Broken Hill Pty. Co. Ltd. v Australian Mutual Provident Society

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In the Supreme Court of Victoria, 17 April 1986.

Rent Review. Special Value of Premises to Tenant. Tenant's Fixtures. Comparable Rentals Paid by Sitting Tenants.

Nicholson J: I have before me an action and cross action between the Broken Hill Proprietary Company Limited (BHP) and the Australian Mutual Provident Society (AMP) relating to the building owned by AMP and occupied as to a large part by BHP, known as BHP House situated on the corner of Bourke and William Streets, Melbourne.

The action commenced by BHP was the first in point of time, but nothing turns upon this fact since, when the pleadings are examined, it can be seen that each action is virtually a mirror of the other and the two actions can, for the purposes of my judgment, be treated as one.

The dispute between the parties concerns the proper interpretation of a clause in an agreement made between the parties on 8 December 1971 for the

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management of BHP House. The dispute relates to the fixing of rentals in respect of the portion of the building occupied by BHP which is governed by the clause in question.

Before turning to the clause in detail it is, I think, necessary to deal with the background to and the general nature of the agreements made between the parties in relation to BHP House which are rather more complicated than the usual relationship of landlord and tenant.

Prior to the construction of BHP House, BHP had occupied a much smaller building in Bourke Street near to the present site which, although constructed in the early 1950's had, by the mid 60's, proved to be far too small for BHP's requirements. It therefore became necessary for the company to obtain a new building and, as I understand it, the company decided upon the construction of a building large enough to service its needs for upwards of fifty years. This meant that in the initial stages, such a building would not be fully occupied by BHP and it was envisaged that it would not be so fully occupied for some thirty years.

The company decided to construct a prestigious office building which would incorporate features drawing attention to the company's pre-eminent position as a producer of steel and petroleum. Accordingly, the building, when constructed, featured the use of structural steel and had its own power plant fuelled by natural gas from BHP's petroleum fields.

In order to finance this project, BHP entered into negotiations with AMP which, as Australia's largest life assurance society, devotes substantial funds to the purchase and development of city buildings and the leasing of the same upon a long term basis. AMP itself, shortly prior to the construction of BHP House, had erected a large and significant building directly opposite for its own purposes.

During the time that the building of BHP House was contemplated and almost up to the time that its construction was completed, the evidence disclosed that there were boom economic conditions and a considerable shortage of city office space in Melbourne. Accordingly, the rental market was no more favourable to new tenants contemplating the rental of city office space than to existing tenants faced with rent reviews, and in discussing rents for valuation purposes, the valuers who gave evidence before me said that there was no distinction drawn at that time between rents that would be payable by new tenants and by existing or sitting tenants.

However, it appears that by the time that BHP House became available for rent, the situation had changed dramatically so that, in order to attract new tenants, it became necessary for landlords to offer substantial discounts and incentives which would not subsequently be available to the tenant as a sitting tenant on the occasion of rent reviews.

Therefore, a two tiered rental structure developed which has apparently persisted to this day so that, for valuation purposes it is recognised that rentals available to a new tenant are significantly lower than those available to a sitting tenant. This factor is of significance in the present case because it means that those drafting the 1971 agreements clearly could not have and did not contemplate such a two tiered rental structure.

The substance of the arrangements between the parties in relation to the

building was that of a joint venture over a fifty year period. AMP provided a capital outlay of $27,750,000 for the construction of the building and BHP guaranteed a minimum of 7.75% return per annum which was payable to AMP whether or not such a return was achieved. After provision of running expenses and the 7.75% return, profits over and above that figure were to be shared between the parties in varying proportions dependent upon the extent of the profits.

BHP was the exclusive manager and letting agent of the building and was authorised to let portions of BHP House at rentals no less than an agreed minimum rental and that agreed minimum rental was to be the basis upon which BHP's rental payments to AMP were to be calculated in respect of the portions of the building which it occupied.

BHP was to have the right, but not the obligation, to occupy such portions of BHP House as it desired and, providing that it occupied five floors or more, then BHP was to receive a discount of seven per cent from the negotiated minimum rental after the first year.

In fact, BHP has always occupied more than five floors and has progressively increased its occupancy of the building.

The arrangement between the parties was embodied in three agreements all dated 8 December 1971. These agreements were a management agreement, a building agreement and a deed of indemnity.

