is any difference between the reasoning of Lord Hope and Lord Rodger, I prefer that of Lord Rodger.