CA on appeal from QBD before Butler-Sloss LJ; Hirst LJ; Auld LJ. 9th October 1997

LORD JUSTICE AULD:

INTRODUCTION

1. This is an appeal, following the grant of leave by this Court, by Robert G. Curtis ("*the landlord*"), from an order in his favour of McCullough J. of 27th November 1996 quashing determinations of the London Rent Assessment Committee of "*fair*" rents of two unfurnished regulated tenancies for registration under Part IV of the Rent Act 1977 and remitting the references to a differently constituted Committee for determination in accordance with his judgment. The appeal raises three main questions. The first is whether and in what circumstances a successful party can challenge in the Court of Appeal the reasoning of the judge below. If such a challenge can be made, the second and third questions concern the lawfulness and rationality of the Committee's mode of assessment and the adequacy of its written reasons.

2. The Rent Act 1965 introduced a scheme for regulating unfurnished tenancies and for rent control of them by the registration of fair rents. The Rent Act 1974 extended the scheme to furnished tenancies. Parts III and 1V of the Rent Act 1977 now contain the statutory scheme. It enables limitation of the recoverable rents of regulated tenancies by entry of them in registers maintained by rent officers for local authority registration areas. Either party may apply to a rent officer to register a rent, which means, albeit indirectly introduced in Section 67(2) of the Act, "*a fair rent*". The rent officer's determination of such a rent is subject to appeal by reference to a rent assessment committee, consisting usually of a legally qualified chairman, a surveyor and a lay member.

3. The 1977 Act does not define *"a fair rent*", but Section 70 of it describes how it is to be determined. Its effect is to take as its starting point the market rent for the premises in their current state, assuming a hypothetical absence of scarcity of similar properties available for letting in the locality and disregarding the personal circumstances of the landlord and tenant and certain other matters, including disrepair or defects for which the tenant is responsible or improvements made by him.

4. The Housing Act 1988 created new forms of tenancy from 15th January 1989, assured periodic tenancies and assured shorthold tenancies at open market rents. Such rents were to be determined by the parties in the first instance and, on the proposal by a landlord of a new rent, by a rent assessment committee if required by the tenant. Section 14 provides that a market rent is that which, subject to certain considerations, the property "might reasonably be expected to be let in the open market by a willing landlord under an assured tenancy". The Act also provided for a phasing out of the regime of regulated tenancies and registered *"fair*" rents provided by the 1977 Act. The phasing out will take a long time since it is to be achieved by freeing only post 1988 Act tenancies, subject to certain exceptions, from the control of the earlier legislation. There are thus two systems of statutory control of tenancies and rents, a substantial but dwindling body of pre-1989 regulated tenancies for which fair rents may be registered and a growing number of assured tenancies at market rents. In most cases registered fair rents are significantly lower than market rents for comparable properties. McCullough J neatly summarised the effect of the two systems on page 4 of the transcript of his judgment: *"... unless the tenant requires the intervention of the rent assessment committee, the rent is fixed in a real market. Thus, given two dwellings in a comparable location, with comparable accommodation, in a comparable state of repair and decoration ... and let on the same terms, if one was let before 15th January 1989 and the other on or after that date, the tenant of the former will pay a lower rent than that paid by the latter unless there is no scarcity component in the rent of the latter."*

5. Before 1989 rent officers and rent assessment committees, when determining fair rents for registration under the 1977 Act, most commonly looked to other registered rents as comparables. There were then relatively few market rent comparables. Since that time market rents of assured tenancies of similar dwellings have become increasingly available as comparables and starting points for determination of 1977 Act fair rents.

6. The main substantive issues raised by this appeal are whether rent officers and rent assessment committees -
   1. should normally determine fair rents by reference to market rent comparables rather than fair rent comparables when both are available;
   2. should, if they prefer fair rent comparables or some other method to available market rent comparables, have good reasons for doing so; and
   3. should explain their reasons adequately, setting out their workings arithmetically if necessary.

7. The Court of Appeal considered these issues, obiter, in ***Spath Holme Ltd. v. Chairman of the Greater Manchester and Lancashire Rent Assessment Committee & Ors.*** [1995] 2 EGLR 80, CA. Morritt LJ., with whom Glidewell LJ. and Sir John May agreed, held, as part of the ratio, that a "*fair rent*" under the 1977 Act is the same as a "*market rent"* under the 1988 Act save for the assumption of no scarcity and allowing for the statutory "*disregards"*, and that, in assessing a fair rent, regard should be had to market rent comparables if any. He said, at 122-3: *"... the fair rent to be determined is a market rent less the disregards and discounted for scarcity. Thus, ... if there is no scarcity and no disregards then the rents should be the same whether the tenancy is a regulated tenancy or an assured tenancy."*

8. As to the issues here, the sense of Morritt LJ's obiter observations was -
   1. that where there are good market comparables, such as assured tenancies of flats in the same block virtually identical to that for which a fair rent is to be determined, those comparables should normally be adopted as the means of assessing the fair rent; and
   2. that in such circumstance if a committee departs from such approach they should explain why; and

3. the extent to which they should explain their reasoning must vary with the nature of the decision and of the case generally and that their "*workings*" or figures may well be required.

9. Uncertainty about the interpretation of those observations and about their effect in law have caused difficulties for at least some rent assessment committees. Those difficulties are reflected in some inconsistency in approach by judges at first instance on appeal from assessments. It is said that landlords rely on the observations as authority for the propositions that rent officers and rent assessment committees should no longer rely on previous determinations and registered fair rent comparables, but should instead refer to market rent comparables and should explain their determinations, setting out their arithmetical workings. Some rent assessment committees have taken a contrary view - dismissing Morritt LJ's observations as obiter - stating that it is sufficient to rely without more on general or particular registered fair rent comparables to meet a challenge based on market rent comparables, and that, in any event, there is no need to give detailed reasons, still less arithmetical workings, whichever method of assessment they use.

10. Before considering the ***Spath Holme*** case and its effect in greater detail, I should set out Section 70 of the 1977 Act. It provides for the determination of "*a fair rent*" for registration under the Act. In sub-sections (1) and (2), it sets out respectively the criteria for and the assumption of no scarcity to be made in determining such a rent and, in sub-section (3), the matters to be disregarded when making the determination.

"(1) In determining, for the purposes of this Part of this Act, what rent is or would be a fair rent under a regulated tenancy of a dwelling-house, regard shall be had to all the circumstances (other than personal circumstances) and in particular to -

(a) the age, character, locality and state of repair of the dwelling-house,

(b) if any furniture is provided for use under the tenancy, the quantity, quality and condition of the furniture, and

(c) any premium, or sum in the nature of a premium, which has been or may be lawfully required or received on the grant, renewal, continuance or assignment of the tenancy.

(2) For the purposes of the determination it shall be assumed that the number of persons seeking to become tenants of similar dwelling-houses in the locality on the terms (other than those relating to rent) of the regulated tenancy is not substantially greater than the number of such dwelling-houses in the locality which are available for letting on such terms.

(3) There shall be disregarded-

(d) any disrepair or other defect attributable to a failure by the tenant under the regulated tenancy or any predecessor in title of his to comply with any terms thereof;

(e) any improvement carried out, otherwise than in pursuance of the terms of the tenancy, by the tenant under the regulated tenancy or any predecessor in title of his;

(e) if any furniture is provided for use under the regulated tenancy, any improvement to the furniture by the tenant under the regulated tenancy or any predecessor in title of his or, as the case may be, any deterioration in the condition of the furniture due to any ill-treatment by the tenant, any person residing or lodging with him, or any sub-tenant of his."

SPATH HOLME

11. In ***Spath Holme*** the rent assessment committee had rejected market rent comparables as an indicator of market rent for the subject premises, because, inter alia, they were not satisfied of the actual absence of scarcity, and thus found that the landlord had not demonstrated the unsoundness of registered fair rent comparables. Harrison J., whose first instance judgment, at (1994) 27 HLR 243, to quash the determination of the rent assessment committee was upheld by the Court of Appeal, set out the following six principles, at 257:

"(1) A 'fair rent' under Section 70 of the Rent Act 1977 is the market rent adjusted for the scarcity element under section 70(2) and disregarding the personal circumstances mentioned in section 70(1)and the matters specified in section 70(3).

(2) There are various methods of assessing the fair rent, including the use of registered fair rent comparables and the use of assured tenancy comparables.

(3) The method or methods adopted by a rent assessment committee may vary according to the particular circumstances of each case.

(4) The rent assessment committee must consider, and have regard to, the method or methods suggested to them by the parties.

(5) In deciding which method to adopt the rent assessment committee must take into account relevant considerations and give adequate reasons for their choice of method.

(6) Subject to compliance with those requirements, the rent assessment committee is free to adopt the method which appears to them, on the evidence, to be the most appropriate method provided it is not a method which is either unlawful or unreasonable.

It follows from a consideration of those principles that a rent assessment committee is not bound to use assured tenancy comparable in determining a fair rent under section 70, although that method may be expected to be used increasingly in the future in the same way as registered fair rent comparables were used increasingly following the advent of the Rent Acts."