It is, I think, unnecessary to refer to the terms of the building agreement or the deed of indemnity. The management agreement substantially determines the rights of the parties over the fifty year period during which it is to run and to it is appended a standard form of lease to be used for all lettings.

The present dispute concerns the interpretation of clause 11 of the management agreement which is in the following terms:

> "(a) The society and the Company shall before BHP House is ready for occupation by tenants and licensees and hirers agree in writing upon the minimum rentals licensing fees or hiring charges per square foot per annum to be charged or made or accounted for by the company for letting licensing or hiring or using parts of BHP House and the basis for calculating the proportionate shares of increases in the rates and cleaning attributable to BHP House which shall be or become payable by tenants and others by way of reimbursement and the fees to be charged for car parking spaces in BHP House.
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> The said rentals licensing fees and hiring charges and the said basis for reimbursement of increases in rates and cleaning attributable to BHP House and the said fees shall be reviewed by and agreed upon in writing between the Society and the Company at or before the end of each successive period calculated from the date of practical completion of BHP House and shall have effect during the period then next ensuing.
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> The period referred to in this sub clause shall in the case of the Company and its subsidiaries and associated companies be a period of five years and in other cases be such period as may be agreed between the parties hereto from time to time but shall not be more than five years.
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> (b) The rentals licence and parking fees and hiring charges payable by the company or by any subsidiary or associated company as provided in clause 5 hereof shall be calculated using unit rates determined in accordance with sub

clause (a) of this clause and in the case of rentals these rates shall be based upon a notional letting to a tenant occupying a single typical whole floor situated in the portion of BHP House concerned reduced by seven per centum.

The Company shall also be liable to pay its proportionate share of increases in rates and cleaning attributable to BHP House as provided in sub clause (a) hereof. The reduction hereinbefore referred to shall apply to the first twelve months of the term and thereafter shall only apply whilst the Company and already subsidiary or associated company occupies at least five whole floors in BHP House.

(c) Should the Society and the Company not be able to reach agreement with relation to the foregoing matters or any of them the same shall be submitted to and determined by arbitration in accordance with clause 16 thereof and with respect to any such arbitration to determine rentals licensing fees parking fees or hiring charges as the case may be the arbitrator is hereby directed to fix the said rentals licensing fees or hiring charges at the levels he considers at the time of arbitration would be obtainable on the market having specific regard in the case of any space in BHP House occupied by or let to or to be occupied by or to be let to the Company or any of its subsidiary or associated companies to the provisions of sub clause (b) of this clause but disregarding in any such case the reduction allowable pursuant to the said sub clause (b) and here (sic) regard if appropriate in his opinion to rentals licensing fees parking fees and hiring charges being obtained in comparable lettings in the City of Melbourne exclusive of tenants fixtures and subject to the provisions of clause 3(c) of the building agreement".

It is also relevant to refer to the terms of clauses 4 and 5 of the management agreement. Clause 4 empowers BHP to let out portions of BHP House on terms in or substantially to the effect of the standard form of lease annexed to the agreement and part (d) of clause 4 provides as follows:

> "The rates of rent or licence or hire fees reserved by or payable under such lease or licence or hire agreement shall not without the consent in writing of the Society be less than or at any time reduced below the minimum rates of rent or licence or hire fees previously agreed upon between the Society and the Company pursuant to clause 11 hereof for the period of five years or such lesser period as may be agreed upon current at the time of granting such lease or licence of hire agreement".

The relevant portion of clause 5 for present purposes is as follows:

> "The power conferred on the Company by the preceding clause hereof shall include the exclusive right and authority at all times and from time to time as the Company sees fit:
>
> (i) to grant to itself or to any of its subsidiary or associated companies leases or licences or hiring agreements of or –
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> (ii) to reserve from letting or licensing or hiring for the use of itself or any of its subsidiary or associated companies the whole or such part or parts of BHP House as it may require to be paid for in each case at rentals fees or charges including parking fees determined in accordance with clause 11 hereof. Any grant or reservation as aforesaid by the Company shall be forthwith advised to the Society in writing".

