LEGAL DECISION

Superannuation Investments Limited v Woolworths (NZ) Limited *(High Court, Auckland, CL 22/96, 25 September 1996)*

Arbitration — Lease — Rent review — Appeal from umpire's award — Whether face of umpire's award discloses an error of law — Issue estoppel — Whether issue estoppel applies to rent reviews — Base rent — Turnover rent

IN THE HIGH COURT OF AUCKLAND

CL NO. 22/96

AUCKLAND REGISTRY

BETWEEN: SUPERANNUATION INVESTMENTS LIMITED, A DULY INCORPORATED COMPANY HAVING ITS REGISTERED OFFICE AT AUCKLAND AND CARRYING ON BUSINESS AS AN INVESTMENT MANAGER

Plaintiff

AND: WOOLWORTHS (NZ) LIMITED, A DULY INCORPORATED COMPANY HAVING ITS REGISTERED OFFICE AT AUCKLAND AND CARRYING ON BUSINESS AS A RETAILER

Defendant

Hearing: 13 September 1996

Judgment: 25 September 1996

Counsel: RG Simpson and JA Fletcher for plaintiff

Liam McEntegart for Defendant

RESERVED JUDGMENT OF WILLIAMS J

Solicitors:

Bell Gully Buddle Weir, DX CP20509 Auckland, for plaintiff

Simpson Grierson, DX CX10092 Auckland, for Defendant

This is a claim against the award of a Mr Gribble acting as an umpire in a rental review application between Superannuation Investments as sublessor and Woolworths as sublessee. Superannuation Investments claims that there was an error of law on the face of Mr Gribble's award. Alternatively, it claims that the parties are bound by issue estoppel because of the contents of an earlier rent review between these parties conducted by a Mr McGough on 20 December 1993.

Woolworths contends that the award discloses no error of law. It contends further that issue estoppel cannot apply to rent reviews.

The land at 123-127 Lake Road, Northcote in North Shore City is occupied by the North Shore City Council, and has been leased to (now) Superannuation Investments. On 5 February 1992 the land was subleased to Woolworths for a term of 17 years, 1 April 1989 - 31 March 2006. Under the sublease, the Base Rental was initially $332,000pa plus GST payable monthly in advance, the amounts reviewable triennially (and biennially in the last 8 years).

Clause 2.5(a) provided for the rent to be reviewed at those intervals:

> "To a rental that is the total of ... a reviewed Base Rental fixed in the manner set out in clause 7.4 herein; and a Turnover Rental comprising the amount that ... 1.75% of the Lessees gross turnover ... ex-

ceeds the amounts of the reviewed Base Rent for the same Lease Year."

Interest was payable on overdue rental (clause 2.6). The Lessee is required to pay outgoings (clause 2.8) and GST "payable on the Base Rent and the Turnover Rent and all other amounts payable under this Lease" (clause 2.9).

Pursuant to clause 7.1 the Lessee covenanted to pay "*The Base Rent and the Turnover Rent*" monthly in advance in respect of the former and within 60 days of the end of the year in the case of the latter. The Lessee was also required to pay "*all ground rent, rates, taxes ... charges, assessments, duties impositions and fees* ... "and costs of water, energy and alike (clause 7.3).

Clause 7.4(a) relevantly provided:

> "The Base Rent payable under this Lease shall be reviewed at the commencement date of each of the periodic intervals ... to the Market rent for the Premises to be agreed upon ... and failing agreement then such Market Rent as shall be fixed by arbitrators as provided hereunder BUT in no event shall the Base Rent so agreed upon or fixed ever be less than the Base Rental payable for the immediately preceding rental period. "

The procedure for setting the Base Rent was the conventional process of the Lessor giving notice, the Lessee responding and the parties then appointing arbitrators with the arbitrators appointing an umpire.

The Second Schedule to the sublease contained an extensive turnover rental provision to ensure that an accurate account could be kept of the same. Its provisions do not require recital.

The parties and their arbitrators were unable to agree on the Base Rent for the three year period commencing on 1 April 1995 and accordingly appointed Mr Gribble as umpire. In his award dated 15 February 1996 he fixed the Base Rent at $354,547pa plus GST, but, given the ratchet provision in clause 7.4(a), then fixed the Base Rent at $360,000pa, that being the Base Rent payable pursuant to Mr McGough's award. The principal question with which this case is concerned is whether Mr Gribble's award demonstrates on its face that he fell into error of law.

The award itself was brief, but an 8 page annex was attached to it and it was common ground that that was to be regarded as part of the award.

The first section of the annex seemed to be a summary. It noted that Superannuation Investments' arbitrator had contended for a rental of $404,635pa plus GST, while the arbitrator for Woolworths had submitted a figure of $264,400 increased to $360,000 plus GST by the ratchet clause, that lower figure including a deduction described as "*Allowance for wrongly based turnover clause against leasehold rental.*" The material made available to Mr Gribble included Mr McGough's award. In this section, Mr Gribble noted that the ground rent under the headlease was $59,000, reviewable 7 yearly with its 21 year term expiring on 31 December 1999. Mr Gribble noted Woolworths' obligation to pay the rent, outgoings, rates, internal maintenance, insurance ground rent and keep both the interior and exterior of the building in good condition.

He then went on to list agreed matters, lettable area, carparking arrangements, locational advantages and the fact that he had been supplied with turnover figures.