12. Harrison J. added, at 258, that it was open to a committee to adopt either the market rent or registered rent approach, or both, depending on the material before them, and that the absence of scarcity was no reason for

rejecting market rent comparables. He said, however, that a committee would have to show weighty reasons for departing substantially from market rents recently agreed on similar flats within the same block, as in that case.

13. On appeal to the Court of Appeal the rent assessment committee maintained that adjusted market rents could not be used as comparables to determine fair rents. Not unnaturally in the light of that contention, it also expressed concern about Harrison J's observation on the need to show weighty reasons for departing from assured rent comparables, since market rents and fair rents are not the same. As I have said, the Court of Appeal upheld Harrison J's approach and implicitly approved his six principles. It held that, subject to scarcity and disregards, a fair rent is a market rent - i.e. an adjusted market rent - and that market rent comparables where they exist are matters to which a rent officer or committee may have regard when assessing a fair rent.

14. However, in response to submissions made on behalf of the chairman of the committee, based on his concern as to how a committee should approach and explain their decision when there are both fair and market rent comparables, Morritt LJ went on to give some general guidance on those matters. In observations, at 123-124 that may be obiter but, in my view, flow from the main ratio of his judgment that a fair rent is an adjusted market rent and that market rent comparables are relevant to the assessment of a fair rent, he said:

" In this case there are a number of flats in the same block let on assured tenancies at, by definition, open market rents which are virtually identical to those for which a fair rent is to be determined. In my judgment if, in those circumstances, a Rent Assessment Committee wishes to exercise its discretion to adopt some other comparable or method of assessment it will be failing in its duty to give reasons if it does not explain why.

In this case the third reason given by the Rent Assessment Committee as recorded by the judge was that the registered rent comparables had not been demonstrated to be unsound. That is not, of course, a reason for rejecting the assured tenancy comparables. It is not for the court to say in advance what would be a good reason for doing so but if such a reason involves 'working through' such comparables so be it: that consequence is no ground for rejecting the validity of its cause. But it should also be noted that the registered rent comparables are not in their nature any more or less sound than the open market rent with or without discount. Any registered rent has built into at least two variables namely the open market rent and the discount for scarcity. Each should have been considered at the time of the original determination. The assessment of the soundness of that registered rent for use as a comparable would require each of those variables to be reconsidered at the time of their possible use as a comparable.

In this connection it was also objected that if the Rent Assessment Committee were required to give detailed reasons that might necessitate giving detailed arithmetical workings or quantifying the degree of scarcity involved contrary to statements in Guppy's Property v. Knott No 1 ... and Metropolitan Properties v. Laufer ... But those statements were made in relation to the facts of those cases. It does not follow that there will not be cases in which the duty to give reasons will require such workings or quantification to be afforded."

15. Before, I turn to the facts of this case, I should mention that Morritt LJ's observation in the above passage that the soundness of registered rent comparables should be re-assessed at the time of their possible use as comparables has occasioned some confusion. McCullough J, read it, at 18, as a re-assessment of the original determination. I read it, as McCullough J., at 20, thought it should read, as a re-assessment in the light of the circumstances at the time of its possible use as a comparable. However, as the most usual yardstick for such re-assessment[1] is likely to be the market rent derived from market rent comparables, it is difficult to see the point of such an exercise. If there are market rent comparables from which the fair rent can be derived, why bother with fair rent comparables at all?

16. Perhaps more importantly, Morritt LJ, in making that observation, seems to me simply to have been making the point that registered rent comparables if relied on, just as market rent comparables if relied on, must be brought up to date by some process of working through or quantification. He was not suggesting, as has been assumed by Mr. Bonney in his submissions, that where there are both market and fair rent comparables the former or some other yardstick should be used to test the current validity of the latter. As I understand his general reasoning, his view was that where there are close market rent comparables, there is normally no need to consider fair rent comparables.

THE FACTS

17. I turn now to the facts of this case, the determination of the Rent Assessment Committee and the judgment of McCullough J.

18. The landlord owned two similar flats in a two-storey purpose-built terrace of flats, one on the ground floor and one on the first floor. Both were regulated unfurnished tenancies. On 8th July 1993 a rent assessment committee had determined fair rents of £3,100 p.a. for the ground floor flat and £3,400 p.a. for the first floor flat. Two years later, on 14th July 1995, on the landlord's application for the determination of £5,200 p.a. and £5,720 as fair rents for the flats respectively, the rent officer registered rents of £3,640 and £3,900. The landlord referred these assessments to the respondent Rent Assessment Committee, seeking before it somewhat higher rents than he had put to the rent assessment officer, namely £5,720 p.a. and £6,240 p.a. respectively. There was thus a very substantial difference between the rent officer's registrations and the market rents based on the landlord's market rent comparables, over £2,000 p.a. in each case.

19. At a hearing on 21st December 1995 the Committee received written and oral submissions from the landlord and written submissions from the tenants, who did not attend. The landlord relied on as comparables seven assured

[1] There is a possibility of using return on capital as a means of determining market, and hence fair rent - see ***Western Heritable Investment Company Ltd. v. Husband*** [1983] 2 AC 849, HL Sc, per Lord Keith at 854F - but recourse to such a method appears to be unusual.

short-hold tenancies of identical or very similar flats in the same block and in a similar block in an adjoining road, the market rents of which broadly matched those which he sought. He also maintained, producing written confirmation from two local estate agents, that there was no scarcity of such properties in the area, the relevance being that the market rent that such comparables might suggest for the subject properties would not require adjustment downwards to take account of the no scarcity assumption required by Section 70(2).

20. The landlord invited the Committee to adopt the approach indicated by Morritt LJ in ***Spath Holme***. He urged them to deal with each of his assured tenancy comparables, indicating their workings and quantifying any substantial scarcity that they found and, if it departed from them, stating their reasons for doing so.

21. The Committee also had before it the registered rents for the two flats as determined by the rent officer in 1993 and a report and a schedule prepared by her of registered rents of other properties in the area indicating a range of comparables well below the market rent comparables on which the landlord relied. The rent officer's report also referred to recent market research information and a market evidence data-base held by her office indicating a local scarcity of similar property. The tenants, in their written submissions, referred respectively to the extent of the increases in rent over the preceding ten years in contrast to increases in pension and to the installation of tenant's fittings. On the day of the hearing the Committee inspected both of the subject flats externally and one internally. They also inspected externally the main comparables upon which the landlord relied.

22. After the hearing, but before the Committee provided their decision, Latham J. allowed an appeal by the same landlord against the same Committee in respect of their determination of a fair rent for one of the comparables relied upon by the rent officer in this case, a ground floor flat almost identical to the subject ground floor flat; see ***Curtis & Susands v. London Rent Assessment Committee*** (1996) 28 HLR 841. There, the landlord had contended for a fair rent of £5,200 p.a. and the Committee had determined a fair rent of £3,380 p.a.. Latham J., in quashing the assessment and remitting it for re-determination by a differently constituted committee, criticised the Committee for only paying lip service to the ***Spath Holme*** principles, for apparently applying an uplift from the previous registered rent rather than having regard to an obvious market rent comparable and for failing adequately to explain why they had taken that course. They had purported to explain it by stating that they had "*gained more help*" from the Committee's previous determinations of the subject premises and by concluding in paragraph 7 of their statement of reasons: *"Having regard to the evidence, to our inspection, to our own knowledge and experience, and to the provisions of Section 70 of the Rent Act 1977 we determined the fair rent exclusive of rates to be ...[£3,380 p.a.]"*

23. Latham J's comment on an almost identical paragraph in the Committee's reasons in one of two unsuccessful appeals by Susands heard together with that of Curtis was: *"Now that the Court of Appeal has underlined both the objective as identified by Harrison J, and the need to give reasons, Rent Assessment Committees can expect the Court to look with some care at the sort of bare assertions that are set out in paragraph 9 of these reasons.*"

24. Returning to this case, the landlord, by letter to the clerk of the Committee of 6th February 1996, sought to make further submissions, which he set out in the letter. He referred to Latham J's criticisms in ***Curtis and Susands***, in particular, as to the Committee's failure to explain their decision so as to demonstrate that they had had proper regard to the market rent comparables and how they had dealt with them. By letter of 9th February 1996, the clerk to the Committee wrote enclosing their decision and returning his letter, stating that the Chairwoman had determined that the Committee would not consider it because neither the sealed Court Order nor the approved transcript of Latham J's judgment was available. The letter did, however, indicate that the Committee had removed the property from their consideration as one of the fair rent comparables relied upon by the rent officer.

THE RENT ASSESSMENT COMMITTEE'S DETERMINATION

25. By their decision the Committee confirmed the rent officer's determinations of £3,640 p.a. for the ground floor flat and £3,900 for the first floor flat, a modest increase in each case on the 1993 determinations for the premises.