On 8 December 1972, a certificate of practical completion of the building was granted and BHP went into occupation. It appears that the parties were able to

agree upon an initial minimum rent and upon a minimum rent on the occasion of the first rent review which took place in 1977. They were not, however, able to agree upon a minimum rent for the period of five years commencing 8 December 1982 and this failure to reach agreement has led to these proceedings.

In order to appreciate the nature of the dispute it is, I think, desirable to set out the meanings attributed to clause 11 appearing in the pleadings.

In paragraph 11 of its statement of claim, AMP contends that upon the proper construction of the agreement, the parties or the arbitrator appointed pursuant to clause 11 of the agreement are obliged, or alternatively it is proper to have regard to the following facts and matters:

(a) the effect on the rental of the premises of the fact that BHP has been in occupation of the premises since 8 December 1972;
(b) the effect on the rental of the premises of any improvements carried out by or on behalf of BHP to the premises and the effect of fitting out and finishing the premises to standards acceptable to BHP;
(c) that the premises have special attractions or a special value to BHP or that BHP is particularly in need of the premises;
(d) the manner in which rents of comparable premises in the Central Business District of Melbourne have been reviewed in relation to existing tenants whose leases still have some years to run;
(e) that BHP House is fully occupied and that the premises are already adapted to the needs of BHP;
(f) that BHP does not have to bear the expense or suffer the delay of having fitting out works done anew or incur the cost of removal to other premises;
(g) that BHP's right to occupy the premises still has many years to run;
(h) rents of comparable premises in the Central Business District of Melbourne for existing tenants whose lease has some years to run:
(i) that such rental is reviewed under the agreement at intervals of five years; and
(j) that such rental is to be determined in accordance with the terms of the agreement.

BHP on the other hand asserts that on the proper construction of the management agreement, neither of the parties nor an arbitrator appointed pursuant to clause 11(c) of the agreement are obliged, and it is not proper, to have regard to any of the facts and matters referred to by AMP and further, that it is proper and the parties are obliged to have regard only to evidence derived from rentals obtained on new lettings of empty space in BHP House, or in the case of an arbitrator, if appropriate in his opinion, to rentals obtained in comparable lettings in the City of Melbourne exclusive of tenants' fixtures. Both parties seek declarations accordingly.

It should perhaps be mentioned that pursuant to the agreements, BHP provided all partitions and fittings and AMP paid the capital cost of carpeting the premises. As I have mentioned, BHP also installed particular features such as the energy supply.

I turn now to the substance of the dispute between the parties relating to the construction of clause 11. Mr. Charles argued that in construing clause 11, it was important to remember that it appears in the context of something quite

different to a usual leasing arrangement in relation to a building. He said that the parties were bargaining for something quite different to an ordinary lease. BHP wanted someone to finance the building and AMP wanted a long term investment for the purpose of capital gain and a reliable, solvent and reputable manager to take care of all the management problems associated with the building. In addition, it wanted a guaranteed financial return and a share of the profits.

He pointed out that under the agreement, BHP was not only to manage the property but to keep it in good repair and fully maintained. He said that it was quite clear from the scheme of the agreement that tenants other than BHP were to pay market rentals but that BHP was to occupy a privileged position. He said that this became apparent when one compared the management agreement with the standard form of lease annexed thereto which provided that on the expiration of an outside tenant's term, the landlord may by notice in writing, fix the rent at an amount which in its opinion would be the then current market rent of the premises, and which in the event of dispute was to be fixed by two valuers.

He said that the proper construction of clause 11 was that pursuant to sub clause (a), the parties were to agree upon the minimum rent below which the premises would not be let. He argued that the proper meaning to be ascribed to the term "minimum rent" was such a rent that for practical purposes the rent chargeable to others must equal or exceed it, and that it has a connotation of a base rent, and is thus not the same as a market average or reasonable rental as those words are used in rent review clauses, but must rather be the lowest end of the scale at which premises could be let.

He went on to argue that the proper construction of sub clause (b) was that BHP's rent should be calculated, based upon a notional letting to a new tenant occupying a single floor of open space, and that accordingly, no regard should be paid to the various matters which AMP said the arbitrator should take into account.

He said that it was apparent that although sub clause (c) referred to some concept of a market rent, the sub clause directed the arbitrator to have special regard to the provisions of sub clause (b) in relation to BHP which in turn brought sub clause (a) into play.

On the other hand, Mr. Forsyth contended on behalf of AMP that at the very least the arbitrator was required to proceed upon the basis of a fair market rent by reason of sub clause (c)'s use of the words "obtainable on the market", which he pointed out were equally applicable to arbitrations relating to space occupied by BHP.

He conceded that the arbitrator was required to have specific regard to sub clause (b), but he said that this did not involve the introduction of any concept of a minimum rent of the type relied upon by Mr. Charles if minimum rent meant anything different to fair market rent, which he did not concede was the case.

He argued that all that sub clause (c) required was for the arbitrator to have regard to sub clause (b); that the expression "minimum rental" was referred to only in sub clause (a) and thus only indirectly came to be considered under sub clause (c) and could not operate to qualify the words "obtainable on the market" appearing in sub clause (c).

He also put that the use of the expression "minimum rent" in sub clause (a) was confined to the initial rents which the parties might agree upon at the time that the building was opened. He went on to argue that there was nothing in clause 11 which would operate to preclude an arbitrator from considering all of the matters which AMP said should be taken into account.

He put it that one of the most significant matters that an arbitrator would take into account in arriving at a rental was whether there was in fact a tenant in possession of the premises or whether a new tenancy was contemplated, and he argued that the clear meaning of the clause was that an arbitrator could take into account both types of tenancy in considering the appropriate market rent.

In support of his arguments, he referred to a number of authorities, to some of which I shall refer subsequently. Although these authorities are helpful, it must of course be appreciated that they relate to the construction of particular rent review clauses in particular leases and there are obvious dangers about applying the principles which they espouse without carefully bearing this fact in mind.

In the final analysis, the question before me is one of construction in light of the objective background facts which the law permits me to consider. In particular I take into account the facts relied upon by Mr. Charles that this clause does not appear in a standard lease between landlord and tenant, but rather forms part of an unusual agreement between the parties in which BHP has a considerably greater interest than as a mere tenant.

Nevertheless, I think it must be recognised that clause 11 is a type of rent review clause albeit somewhat different from those normally encountered. In particular the parties have agreed that differences between them should be determined by an arbitrator and in that sense it bears a strong resemblance to normal rent view clauses.

In my opinion, 11(c) offers the key to the question of the appropriate rate at which rentals should be determined. That clause directs the arbitrator to fix the rental at the level he considers at the time of arbitration would be available on the market. If that level be inconsistent with the concept of a minimum rent referred to in sub clause (a), then I consider that it is the clear intention of the parties that the level referred to in sub clause (c) should guide the arbitrator.

It may be that the reference to minimum rentals in sub clause (a) does not mean anything different. It is, I think, arguable that sub clause (a) contains an inference that the minimum rental so fixed is nevertheless a market rent and indeed it seems unlikely that anything to the contrary was intended, for what the clause contemplates is an agreement between the parties as to the level of rental at which the premises will be let to other persons as well as BHP.

It is true that BHP as the agent of AMP would have had an obligation to let the premises at the best rent possible, which might exceed this figure, but nevertheless it is apparent that the minimum rent was intended to be a market rent.

Indeed, the agreement provides that if BHP wishes to let any portion of the premises at a lesser figure than the minimum, then it may only do so with the consent of AMP.

Even if the expression "minimum rental" does bear the meaning contended for by BHP in the sense of being a base rent, I think that there is a further answer

to BHP's contention that it should govern the rate at which BHP's rentals are to be set in the future. It is apparent that at the time the agreement was made no rentals had in fact had been set in relation to BHP's occupation of the building, and clause 11 was drafted with a view to the fixing of the initial rentals as well as subsequent rent reviews.

Sub clause (a) of clause 11 may well have been intended to give BHP at the initial stage the advantage of leasing space at the lowest market rental that would be then available. At that stage the building had no tenants other than BHP which was proposing to occupy a substantial part of it. In such circumstances it would not be surprising if BHP were to receive some initial advantage. It is, however, another question as to whether BHP was to continue to receive that advantage thereafter.