26. The written reasons of the Committee indicate how they say they approached their task. I summarise it as follows. They considered the seven market rent comparables upon which the landlord relied, and accepted four of them as *"provid[ing] current market rental evidence for the subject flats forming the basis of their assessment of their fair rent assessment"*. They gave reasons for rejecting the other three. They identified in some detail differences between the four market rent comparables and the subject flats, but did not quantify the effect of those differences in monetary or percentage terms. They concluded, having heard conflicting evidence from the landlord and the rent officer, that there was scarcity, which they did not quantify in percentage or other terms. They referred to the 1993 determinations of fair rents for the subject premises, which they stated had "*not been demonstrated to be unsound*". They presumed that those determinations reflected the scarcity element at the time they were made and accepted evidence from the rent officer, seemingly derived from her own market research survey and/or data-base, that market rent levels in the area had been static for two years. They had regard to the previous determinations and to their general knowledge of comparable registered rents. They made "*appropriate deductions*" for the differences between the four market rent comparables and the subject premises and allowed for scarcity, neither of which they quantified in any way. *"Having done so, they saw no reason to disturb the Rent Officer's registrations."*

27. I set out below some of the more critical passages of the written reasons. First, the Chairwoman rehearsed the scheme of the landlord's submission:

*"7. On the subject of a fair rent the landlord cited passages from the **Spath Holme** case and summarised the findings of the SLA [Small Landlords' Association] He requested the Committee, following the **Spath Holme** case, to work through the assured tenancy comparables giving their workings or quantification of any substantial scarcity. He concluded ... by stating that the starting point for assessing a fair rent is the market rent adjusted for any scarcity element ..."*

She mentioned the other material and submissions to which I have referred and the Committee's inspections, and set out the legal basis of their approach to the factual issues before them:

*"13 The Committee's objective was to determine a fair rent which was a market rent adjusted for scarcity in accordance with the first principle laid down by Harrison J. in the **Spath Holme** High Court case and approved by the Court of Appeal. They accepted that in this instance [four of seven of] the landlord's assured shorthold tenancy comparables ... provided current market rental evidence for the subject flats forming the basis of their fair rent assessment. Whilst they observed that the properties were similar, the lettings were not identical to the regulated tenancies because they were assured shorthold tenancies, as opposed to assured tenancies, as in the **Spath Holme** case. As the Committee are bound to have regard to all the circumstances (other than personal circumstances) under section 70(1) of the Rent Act 1977 they found that there were the following differences between the market rent comparables and the subject flats. ..."*

The Chairwoman then referred to differences of size, standard of kitchen fittings, repairing liabilities and *"a perceived enhanced value arising in short term lettings"*.

28. On the issue of scarcity, the Chairwoman referred to the test of Lord Widgery CJ, with which Mais and Croom-Johnson JJ had agreed, in ***Metropolitan Property Holdings Ltd. v. Finegold & Ors*** [1975] 1 WLR 349, DC, at 353-4, that it must be taken over a broad area, not just the immediate locality. She and her fellow members of the Committee rejected the views of the two local estate agents on whom the landlord relied because, in their view, they related to the immediate locality only and because they were simply assertions of opinion unsupported by *"hard evidence*". In paragraph 15 she expressed the Committee's view, in reliance on the rent officer's report based on her general knowledge of scarcity of property of the sort in the area and on the short time it had taken the landlord to let some of the properties on which he had relied as comparables - *"that there was a substantial shortage of basic unimproved property to let at lower levels of rent for which there is an unfulfilled demand and which is reflected in the market rents the landlord [was] able to achieve ... They concluded that a discount from market rents must be applied to account for the scarcity factor.*"

29. Having gone thus far along the market rent comparables route, the Chairwoman then purported to test them and their conclusion as to scarcity by reference to registered rents comparables, before expressing the Committee's conclusion

"16. The Committee had regard to the report from the Rent Officer which was in evidence and which referred to her own extensive market evidence research and survey recently conducted from information obtained from many agents and landlords from which the Rent Officer had concluded that there was a dearth of flats available to rent in Waltham Forest without floor covering, white goods and central heating.

17. The rents previously determined for the subject flats by a Committee ... with effect from 21 June 1993 have not been demonstrated to be unsound and are presumed to have reflected the scarcity element at that time. Evidence obtained by the Rent Office suggests that market rent levels have been static, Forest Bureau [one of the agents upon whom the landlord relied] apparently stating that it has been static for over two years. This would tend to show that there has been no marked diminution in scarcity since the last fair rent determination. ...

19. The Committee had regard to their knowledge of comparable registered rents and also to the last Committee decision in respect of the subject flats ... ...

21. In reaching their decision based on likely market rents for the subject flats the Committee have made appropriate deductions from the landlord's market rent comparables for the difference commented on between those and the subject flats as well as a discount for the scarcity element. Having done so they no reason to disturb the Rent Officer's registrations. Nor did they consider that in the circumstances of this case it was appropriate to offer artificial calculations, detailed workings or hypothetical percentages; they were entitled as a tribunal expert in valuation to rely upon a broad but well-founded assessment approach.

22. Having regard to all the evidence put before them, to their inspection, to their own knowledge and experience, and to the provisions of section 70 of the Rent Act 1977 the Committee confirmed those fair rents to be registered ..."

That last paragraph, it should be noted, was in the same terms as the paragraph in ***Curtis & Susands*** which Latham J. had regarded as unsatisfactory. However, here the Committee have reasoned their decision more fully before expressing their conclusion in that way than they did in that case.

McCULLOUGH J'S JUDGMENT

30. The landlord appealed to McCullough J. on 18 grounds. He succeeded on one only, namely that the Committee had taken into account written assertions of the tenants as to their responsibility for internal repairs made after the hearing and of which they (the Committee) only informed him after their decision. On that procedural ground McCullough J quashed the Committee's decision and remitted the matter to a differently constituted Committee for determination in accordance with his judgment.

31. The landlord is concerned about the grounds on which he failed before the Judge, notwithstanding his success in having the Committee's decision quashed and remitted for redetermination. That is because he maintains that the

Judge wrongly rejected those grounds and that the new Committee, having regard to the Judge's rulings, are likely to make the same mistakes again. He maintains that the Committee, whilst acknowledging the ***Spath Holme*** principle that a fair rent is a market rent adjusted for scarcity and the *"disregards",* failed to apply it on the evidence before them and failed adequately to explain their decision. He says that, despite what they said, they wrongly rejected the assured tenancy comparables as the best evidence of fair rents for the subject properties and wrongly relied on the registered rent comparables and their own knowledge of the registered rents of other unspecified properties. He argues that the Committee failed to identify any workings or calculations quantifying the differences to which they had referred between his market rent comparables and the subject premises or as to the scarcity element and that, overall, they had shown no good reasons for departing from the comparable market rents as indicators of fair rents. He relies also, in this connection, on the Chairwoman's refusal to take account of Latham J's judgment in ***Curtis & Susands***.

32. McCullough J found, in reliance on the Committee's assertions in paragraphs 13 and 21 of their reasons, that they had *"accepted"* four of the landlord's seven assured tenancy comparables as *"forming the basis of their fair rent assessment";* that they had made "*appropriate",* though unspecified, deductions for the differences, which they had identified, and for scarcity. He regarded that as sufficient "*working through*" - as sufficient and implicit reasoning that the deductions taken together were of sufficient weight to adjust the market rent comparables to the rent officer's registrations. He held that it was well established that the Committee was entitled to rely on their own knowledge of comparable registered rents without having to specify the properties for which they had been registered.[2] He equated the exercise with the reliance of a judge in a criminal court on his general knowledge of sentencing levels when fixing on an appropriate penalty.

33. As to the Committee's reliance on the previous (1993) registered rents for the flats, McCullough J accepted, in reliance on pre 1988 Act authorities, that, in the absence of material to suggest to the contrary, a rent officer or rent assessment committee was entitled to assume that the fair rent last determined for the premise had been properly determined. [3] However, he was of the view that where, as in Spath Holme, there was evidence that fair rents had fallen far behind market rents, allowing for the element of scarcity in the latter, such difference would, as Morritt LJ said, require reconsideration of the "*soundness*" of the registered rent as a comparable. This is how he expressed the point, at page 19 of the transcript of his judgment: *" ... in general ..., experience since 1989 has increasingly shown that fair rents have fallen too far behind market rents (allowing for the element of scarcity in the latter). As the years progress this disparity may be expected to diminish and, ideally, should be eliminated. ... If that is right, then the assumption ... will more often, and perhaps generally be displaced. Nowadays it will more often, and perhaps generally, be shown that the market rents of matching premises (i.e. those to all intents and purposes exactly comparable) let on matching assured tenancies suggest a fair rent significantly greater than that suggested by the last rent registered for the subject premises. Where it is, the very fact of this difference will prompt the need for the reconsideration of which Morritt LJ spoke*."