I think that the use of the expression "on the market" in sub clause (c) leads to the inevitable conclusion that it was not. Of course, it still received the advantage conferred by sub clause (b) to which I will turn hereafter. I think, however, that this part of sub clause (a) referring to minimum rentals should be confined to the initial rentals to be charged to BHP, and I think that thereafter it is apparent that the clause contemplates that BHP will pay market rentals subject to the limitations contained in sub clause (b), and the discount provided for in sub clause (b), if appropriate. I would accordingly construe the clause generally as providing that BHP is required to pay rentals equivalent to those obtainable on the market for the portion of BHP House which it occupies from time to time, subject to the limitations to which I have referred.

I now turn to the more difficult question of what limitation should be placed upon the arbitrator's general discretion under sub clause (c) by reason of sub clause (b) of clause 11. Mr. Forsyth advanced the general proposition that the court should be slow to read limitations into the exercise of the discretion of a valuer or arbitrator in the absence of specific words to that effect. In support of this proposition he relied upon the decision of the Full Court in *Karen Lee Nominees Pty. Ltd. v Gollin and Co. Ltd.* [1983] 1 VLR 657, and upon *Email v Robert Gray (Langwarrin) Pty. Ltd.* [1984] VR 16 at 21 in which the court said:

> "In our opinion the parties have clearly bestowed upon the valuer the obligation of determining what circumstances are relevant to the question of fixing a reasonable rental. We do not consider that the court should make a declaration which delineates the circumstances to which the valuer should have regard. The declaration that we are disposed to make is that a reasonable rental means a rental which the valuer considers is reasonable, having regard to all the circumstances which the valuer considers irrelevant. Without our seeking to trespass upon the valuer's territory, we think it goes without saying that the valuer may consider that the market rental represents reasonable rental, and he may wish to take into account the various facts which Gray's counsel submit are relevant. He may take some of it into account and not others. He may have regard to matters which were not mentioned in the discussions before this court. The matter is entirely within the province of the valuer because the parties had so provided. It was said by Mr. Graham that unless the court gave some guidance to a valuer as to what was relevant, the parties would probably be back before the court. It would appear to us that the rent assessment could not be attacked upon the ground that relevant matters have been disregarded or irrelevant matters considered. As the parties have agreed to be bound by the valuer' s assessment they will be bound unless the

> assessment is vitiated by fraud, collusion or mistake." *Karen Lee Nominees Pty. Ltd. v Gollin and Co. Pty. Ltd.* [1983] 1 VR 657 at 670.

I was also referred by Mr. Forsyth to a decision of Beach J in *Capel Services Ltd. v Legal and General Assurance Society Ltd.* (unreported, delivered on 23 October 1984) where his Honour applied the principles set out in the above-mentioned cases and in the course of doing so said:

> "By clause 4(2)(a) of the lease the parties have bestowed upon the valuer or valuers the obligation of determining the fair open market value of the rental of the premises. In such circumstances it is not appropriate for this court to delineate the matters which the valuer or valuers should take into account. To do so would be to trespass on the valuer or valuer's territory."

It seems to me that this principle has obvious relevance to the present case. Nevertheless it is also clear that sub clause (b) does impose limits upon the arbitrator's discretion in relation to the fixing of rents for such portions of the premises as are occupied by BHP. In particular, the sub clause requires the rates to be based upon a notional letting to a tenant occupying a single typical whole floor situated in the portion of BHP House concerned. This, I think, would preclude the valuer from taking into account the fact that the tenant was BHP itself, or that BHP had been in occupation of the premises since 1972, or that the premises had special attractions or special value to BHP or that BHP is "peculiarly in need of the premises, or that the premises are fully occupied and already adopted to the needs of BHP, or that BHP has a right to occupy the premises for many years.

I think that the inclusion of the words "notional letting to a tenant" makes it clear that it was not the party's intention that these matters could be taken into account by a valuer. In this regard, much assistance, I think, is to be gained from the decision of Donaldson J (as he then was) in *FR Evans (Leeds) Ltd. v English Electric Co. Ltd.* (1977) 36 Property and Compensation Reports, 185. In that case the court was considering a rent review clause in relation to unusual premises extending over some sixty acres with buildings providing nearly a million square feet of floor space. It was obviously of unique value to the tenant in possession. the relevant rent review clause provided: "the full yearly market rental for the purpose of this lease shall mean the rent at which the demised premises are worth to be let with vacant possession on the open market as a whole between a willing lessor and a willing lessee for the remainder of the said term outstanding". His Lordship considered that the clause made it clear that both the lessor and the lessee were hypothetical persons or abstractions. In relation to the lessee he said:

> "Similarly in my judgment the willing lessee is an abstraction. A hypothetical person actively seeking premises to fulfil needs which these premises could fulfil. He will take account of similar factors that he too will be unaffected by liquidity problems, governmental or other pressures, to boost or maintain employment in the area and so on. In a word his profile may or may not fit that of the English Electric Co. Ltd. but he is not that company".