34. McCullough J, having gone that far, and whilst expressing concern about the Committee's failure to quantify its deductions for the differences between the assured tenancy comparables and the subject flats and for the element of scarcity, nevertheless appears to have felt trapped by the Committee's implicit reasoning in paragraph 21 of their statement of reasons that their "*appropriate deductions*" for those factors reduced the market rents to the levels of those registered by the rent officer. This is how he dealt with the matter, at 20: *" ... It does not ... necessarily follow that with 'appropriate deductions' the market rents of his comparables will have reduced to the level of the previously registered rents of the subject premises, suitably adjusted for inflation. The committee would appear to have thought that they did, and it is difficult to say that this was a conclusion that they could not reasonably reach. [Had they disclosed figures for their 'appropriate deductions' one could have seen whether this was so, but they did not.]*"

35. As to the landlord's complaint and his counsel's submission about the absence of figures, McCullough said. at 21: *"I think there is force in this submission. **Spath Holme** does not go so far as to require figures in every case, but I would echo what Latham J said in **Curtis v. London Rent Assessment Committee** by saying that the court is more likely than hitherto to expect them. If adequate reasons are not given for the decision of a rent assessment committee the fact that its members have knowledge and experience of their subject provides, in my judgment, no excuse. Rather should it facilitate the explanation of the reasoning used. If figures are used there is no difficulty in telling the parties what they are. In this case 'appropriate deductions' were made; so figures were used. The committee considered whether 'to offer artificial calculations, detailed workings or hypothetical percentages' and decided it would not be 'appropriate'. Those dissatisfied with decisions of rent assessment committees do not ask for anything artificial or hypothetical; they want to know how the committee reached its conclusion. I would be surprised if any complicated mathematics was ever needed: some simple subtraction and perhaps the odd percentage should surely do*."

36. McCullough J then set out an example of what he had in mind from a decision of the Southern Rent Assessment Panel in December 1994 and continued, at 22-24:

" The question for the court, however, is not whether figures could easily have been provided let alone whether the court would have preferred to see them included - as it would; it is whether the decision of the committee can be

[2] citing ***Crofton Investment Trust Ltd. v. Greater London Rent Assessment Committee*** [1967] 2 QB 955, CA, per Lord Parker CJ at 967; ***Metropolitan Properties Co. (FGC) Ltd. v. Lannon*** [1969] 1 QB 577, CA, per Lord Denning MR at 597F and Edmund Davies LJ at 603C; and ***Metropolitan Property Holdings Ltd. v. Laufer*** (1974) 29 P&CR 172, DC, per Lord Widgery CJ at 176.

[3] See ***Tormes Property Co. Ltd. v. Landau*** [1971] 1 QB 261, DC, per Lord Parker LCJ at 266G; ***Mason v. Skilling*** [1974] 1 WLR 1437, HL, per Lord Reid at 139H; and ***London Rent Assessment Committee v. St. George's Court*** (1984) 48 P&CR 230, CA, per Griffiths LJ at 235.

castigated as unlawful because they were not provided. I would like to hold that it should, but, at the end of the day, though I have hesitated about it, I do not think that I can. This is chiefly because the committee dealt so fully, albeit without providing figures, with the differences between ...[the landlord's] comparables and the [subject] tenancies ... ... Of a committee's reasons the opaque paragraph to which Latham J referred, and which the London Rent Assessment Committee appears to adopt as a matter of routine, says nothing. Had it stood alone my decision would have been to the contrary. ... ... I would express the hope that, when ... [the landlord's] application is reconsidered, the committee's reasons, whatever their decisions will inform the parties of such simple arithmetic as was used in reaching them."

APPEAL BY A SUCCESSFUL PARTY

37. The first matter for consideration is whether the landlord can appeal from the order of McCullough J, notwithstanding that it was the order he sought, because he is dissatisfied with some of the Judge's reasoning with which, in accordance with the order, a differently constituted Committee is to re-determine the matter. The Judge's order had two parts, a quashing of the decision of the Committee and a remission of the matter, pursuant to RSC Order 55, rule 7(5), to a differently constituted committee for determination in accordance with his judgment.

38. ***Lake v. Lake*** [1955] P 336, CA, a divorce case, is the authority most commonly cited for the proposition that an appeal lies only against an order not the reasons for it. There, a wife respondent who had been found guilty of adultery, but who had succeeded in defending her husband's divorce petition on the ground of condonation, sought to appeal the finding of adultery. Lord Evershed MR, with whom Hodson and Parker LJJ agreed, held that the wife's right of challenge went only to the form of order not to the reasons for it.

39. Lord Evershed's reasoning turned on two points: first, the form of the order, namely that the husband *"had not sufficiently proved the contents of the petition*"; and second, the wording of the then RSC Order 58, r.1 (the predecessor of today's Order 59, rule 3(2)), permitting appeal from *"the whole or any part of any judgment or order"*. As to the form of the order, he said, at 342-343:

"The ... question that we must decide is whether ... there is, properly speaking, any subject-matter upon which we could properly entertain an appeal. I have come to the conclusion that there is not. It is quite clear from the form of order or judgment ... that it records accurately the conclusions which, in the end of all, the commissioner reached.

... I start by assuming and accepting that this is an appropriate and correct form of order. From that it seems to me to follow inevitably that we could not now entertain an appeal upon the matter of fact, Aye or No, was the wife guilty of adultery? for the short and simple reason that, even if we came to the conclusion that the commissioner formed a wrong view on the facts, we could not make any alteration in the form of the order under appeal. It would still stand correctly recording the result of the proceedings, exactly as it stands now. I go further. Let it be supposed that Mr. Laughton-Scott were free to raise this matter in the court, and that the court came to the conclusion ... that the manner of trial of this issue was not satisfactory ... the right course for the court to take, presumably, would be then to order a new trial. A new trial of what? That again, as I think, shows the impossibility of our acceding to Mr. Laughton-Scott's request, for I cannot see how we could possibly order the issue of adultery as such to be retried, seeing that a retrial could not possibly lead, in the circumstances, to any effective result whatever."

40. As to the words *"judgment or order*" in Order 58, r.1, Lord Evershed said, at 343: *"... Nothing which Mr. Laughton-Scott brought to our attention from the cases which he mentioned persuades me that by the words 'judgment or order' in the rule, or where they occur in the Judicature Act 1925, is meant anything other than the formal judgment or order which is drawn up and disposes of the proceedings, and which, in appropriate cases, the successful party is entitled to enforce or execute."*

41. Hodson LJ, in his concurring judgment, at 346, referred with approval on this point to Lord Esher MR's distinction between a "*judgment"* and an *"order*" in ***Onslow v. Inland Revenue Commissioners*** (1890) 25 QBD 465, at ..., namely *"[a] 'judgment' is a decision obtained in an action, and every other decision is an order*".

42. Mr. James Bonney, QC, on behalf of the landlord, submitted that the principle in Lake v. Lake applies only where the Court of Appeal cannot alter the order made below or cannot otherwise grant effective relief. Neither of those circumstances, he maintained, apply here; the relief sought includes the remission of the matter for determination by a differently constituted committee in accordance with the judgment of this Court, which relief, if granted, should affect that committee's determination. He added that it would be unjust to require the landlord to submit to a re-determination in accordance with McCullough J's reasoning, which he maintained was wrong, possibly requiring him to seek further recourse to the courts to resolve matters that can be dealt with now. He added that there is some urgency for this Court to deal with them now because McCullough J's judgment differs from that of Turner J delivered on the same day in ***North Western Estates Development Ltd. v. Chairman of Merseyside & Cheshire Rent Assessment Committee*** (unreported). 27th November 1996, and that the outcomes in many pending cases will turn upon the guidance the Court can give.

43. Mr. Kim Lewison, QC, on behalf of the Committee, made no submissions on the point, indicating that their attitude was neutral on it. He suggested, however, that McCullough J's judgment did not preclude the landlord from urging a new committee to adopt and demonstrate in its written reasons an arithmetical approach, the Judge having said that such would be desirable though not, as a matter of law, necessary.

44. In my judgment, there is force in Mr. Bonney's submissions. If he is right in saying that McCullough J's rulings on the substantive issue are wrong or are such as possibly to mislead a new committee into repeating the errors of the present Committee, the Judge's order has not given the landlord all that he wants and to which he is entitled and the Court of Appeal can do something about it. The Court cannot do anything about the first part of the order, the

quashing of the determination, and the landlord naturally does not seek that. However, it can give a different and proper effect to the second, the remission of the reference for determination in accordance with the order of the Court. It can exercise, under RSC Order 59 rule 10(3), the power of the court below to remit the matter for rehearing and determination under RSC Order 55 rule 7(5) in accordance with the correct opinion of the Court. [4] Accordingly, I would hold that the landlord may appeal against the order of McCullough J.

POST SPATH HOLME CASES

45. Since the Court of Appeal's judgment in Spath Holme there have been a number of first instance judgments which suggest some uncertainty as to the application of its principles, in particular, as to manner and detail in which a rent assessment committee should demonstrate its process of reasoning in fixing on a fair rent. That uncertainty necessarily turns in part on the earlier question to which I have referred, whether when good market rent comparables are available a committee should use them as the starting point for their assessment and should only depart substantially from them where there are good reasons for doing so. Here. the Committee purportedly took market rent comparables as their starting point. McCullough J appears to have accepted that that was an appropriate approach because he regarded such comparables as the best indicators of market rent. As I have indicated, he was uneasy about the Committee's failure to furnish their reasons with figures, but he did not regard that deficiency as sufficient to render their determinations unlawful. As I have also indicated, he took the same view as Latham J in ***Curtis and Susands*** on the inadequacy of the London Rent Assessment Committee's routine concluding paragraph, if it had stood on its own. The main difference between the two cases is that here, the Committee, having purportedly relied on market rent comparables, set out some reasons for adjusting them to the previously registered rents for the subject premises subject to a modest uplift.