His Lordship went on to say at page 191:

> "The negotiations are assumed to be friendly and fair, but subject to that qualification would be conducted in the light of all the bargaining advantages and disadvantages which existed on 1 October 1976. Those advantages and disadvantages are, however, those which have affected the property and any lessee of that property. The existence or absence of rival potential lessees of the property is merely one indication of the balance of advantage or disadvantage, and by no means one which is necessarily decisive. I do not agree that the hypothetical negotiations or higgling of the market place, to use that delightfully archaic phrase which occurs in some of the authorities, are to be conducted on the assumption that if the parties fail to reach agreement on the rent, the hypothetical tenants will be free to occupy two or more smaller properties as an alternative to taking out a lease of the Walton works. The parties will reach agreement and the willing lessee will not take up any of the alternative options. However, in the course of the higgling he will point out to the willing lessor, and the willing lessor will accept, that taking two or more alternative properties as a theoretically available alternative option, the relative advantage or disadvantage of which will be reflected in the rent which is ultimately agreed. In the absence of real higglers, it is for the arbitrator to assess the reality of such an alternative option, its relative advantage or disadvantage and the extent to which the agreed rent would reflect those facts".

His Lordship concluded his general remarks relevant to the present issue by saying:

> "However, I do accept that the appropriateness of the rent is to be judged in the light of all the circumstances of the case, other than those relating to the landlord and tenant as actual juridical persons, and that one of those circumstances is the rental values prevailing in the area. There are, of course, many others. The rent for which each is negotiating is that which is high enough to be acceptable for a willing lessor and low enough to be acceptable to a willing lessee. In the hypothetical life of hypothetical higglers, there is always one rent and never more than one rent which meets this criteria. If the arbitrator is heard to murmur 'Oh, happy hypothetical higglers', this is only too understandable, he has my sympathy".

The present case differs from the one his Lordship was considering in the sense that the office space in question is not unique and it is obvious that there would be other tenants than BHP in the market. However, the decision does, in my opinion, support the construction which I have placed upon sub clause (b) as operating to exclude from the arbitrator's consideration the fact that the premises have any special value to BHP or that BHP is the tenant of them. This is not to say that he could not take into account that the premises might be attractive to a tenant such as BHP, but he could not take into account the fact that BHP was in fact the tenant or the proposed tenant.

I turn now to the vexed question of the two tiered rental structure in light of what I have said. The existence of the structure was unknown to the parties at the time of making the agreement. Mr. Forsyth referred me to a number of cases including *Avon County Council v Alliance Property Co. Ltd.* (1982) 258 Estates Gazette, 118, *Segama MV v Penny Leroy Ltd* (1982) 69 Estates Gazette 384, *Newey v Eyre Ltd. v J Curtis and Son Ltd* (1984) 271 Estates Gazette, 891, and *Ponsford and Ors v HMS Aerosols Ltd* [1979] AC 63, in support of his general proposition that a valuer was entitled to look at rents paid by both new and existing tenants in fixing the appropriate rental.

In particular he relied upon a passage in the judgment of Viscount Dilhorne

who formed part of the majority in the latter case at 76-7 where his Lordship said:

> "Rent review provisions are now commonly included in leases at the instance of lessors to give them some protection against inflation. If they were not included landlords might only be disposed to let for a shorter term. Their object is to secure that in real terms the rent payable does not fall below that initially agreed upon. It was not disputed in this case that that is their main object. In the present case and in many others provision is made for the assessment to be made by an independent surveyor. What has he to do? Surely it is to assess what rent the demised premises would command if let on the terms of the lease and for the period the assessed rent is to cover at the time the assessment falls to be made. That rent may depend to some extent on local factors such as deterioration of the neighbourhood. In assessing it the surveyor will be assessing the reasonable rent that others, not just the sitting tenant, would be prepared to pay for the use and occupation of the premises. He will not consider the tenant's position separately".

In that case, the court was considering a clause which provided for the fixing of a reasonable rent for the demised premises and the dispute concerned whether it was appropriate to take into account improvements installed by the tenant in determining the reasonable rent.

That case was distinguished by the Full Court in *Email Limited v Robert Bray (Langwarrin) Pty. Ltd.* upon the basis that the clause that the Full Court was dealing with did not contain the expression "for the demised premises", and the majority judgment was in any event criticised by the court.

The Full Court made the point that reasonable rent means something quite different from market rent, which would obviously involve an examination of the premises in relation to their marketability.

However this may be, it seems to me that both cases emphasise the point that where a rent obtainable on the market is to be assessed, it is the market which must be examined and the market would include rents payable by continuing tenants as well as new tenants.

Accordingly, I think that Mr. Forsyth is correct in his contention that a valuer in assessing the rental value of these premises would be entitled to look at all facets of the market.

Having said that, however, I consider that having regard to the content of sub clause (b) and to the notional nature of the tenancy involved, the valuer would not be entitled to fix rentals upon the basis of those applicable to a sitting tenant.

Similarly, I do not think that it would be appropriate for him to fix rentals based upon the fact that the notional tenant was a new tenant. It is clear that the agreement never contemplated that the arbitrator would draw any such distinction.

Without trespassing on the function of the arbitrator, it would seem to me that the figure that he would arrive at would ignore special discounts to new tenants in order to attract them into occupation but would similarly ignore loadings which might be attached to the rentals payable by an existing tenant such as taking into account factors of the expense of a move and corresponding inconvenience resulting therefrom.

The arbitrator's task, as Donaldson J pointed out in *F R Evans Leeds v*

English Electric Co. Ltd. is to arrive at one rental for the premises. In doing so, he is perfectly entitled to use the normal valuer's method of examining what he regards as comparable rentals and making such allowances for differing factors as he thinks appropriate. Because of the operation of sub clause (b) however, he is constrained to look at a purely notional or hypothetical situation.

I think that AMP is correct in its contention that an arbitrator is entitled to look at the premises themselves, including improvements carried out by BHP and the general standard in assessing their rental value.

BHP is not, in my opinion, in the position of the tenant in the *Email Ltd.* case, for as the court pointed out in that case the arbitrator's task was to fix a reasonable rental in the circumstances, which was something quite different from a market rental. There is nothing in clause 11 to prevent him from doing so, and indeed sub clause (b) requires the notional valuation exercise to be carried out in respect of the particular single floor of BHP House in question.

Accordingly it is obvious that he must fix rentals upon the basis of the premises themselves in their present form. Because sub clause (c) requires him to exclude tenants fixtures in considering comparable lettings, he would eventually have to make a deduction from the rental arrived at for improvements carried out by GHP, and I did not understand Mr. Forsyth to argue to the contrary, but this does not mean that he would not consider the premises as they exist at present.

I turn now to the specific relief sought by the parties, and in doing so it is, I think, convenient to deal first with the declaration sought by AMP.

It follows from what I have said that I should refuse to make declarations in the terms of a, b, c, e, f and g. As to the remainder, I am not prepared to make a declaration that the arbitrator is bound to take any particular matter into account for the reasons already stated, but I am prepared to make declarations that it is open to an arbitrator to take into account the matters referred to in d, h, i and j of AMP's claim.

So far as the relief claimed by BHP is concerned, I am not prepared to make a declaration in the terms sought, but it is apparent from my reasons that I am prepared to make an appropriate declaration as to the arbitrator's obligation to treat the exercise as a notional one excluding factors personal to BHP. Such a declaration could take the form of stating that it is not open to an arbitrator to take into account the matters referred to in parts a, b, c, e, f and g of AMP's claim, but it may be preferable to leave it to counsel to frame appropriate declarations in that regard for submission to me in the light of my reasons for judgment.

I add that I would be prepared to make a declaration that it is open to an arbitrator to have regard to evidence derived from new lettings of empty space in BHP House and to rentals obtained in comparable lettings exclusive of tenants fixtures, but I would not be prepared to make a declaration in terms which recognised any distinction between the criteria used by the parties to determine rentals by agreement and those used by an arbitrator.