46. There is much in common in the approach of McCullough J in this case and that of Turner J in ***North Western Estates Development case***. They are both of the view that committees must explain their process of reasoning in fixing on their assessments, McCullough J expressly stating that some use of figures would be desirable and Turner J implicitly calling for figures as part of the reasoning process. The main difference between them is that McCullough J was prepared to accept as adequate reasoning for differing from market rent comparables [5] the Committee's statement of reliance both on their previous determinations for the subject premises and on their general knowledge of comparable registered rents without identification of the properties or re-assessment of their current applicability; whereas Turner J held, on his understanding of Morritt LJ's observation in ***Spath Holme***, that if a committee has in mind relying on such comparables to depart substantially from market rent comparables, they must first re-assess their soundness and must demonstrate by their reasoning that they have done so.

47. In the ***North Western Estates Development Ltd.*** case, the committee had to consider as comparables both assured shorthold tenancy market rents and registered fair rents. The landlord's case was that there was no scarcity requiring a discount from the market rent. However, the committee made a significant deduction for scarcity without explaining why, save for a general reference to registered fair rent comparables, by clinging to a particular fair rent determination comparable because they "*had no reason to believe that it was suspect*", and otherwise in the most general terms in paragraph 7 of their reasons - *"... by quantifying scarcity to the best of our ability using our knowledge and experience of supply and demand; by taking into account rents in this neighbourhood as indicated by the landlord's comparable[s] as well as comparable[s] relating to the registered rent of other regulated tenancies in the immediate vicinity; by taking account of the statutory provisions ...; by noting the general level of rents as an indication of the character of the locality and lastly the evidence of our inspection and thus we determined that the fair rent herein should be £33.50 per week*."

48. On appeal by the landlord, Turner J, allowed all but one of the grounds of appeal. On the issue of the adequacy of the committee's reasons, he summarised, at pages 12F-13B of the transcript of his judgment, the law as he understood it in the light of Morritt LJ's judgment in ***Spath Holme*** and of a number of earlier authorities, including pre-1988 decisions of the Divisional Court on the giving of reasons :

"What Morritt LJ was clearly seeking to avoid was that an assessment committee would perpetuate a level of rent which was not fair merely by referring to, and being guided to the point of exclusion, by other registered rents. Before a registered rent was used as a comparable it required to be re-examined and justified, or, in his language, 'worked through'.

It is manifest from the above, that unless there is clear evidence of the validity of a comparable ... it will usually be the case that 'working through' of open market rents, discounted and subject to disregards, as appropriate, and of registered fair rents will be required."

49. He described, at 16C-17A, paragraph 7 of the committee's reasons as a "*hotchpotch*" containing no clear findings of fact - *"Although paragraph 7 of the reasons says that the committee did quantify scarcity by 'using our knowledge and experience of supply and demand', it did not refer to the evidence adduced in regard to the general supply of properties available for renting as assured tenancies. On this ground, the decision may be criticised for a lack of sufficiency. Again, there being evidence which was fit for the committee's consideration, the fact that it did not expressly bring it into account suggest[s] that the muddled approach, above described as 'hotch potch', readily gives rise to the inference that the committee wrongly directed itself in law. Significantly, within that information there was*

[4] See also on the precise form of the order and whether it gives the successful party all that he wants ***Young v. Secretary of State for the Environment*** [1990] 2 PLR, 82, CA, per Dillon LJ at 87A-D, per Woolf LJ at 89C-D and per McCowan LJ at 90C-D.

[5] in addition to the differences between them and the subject premises identified by the Committee

nothing to indicate the extent to which the two critical variables, identified by Morritt LJ in ***Spath Holme****, which were scarcity and disregards [sic] could have influenced the determining committees to fix a fair rent at a figure which must be assumed to have been below the open market rent.*"

50. And at pages 18E-19C he added the following general observations on adequacy of reasons: "*... much has changed since the early decisions of the Divisional Court concerned with the reasons that RACs were required to give ... These early cases [sic] may in some instances have been reached on the basis that RACs were not composed of legally qualified individuals and that it would be wrong to expect too much of them by way of reasons which would stand up to rigorous judicial scrutiny. Nevertheless, it would be wrong to ignore the factors of (a) a jurisprudential need for such a tribunal to provide adequate and sufficient reasons for its decisions;* ***Poyser and Mills*** *and subsequent cases (b) the increased training which is now afforded to all members of the tribunals under the auspices of the Judicial Studies Board and (c) the qualifications of those who are now selected to become members of RACs. All those factors strongly point to the requirement that reasons should not merely pay lip service to the statutory umbrella under which the particular tribunal is operating, rather that they should condescend to articulate the actual process that has led to the decision which is, in this court, sought to be impugned. This is a natural and logical development of the decision in* ***Crake v. Supplementary Benefits Commission*** *[1982] 12 All E R 498.*"

51. Owen J. adopted a similar approach in ***The District Estates Ltd. v. The Chairman of Merseyside and Cheshire Rent Assessment Committee*** [1997] NPC 39. There, he allowed the landlord's appeal following a concession by the committee that they had given insufficient reasons, but went on in his judgment to express, obiter, a number of general propositions, including the following: that in most cases in which registered rent comparables are put forward it might well be necessary to reconsider the variables inherent in them and that in calculating a fair rent from market rent comparables by reference to differences between properties and the statutory disregards and by discounting for scarcity, some calculations are likely to be required and that *"if proper reasons are to be given those calculations will need to be disclosed*".

52. A recent judicial observation, which - possibly influenced by the particular circumstances of the case - is not of a piece with the above approaches as to the need for reasons is that of MacPherson of Cluny J. in ***Northumberland & Durham Property Trust Ltd. v. The London Rent Assessment Committee*** (unreported), 29th February 1996. There, the committee had regard to a single market rent comparable, to seven recently determined fair rents of similar flats in the same terrace (one of them in the same house) as the subject premises and to all the material differences between the various premises. In considering the scarcity element, the committee took the view, without putting a percentage to it, that the recently determined fair rents must have reflected "*a high degree of scarcity from which a substantial discount from the market rent must be applied*". The main argument on behalf of the landlord, which MacPherson J. rejected, was that the committee should not have considered the fair rent comparables. However, the landlord, who had contended for a fair rent based on its market rent comparable discounted for scarcity, also challenged the committee's approach to that issue. In the course of rejecting that challenge too, MacPherson J. said, at pages 12A-13A of the transcript of his judgment: "*... They were experienced in applying the discount for scarcity to figures which were put before them because that is part of the experience of Committees operating in this field. I see no error in law in their approach in connection with scarcity. How much they discounted in connection with scarcity is not identified. But, as the cases show, there is no need for a rent committee to show the mathematical working which they employ. Cases have been cited to me which, in my judgment, establish that beyond peradventure. I do not need to name them because it seems to me that the basis of that argument on behalf of the respondents is unassailable. What the Committee must do is to show that they have approached the case in the proper way. They must heed all the arguments that are put before them. They must follow the advice and instruction given to them in any case which is put before them. But, at the end of the day, provided they follow the principles set out and consider both the market rent discounted and the other comparables which they must unavoidably consider, they do not have to give fuller reasons than this committee gave for its own conclusions. At the end of the day what they are entitled to say is that they determined the fair rents as they conclude them to be in the final paragraph of their decision.*"

THE GROUNDS OF APPEAL AND THE SUBMISSIONS

53. There are 33 grounds of appeal. With one or two exceptions, Mr. Bonney's submissions on them may be summarised in the following five propositions:

1. A fair rent is an adjusted market rent. Thus, the identification of a market rent is the first step in assessing a fair rent. Comparable market rents, if they are present, are the best evidence of the market rent (a fortiori in this case where four of the comparables were similar flats in the same and/or an adjacent purpose-built block).
2. Where there are market rent comparables from which a rent assessment committee can derive a fair rent, they should rely on them without reference to any registered fair rent of the subject premises or of fair rent comparables unless they have re-assessed and found them to be reliable indicators of the current market rent suitably discounted for scarcity and disregards if any. The Committee did not do that. On the contrary, Their approach was to require the landlord to demonstrate that the previously registered rents for the subject premises were unsound by reason of scarcity or otherwise and to act on their previous determinations in respect of the subject premises and on their knowledge of fair rent comparables generally without re-assessing their current applicability.
3. If there are market rent comparables, a rent assessment committee must have and must identify good reasons for departing substantially from them, if they do, in their assessment of a fair rent.

4. A committee's assessment of a fair rent from the starting point of a market rent requires it to identify a number of figures: first, the market rent, which will include, depending on the closeness of the market rent comparables, figures or percentages to allow for differences between them and the subject premises, a figure or percentage for scarcity, if any, and a figure or figures to reflect the appropriate disregards, if any.
5 The Committee's statement in paragraph 21 of their reasons that they had made "appropriate deductions", without identifying figures, from the market rent comparables is inadequate reasoning. It deprives the landlord of information which, if it existed, should have been readily available to demonstrate and justify their decision to depart so substantially from those comparables and invites the inference that the Committee had not in fact made appropriate calculations or deductions and had, therefore, determined the matter unlawfully or irrationally.

54. Mr Lewison, in reply, relied on the following propositions:

1. Fair rent is not an adjusted market rent. [6] Morritt LJ was wrong when he said in ***Spath Holme***, at 122, that a fair rent is "*the market rent less the disregards and discounted for scarcity*". The 1977 Act has not prescribed market rent as the starting point - Section 70 does not even mention it , and it is not for the courts to tell rent assessment committees, who are in the position of valuers, how to assess fair rents. The Act requires only the assessment of a fair rent, and identifying and starting with a market rent is only one of several methods of achieving that end. Depending on the available material, two other possibilities are the use of fair rent comparables and/or the assessment of return on capital value. On the material before it, the Committee were entitled to use market and/or fair rent comparables as they saw fit. [7]
2. The 1988 Act has not changed the law governing fair rents or introduced any new culture. Market rent comparables, where available, have always been potentially relevant in the assessment of fair rents; [8] there are just more of them now. There is, therefore no reason to discard pre 1989 jurisprudence to the effect that a committee should, subject to allowing for inflation, rely on close registered fair rent comparables and may do so without re-assessing them.
3. Market rent as a starting point may be relevant, but it is not determinative. Even if it is a better approach in any individual case than that of taking registered fair rent comparables, that does not make reliance on the latter unlawful. Here, the Committee, having considered both sets of comparables, would have been entitled to assess the fair rents *"in the round"* or by reference to fair rent comparables only and without first identifying the market rent from the market rent comparables. In the event, the Committee applied the Spath Holme principle of taking as their starting point market rent derived from market rent comparables and, in paragraph 21 of their reasons, made the assessments on that basis.
4. Rent assessment committees are in the position of valuers and may rely on their own knowledge, experience and expertise in assessing a fair rent. They do not have to give specific reasons and, certainly, are not bound to give figures to show how they have reached their decision. See a number of Divisional Court authorities in the 1970's in which Lord Widgery CJ gave the leading judgment, [9] the observation of Harrison J. in ***Spath Holme,*** at 260, that a committee need not quantify the scarcity element "*in any precise way*", and the passage I have cited from the judgment of MacPherson J. in the Northumberland and Durham Property Trust Ltd. case. In any event, the Committee had given reasons, which amounted to a sufficient "working-through" of their decision making process.
5. Inadequacy of reasons is not a ground for quashing an assessment or for remitting it for re-determination unless the inadequacy leads the court to infer that a committee have determined the matter irrationally or otherwise unlawfully. [10] Here, even if the reasons are inadequate, they do not justify such an inference.

CONCLUSIONS

The nature of a fair rent

55. In my judgment, a fair rent is a market rent adjusted for scarcity and disregards, as Morritt LJ held as part of the ratio in ***Spath Holme***, at 118-119 and 121-122, and as Lord Widgery analysed it as long ago as 1975 in ***Metropolitan Property Holdings Limited v. Finegold*** [1975] 1 WLR 349, DC, at 351-353.[11] The concept of *"fair"* in such a context is elusive unless it is tied to particular criteria. Section 70 of the 1977 Act contains those criteria. Its scheme is to set out, in Section 70(1), a number of circumstances which together would identify a market rent and, in Section 70(2) and (3), the required adjustments where appropriate. It hardly needs saying that the assumption of a hypothetical absence of scarcity required by Section 70(2) presupposes that the starting point in Section 70(1) is market rent. Although I agree with the judgment of Harrison J endorsed by this Court in ***Spath Holme***, that, depending on the material available, there may be more than one route to determine a fair rent, every route must have that starting point. That is so, whether reliance is placed on market or fair rent comparables or on return on capital. In each of the former two methods there is a need to re-assess their validity and applicability at the time of their use as

6 contrary to the Committee's purported approach to its determinations
7 See e.g. ***Tormes Property Co. Ltd. v, Landau*** [1971] 1 QB 261, DC, per Lord Parker CJ at 266B-E; and ***Mason v. Skilling*** [1974] 1 WLR 1437, HL, per Lord Morris at 1441
8 ***Metropolitan Property Holdings v. Laufer*** (1974) 29 P & CR 172, DC; ***Mason v. Skilling*** [1974] 1 WLR 1437, HL.
9 ***Metropolitan Property Holdings Limited v. Laufer*** (1974) 29 P & CR 172; ***Guppys (Bridport) v. Sandoe*** (1975) 30 P & CR 69 and ***Guppys Properties Limited v. Knott (No. 1)*** [1978] EGD 255.
10 ***Mountview Court Properties Ltd. v.Devlin*** (1970) 21 P & CR 689, DC
11 See also ***BTE Limited v. Merseyside and Cheshire Rent Assessment Committee*** (1991) 24 HLR 514, per Hutchison J. at 5-6-517 and ***Western Heritable Investment Company Limited v. Husband*** [1983] 2 AC 849, HL(Sc), per Lord Keith at 856C-F and per Lord Brightman at 860C-E.

comparables.[12] In the case of return on capital, which seems to be rarely used, the criteria in Section 70(1) cannot be by-passed; the exercise must in some way identify a market rent en route to assessing a fair rent.

Market rent comparables, the best evidence

56. Clearly, rent officers and rent assessment committees should rely on the best evidence of fair rents; that has always been the approach of the courts. [13] Before the introduction of assured tenancies by the 1988 Act the best evidence available was usually registered fair rent comparables. Now, with the advent and growing volume of assured tenancy market rent comparables, they are most commonly relied on as the best evidence of the starting point for determining a fair rent. The 1988 Act has not have changed the law as to the assessment of fair rents. But, by preventing the creation of new regulated tenancies and introducing assured tenancies at actual market rents, it set in train the progressive diminution in numbers of fair rent comparables and brought into being an ever increasing supply of market rent comparables. Market rents are thus the natural successors to the declining regime of registered fair rents. As My Lord, Lord Justice Hirst, put to Mr. Lewison in the course of his submissions, they are "a much more potent way of assessing market rent" and hence fair rent.

57. Where close market rent comparables are available, it makes sense that they should be treated as the best evidence for the purpose. That is clearly how Morritt LJ regarded the matter in ***Spath Holme***, at 123, in observations, which I have set out, flowing necessarily from the part of the ratio of his judgment that market rent is the starting point for assessment of fair rent. This approach is not a change of law or principle; it is consistent with that of the courts to registered fair rent comparables before the 1988 Act. Only the material has changed. It is for that reason, as Morritt LJ also indicated, that earlier judicial observations about the primacy of registered rent comparables, [14] as to reliance on them unless they can be demonstrated to be wrong [15] and of combining one or more method of assessment [16] are now inapplicable where there are market rent comparables on which a fair rent assessment may be based. The best evidence of the starting point for assessment of fair rents is now that of market rent comparables where they are available.

58. In this case, just as in Spath Holme, market rent comparables were available and were close. The Committee accepted four of them as good enough to form the basis of their fair rent assessment, subject to individual differences that they identified between some of them and the subject premises. In that circumstance, was it necessary or logical for them to turn also to the previously determined registered fair rents for the subject premises and/or to fair rent comparables? In my view, If there are market rent comparables enabling the identification of a market rent as a starting point, there is normally no need to refer to registered fair rent comparables at all, still less to engage in an arid exercise of verifying or reconsidering their soundness as current indicators of an adjusted market rent. Such an exercise is circular, since it can only be done by reference to market rent comparables or some other yardstick which a committee is prepared to accept as an indicator of the current market rent of the subject property. As I have said, I do not believe that that is what Morritt LJ intended in his observations, at 124, about re-assessment of the soundness of registered fair rent comparables. His clear intention, with which I agree, is that if reliance is to be placed on registered fair or market rent comparables, their current validity and applicability as comparables for the subject premises must be re-assessed.

59. In my view, where there are good market rent comparables upon which a committee can act in identifying market rent of the subject premises it can only cause confusion to attempt to use the two regimes of market and fair rent comparables, calibrating one against the other, to determine a fair rent. It follows, a fortiori, that to rely in such a circumstance on registered fair rents, whether generally or particularly, unless one or other party can dislodge them as suitable comparables is wrong. Such an approach would freeze the fair rents by reference to precedent rather than achieve what is intended by the legislation, an exercise of "valuation", an assessment of current fair rents by knowledgeable and experienced committees responsive to the particular characteristics of the subject property and to changing market levels. [17]

Process of assessment

60. The assessment of a fair rent is routinely described as more of an art than a science. Lord Keith, in ***Western Heritable Investment Company Limited v. Husband*** [1983] 2 AC 849, HL, at 858, called it *"an exercise of the valuer's professional skill"*. The members of a rent assessment committee, at least one of whom is normally a chartered surveyor, are expected to be experienced in such valuation and to know and to have a "feel" for the rental property market in their area. But, however much experienced *"feel"* or judgment the exercise requires and is given, the end product is a figure for rent of particular premises. Where the comparables are not exact and/or

[12] as is implicit in the reasoning of Morritt LJ said in ***Spath Holme*** , at 124.

[13] ***Metropolitan Properties Company (FGC) Limited v. Lannon*** [1969] 1 QB 577; **Tormes Property Co. Ltd. v. Landau** [1971] 1 QB 261; **Mountview Court Properties Ltd. v. Devlin** (1970) 21 P & CR 689,DC; and ***Waddington v. Surrey & Sussex Rent Assessment Committee*** [1982] 2 EGLR 107, QBD.

[14] See ***Tormes Property Co. Ltd. v. Landau*** [1971] 1 QB 261, at 267; ***Mason v. Skilling*** [1974] 1 WLR 1437, HL, per Lord Reid at 1439H; ***Western Heritable Investment Company Ltd. v. Husband*** [1983] 2 AC 849, HL, per Lord Brightman at 859G; and ***London Rent Assessment Committee v. St. George's Court*** (1984) 48 P &CR 230, CA, per Griffiths LJ at 233 and 235, per Slade LJ at 236-7 and per Browne-Wilkinson LJ at 238.

[15] ***Metropolitan Properties Company (FGC) Limited v. Lannon*** [1969] 1 QB 577; ***Tormes Property Co. Ltd. v. Landau*** [1971] 1 QB 261; ***Mountview Court Properties Ltd. v. Devlin*** (1970) 21 P & CR 689, DC; and ***Waddington v. Surrey & Sussex Rent Assessment Committee*** [1982] 2 EGLR 107, QBD.

[16] ***Mason v. Skilling*** [1974] 1 WLR 1437, HL, per Lord Reid at 1438-1440; ***Guppys (Bridport) v. Sandoe*** (1975) 30 P & CR 69, DC, per Lord Widgery CJ at 70-71 and **Guppys Properties Limited v. Knott (No. 1)** [1978] EGD 255, DC, per Lord Widgery CH at 258

[17] Cf. the ***North Western Development Estates*** case, in which Turner J, rightly in my view, criticised the committee there for preferring a single fair rent determination to market rent comparables on the ground they "had no reason to believe that it was suspect".

where there is a need to make disputed adjustments for hypothetical lack of scarcity or for disregards,[18] it necessarily involves some working through - some sums, however few and approximate - some arithmetical markers whether in percentage form or otherwise on the way to the final figure. There is no other rational way of giving effect to the scheme of assessment set out in Section 70 of the 1977 Act.

61. That is not to say that the Committee should have no recourse to its general knowledge and experience of local market rentals, of the appropriate adjustments to make for differences between comparables and the subject premises, of the existence and degree of local scarcity, if any, and of their treatment of disregards where necessary. It does mean, however, where there is a significant difference between registered fair rent comparables and close market rent comparables accepted by a committee as providing current market rental evidence for the subject premises, they should not normally have regard to the former at all, and cannot, in any event, properly prefer them to the latter without explanation. Such an explanation would necessarily require some analysis, not simply assertions of the general nature criticised by Latham J. in ***Curtis & Susands*** and of the sort employed by this Committee in paragraphs 19 and 22 of their reasons. It follows that, where there is a significant issue as to a fair rent turning on rival comparables, I do not agree with McCullough J's description of the exercise as analogous to the sentencing function of a judge who may have regard to his general knowledge of sentencing levels.

Reasons

62. Rent Assessment Committees are required, if requested, to state the reasons for their determination in writing. [19]

63. From examples of rent assessment committees' written reasons that I have seen in the authorities and in material put before the Court, many, if not most, committees clearly see their task as working through the requirements of Section 70 in some arithmetical way and giving, in their reasons, a summary account of their workings. According to this Committee's written reasons, they started with the landlord's market rent comparables and, in paragraph 21 of them, made "*appropriate deductions*" from them to mark the differences between them and the subject flats and a scarcity element. That, I assume, is what they meant in referring, in the concluding words of the paragraph, to their entitlement "to rely upon a broad but well-founded assessment approach". If indeed they did work through the exercise in that way, I do not understand why they could not give some arithmetical indication of their workings, rather than merely concluding that "*they saw no reason to disturb the Rent Officer's registrations*". And I share McCullough J's puzzlement as to why, if they had made "*appropriate deductions*", they felt it necessary to declare the inappropriateness of offering, inter alia, "*artificial calculations*" or "*hypothetical percentages*". If they had made appropriate deductions they could have identified them in summary form without recourse to artificialities, which, as I understand their wording, had not been their approach. As to "*hypothetical percentages",* it should be remembered that Section 70(2) required them to make an assumption of a hypothetical absence of scarcity, a hypothesis which would normally require articulation in percentage terms.

64. It is well established that the adequacy of reasons in any case depends upon the facts of and the issues in the case. See e.g. ***Save Britain's Heritage v. Number 1 Poultry Limited*** [1991] 1 WLR 153, HL, per Lord Bridge of Harwich at 167C and per Morritt LJ in ***Spath Holme*** at 123. Whilst there are decisions of the Divisional Court in rent assessment cases in the 1970's asserting the sufficiency of general conclusions, without any or any detailed reasons, based on committees' great experience and local knowledge,[20] they appear to have overlooked the Divisional Court's decision ***in Mountview Court Properties Ltd. v. Devlin*** (1970) 21 P $ CR 689, acknowledging the well-known statement of principle by Megaw J in In Re Poyser and Mills' Arbitration [1964] 2 QB 467, that proper, intelligible and adequate reasons should be given and that in their absence the court may infer an error of law justifying the quashing of the decision.

65. In those cases where a committee's determination is close to the market rent indicated by good market rent comparables and there is no actual scarcity, little or no arithmetical explanation may be necessary. But where a committee's assessment of a fair rent differs significantly from the market rent indicated by market rent comparables, I agree with Morritt LJ's and Harrison J.'s reasoning in ***Spath Holme*** and that of Latham J in ***Curtis & Susands***, at 848, that they must have good reasons for it and they must explain them. As Mr. Bonney submitted, this is consistent with the pre 1989 approach of the courts in relation to registered fair rent comparables;[21] there is no change in approach, only as to the available evidence on which it operates. In most such cases, certainly those where there have been important issues on the comparables and/or on the appropriate adjustments to the market rent figure,[22] an explanation will require some "*working through*", as Morritt LJ put it in ***Spath Holme***. It will require some use of figures to demonstrate the committee's workings towards, or calculation of, the final fair rent figure. In Megaw J.'s words in ***In re Poyser & Mills' Arbitration***, at 478, the reasons must be proper, intelligible and adequate. And, as McCullough J. observed in a passage to which I have already referred at page 21 of his

[18] Where there are no such disputed issues it may be possible for a committee to take a short cut; see e.g. ***GREA Real Property Investments Ltd. v Williams*** [1979] 1 EGLR 651, per Forbes J. at 653.

[19] **Tribunals and Inquiries Act 1992**, S. 10 and Schedule 1; and **Rent Assessment Committees (England & Wales) Regulations 1971** , as amended, reg. 10A.

[20] ***Metropolitan Properties v. Laufer*** [1974] 29 P & CR 172, DC; ***Guppys (Bridport) Ld. Sandoe*** (1975) 30 P & CR 69, DC and ***Guppys Properties Ltd. v. Knott No.1)*** (1978) 30 P & CR 255. DC. Cf. ***Albyn Properties Ltd. v. Knox*** [1977] SCR 108, per Lord Emslie, LP, at 112 - "... they must explain how their figures of fair rent were fixed."

[21] e.g. in ***Mountview*** and ***Lannon***

[22] thus meeting the criterion of Lord Lloyd in ***Bolton Metropolitan District Council v. Secretary of State for the Environment*** [1995] 3 PLR 37, at 43C-D. that the reasons must condescend to "*the principal important controversial issues*". See also ***R. v. Criminal Injuries Compensation Board, ex p. Cook*** [1996] 1 WLR 1037, CA, per Aldous LJ at 1044F-1045E and per Hobhouse LJ at 1050H-1051D.

judgment: *"If adequate reasons are not given for the decision of a rent assessment committee the fact that its members have knowledge and experience of their subject provides, in my judgment, no excuse. Rather should it facilitate the explanation of the reasoning used."*

66. It is trite law that rent assessment committees, like other tribunals, are not required to articulate their reasons to the exacting standards and with the accuracy and precision required of a court.[23] I am conscious too of the many cases with which committees may have to deal in the course of a day, of the speed at which they have to work and of the need to avoid over-burdening their chairmen and chairwomen in stating their reasons. However, as I have said, in cases where their assessment of fair rent differs significantly from that, on the face of it, indicated by market rent comparables, that exercise, if rational, must involve some sums. The Committee says that it did so here, because they claim to have made "*appropriate deductions*" from the market rent comparables. It should have been no great burden for them to have indicated their thought process by a brief indication of their arithmetic. Mr. Bonney has told us that many committees do so, and referred in particular to the practice of the Southern and South Western Assessment Panels, citing examples of their assessments. The scheme of each is similar and they seem to me to be adequate for the purpose. That was the view of McCullough J in relation to an example of the Southern Panel, of December 1994, put before him. He set it out at page 22 of his judgment with words of approval which, for convenience, I repeat:

"Those dissatisfied with decisions of rent assessment committees do not ask for anything artificial or hypothetical; they want to know how the committee reached its conclusion. I would be surprised if any complicated mathematics was ever needed; some simple subtraction and perhaps the odd percentage should surely do. An example is provided by a decision of the Southern Rent Assessment Panel in December 1994. They said:

'We set out our calculations for the information of the parties.

'The market rent, to reflect age, character and condition of property	*£80.00 p.w.*
Less allowance for scarcity (5%)	*£4.00*
Less allowance for kitchen in basic condition	*£5.00*
Less allowance for lack of central heating	*£5.00*
	£14.00
	£66.00'"

67. An example of the South Western Panel, of October 1996, produced to us is similar. The statement of reasons, which relates to a large number of properties referred to the committee, sets out in narrative form their conclusions under a series of headings, namely: market rent, scarcity, tenant's obligations and other deductions. Then, in an attached schedule, they set out against each property and under each of those heads the figure leading to its assessment.

68. I respectfully share McCullough J's view that this Committee's statement of their reasons is inadequate. In my view, this was a classic case for the Committee to explain, with some use of figures, how they reached their fair rent determinations. Those determinations were substantially below those indicated by market rent comparables accepted by the Committee as providing current market rental evidence for the subject premises. As to the *"appropriate deductions",* they have clearly had regard in some unexplained way to their previous determinations and to their general knowledge of registered rent comparables. The obvious deficiencies of explanation are not, in my view, compensated for in Committee's full narrative treatment of the differences between the market rent comparables and the subject premises or in their explanation of their rejection of the landlord's case on the issue of scarcity.

Inference of irrationality or other unlawfulness from inadequacy of reasons

69. In ***Mountview Court Properties Ltd. v. Devlin*** (1970) 21 P & CR 689 the Divisional Court held that a failure by a rent assessment committee to give adequate reasons, though entitling the court to remit the matter to the committee for them to give adequate reasons, was not on its own a ground for quashing the assessment unless the inadequacy gave rise to an inference that the committee had erred in law in reaching their decision.

70. As Woolf LJ said in ***Crake v. Supplementary Benefits Commission*** [1982] 1 All ER 498, at 507J-508b, the law in this respect has moved on considerably:

"I would ... regard the Mountview case as being the main authority to be applied. However, it has to be applied in the light of the ten years which have elapsed since that case was decided. Over that period of ten years the approach of the courts with regard to the giving of reasons has been much more definite than they were at that time and courts are now much more ready to infer that because of inadequate reasons there has been an error of law, than perhaps they were prepared to at the time that the Mountview case was decided.

... in practice I think that there will be few cases where it will not be possible, where the reasons are inadequate, to say one way or another whether the tribunal has gone wrong in law. In some cases the absence of any reasons would indicate that the tribunal had never properly considered the matter (and it must be part of the obligation in law to consider the matter properly) and that the proper thought processes have not been gone through."

71. As I have said, I agree with McCullough J as to the inadequacy of the Committee's stated reasons for their determinations, but I do not agree with his view that they were not so inadequate as to lead to an inference that their decision making process was irrational or otherwise unlawful.

[23] See ***Metropolitan Properties Company (FGC) Limited v. Lannon*** [1969] 1 QB 577, CA, per Danckwerts LJ at 601 Edmund Davies LJ at 603.

72. The Committee's ready recourse in paragraphs 17 and 19 of their reasons to their previous determinations in respect of the subject premises and to their general knowledge of registered rent comparables to support in each case the rents registered by the rent officer is inconsistent with their claimed reliance, in paragraph 21, on appropriately adjusted market rent comparables. As I have said, they do not indicate how they have had regard to their previous determinations, other than to state in paragraph 17 that the landlord had not demonstrated them to be unsound and that they presumed them to have reflected the scarcity element at the time they were made. Nor have they given their workings giving rise to, or identifying, the *"appropriate deductions"* which they say they have made from the market comparable rents they claim to have taken as their starting points. In my view, this goes beyond inadequacy of reasons; it has all the signs of the adoption of an irrational or otherwise unlawful approach to the exercise. It suggests that the Committee have preferred their previous determinations and their unparticularised knowledge of registered rent comparables to the market rent comparables, and they have not adequately explained why, save to indicate that the landlord had not demonstrated that the former were unsound. In short, they appear to have treated the previously determined fair rent of the subject premises and the registered rent comparables as prima facie the closest to the fair rent figures that they had to assess.

OTHER GROUNDS OF APPEAL

73. That leaves a number of other complaints by the landlord.

74. The first is the refusal of the Committee, through the Chairwoman, to have regard to the judgment of Latham J. in Curtis & Susands quashing a decision of the same Committee because the order had not been sealed and an approved copy of the transcript was not available. Whilst I deprecate that refusal, I agree with McCullough J. that in the circumstances, it does not in itself vitiate the Committee's decision. It adds nothing material to that which was already before them from the judgment of Morritt LJ in ***Spath Holme***. Nor is it material to the appeal, the point of which is to give guidance for the re-determination of the matter by a differently constituted committee.

75. Next, the landlord made a number of complaints about the Committee's treatment of the case on scarcity. The only one that deserves mention in this judgment is his suggestion that the Committee wrongly imposed a burden of proof on him to show that there was no actual scarcity. He relied on the opening words of paragraph 14 of the Committee's reasons to the effect that, as he had contended that there was no scarcity, he had to demonstrate it. In my view, there is no merit in this complaint. Section 70(2) requires an assumption of a hypothetical absence of scarcity in the exercise of assessing a fair rent. The landlord sought to neutralise the effect of such an assumption by maintaining that it was the reality and that his market rent comparables reflected that. It seems to me that, however the Committee expressed the matter in paragraph 14, they were entitled to test his case in that respect and to balance the evidence on both sides. They concluded that he had not made out his case because, inter alia, his evidence related only to the immediate locality, not to a broader area as required by ***Metropolitan Property Holdings Ltd. v. Finegold.*** In addition they considered other aspects of his evidence and also material relied upon by the rent officer before finally determining the matter three paragraphs later in paragraph 17. This is an area in which a committee's own knowledge and experience of the locality is of particular value, and I would be reluctant to introduce into the exercise any hard and fast rules of a forensic nature as to where the burden of proof lies.

76. Finally, the landlord complained about the Committee's statement, in paragraph 16 of their reasons, that they had had regard to the conclusion of the rent officer in her report that there was scarcity, a conclusion based on her own market research and data-base which he had not seen. The rent officer had discussed this material with the landlord at a consultation in June 1995 before she registered the rents the subject of the reference, but had refused to show him the data-base material on the ground that it contained confidential information. However, the rent officer did not put the research or data-base material before the Committee and the landlord did not repeat his request to see it at the hearing of the reference. He had access to the rent officer's report to the Committee and to all other material that she put before them and had an opportunity to comment on it, which he did.

77. The landlord now complains that the Committee should not have had regard to the rent officer's report in this respect without considering the primary material on which it was based and without giving him access to that material. I do not consider that the Committee were necessarily wrong in the circumstances in referring to the rent officer's report in the way they did on the issue of scarcity. Such an issue, both as to the presence and degree of scarcity over a broad local area, is not amenable to the same precision of analysis as is the assessment of a market rent for the subject premises. It inevitably turns on an accumulation of knowledge and experience of the pattern and speed of lettings in an area, which is what the rent officer's report in this respect amounted to. It is to be contrasted with the more mechanical exercise of assessing fair rent by reference first to market rent comparables, often in the immediate locality, and as to the valuation of individual differentials and the fixing on allowances for particular disregards. In any event, the rent officer's reported view on this issue was just one of a number of matters on which the Committee relied in concluding that there was scarcity. The landlord had an opportunity to explore her report and test it before the Committee, which he did without seeking, at that stage, to examine the primary material. I would not criticise the Committee's approach in this respect.

78. For the reasons that I have given, I would allow this appeal so as to remit the references for determination by a differently constituted Committee in accordance with the judgments of this Court, and of McCullough J at pages 24D-26E of his judgment.

LORD JUSTICE HIRST: I agree.

LADY JUSTICE BUTLER-SLOSS: I also agree.

Order: Leave to appeal granted; appeal allowed so at to remit the references for determination by a differently constituted Committee in accordance with the judgments of this Court and of McCullough J at pages 24D to 26E of his judgment; costs for the appellant; respondent's application for leave to appeal to the House of Lords refused.

MR JAMES BONNEY QC & JONATHON GAVAGHAN (Instructed by Drewitt Willan, Manchester, M2 5WQ) appeared on behalf of the Appellant
KIM LEWISON QC & JOHN HOBSON (Instructed by The Treasury Solicitor, Queen Anne's Chambers, 28 Broadway, London, SW1H 9JS) appeared on behalf of the First Respondent
The Second Respondent was not present and was not represented
The Third Respondent was not present and was not represented