He then went on to list the points of disagreement saying that (p.3)

> "The major point of disagreement related to the impact of the turnover rental requirement and whether it should impact on the assessment of the market rent. "

The umpire then dealt with the turnover rental, noting that Woolworths' arbitrator had

> " ... made an allowance of $20,000pa for the fact that the turnover clause specified a rental of 1.75% of turnover as detailed in clause 2.5 without in his opinion, reflecting the requirement of the lessee to pay ground rental on top of normal outgoings ...
>
> Mr Lawton was of the opinion, supported by the short legal opinion of Simpson Grierson, ... that the obligation to pay a

percentage rent in terms of the provisions of the lease should be taken into account in the rental assessment under the rent review provisions of Clause 7.4 of the document."

The umpire then summarised the views of the arbitrators respectively and Mr McGough, and then expressed his view in the following passage (p6).

"I believe that in arriving at the Market rental for the premises for the three year review period, the parties would consider all lease terms and conditions including the obligation to pay a turnover rental. If, for example, there was an obligation to pay a turnover rental of 5%, and the evidence suggested that the market norm was 2%, then I would expect this factor to be reflected in the agreed Base Rent, ie the base market rent would reflect all of the terms and conditions agreed to in the lease. Unfortunately as detailed earlier in this Annex, there was no evidence provided of the percentage of turnover for other supermarkets on leasehold land where the Lessee was responsible for the payment of the ground rental. If there had been, there would have been a base provided for a direct comparison. The evidence that was presented suggested a rate for freehold properties of 1.5% to 2% and if 2% were accepted as the norm, then it could be argued that 1.75% may well have reflected the obligation of the Lessee to pay the ground rental. However, with other freehold evidence at 1.5%, the 1.75% requirement could appear to be a premium.

In summary, I believe that the parties would when determining the market rent for the subject premises take into account all of the requirements of the lease in determining the Base Rental including the requirement to pay a percentage of turnover as well as ground rental."

The umpire then moved on to review the rental evidence and then expressed his "*Determination*" in the following passage (p8).

"On the basis of my findings in relation to the matters in dispute, and after allowing for factors as detailed above, I assess the market rental for the three year period at $354,547pa plus GST calculated as follows:

2890.25m² @ $155.00/m²
= $155.00/m²

Less
allowance for
carparks $5.00

Ground
rent $20.41

Percentage
rent $6.92 $32.33

$122.67/m²

2890m² @ $122.67/m²
= $354,547

The above rental takes into account the requirement that the Lessee is responsible for the payment of the ground rental."

However, because of the ratchet clause, Mr Gribble fixed the rent at $360,000pa plus GST.

It is to be noted that the allowance of $6.92 per sq m for "*percentage rent*" equals $20,000pa so that it is clear that although Mr Gribble arrived at a different rent per square metre, in essence he accepted the formula for which Woolworths arbitrator had contended.

Because clause 7.4 of the sublease contains the ratchet clause which refers to the Base Rent for the "*immediately preceding rental period*" and because of the claim in issue estoppel, it is next convenient to turn to Mr McGough's award.

On p.2 he made the following points:

"I am satisfied that it is the intention of the parties that I should fix a market rent for the premises. References to other payments by the Lessee in the form of turnover are irrelevant. It so happens that 1.75% of turnover exceeds the market rent for the premises, then the higher alternative will apply. As an opposite, if 1.75% of turnover is less than a market rent for the premises, then the market rent will apply."

On p.4 he noted the contention of Woolworths's arbitrator which again contained deductions for ground rent and turnover rent,

and that for the sublessor which first made no deduction for either and then calculated a rent on 2% and 1.75% of turnover.

Mr McGough then dealt with the question of turnover saying that the requirement was to fix a market rent (p.6):

> "The contract then goes on to say that in the event of 1.75% of turnover exceeding the market rent for the premises, then the alternative will apply. ... The contract between the parties in this case protects the lessor against ... turnover fluctuation and against under-performance."

and concluded (p.7) that

> "When the test is a market rent for the premises, actual or projected turnovers cannot be allowed to overrule the stated intention of the parties."

Then, after analysing a number of other factors included comparable supermarkets, he chose $145 per sq m for a number of stated reasons, none of which related to turnover and awarded $360,000 per annum being 2890.25 sq m @ $145 per sq m less the ground rent.

The first question is whether Mr Gribble's determination contains an error of law on its face.

The authorities demonstrate that the error of law must appear on the face of the award as a matter of "*actual exposition not one of inference only*". (*Sextant Holdings Ltd (in liq) v NZ Railways Corp (1993)* 2 NZ ConvC 191,556, 191,559; *McLaren v Waikato Regional Council* (1993) 1 NZLR 710,715). The interpretation of a contract is normally a question of law, but the courts will not interfere if the parties have submitted that question specifically to arbitration (*Attorney General v Offshore Mining Co Ltd* (1983 NZLR 418, 421). The parties advised that it was accepted that the claimed errors of law in this proceeding were not put to Mr Gribble as specific questions.

Woolworths, however, submitted that there was no error disclosed on the face of Mr Gribble's determination, relying on the decision of the Privy Council in *Champsey Bara & Co v Jivraj Balloo Spinning & Weaving Co Ltd* [1923] AC 480, 487 where the following appears:

> "An error in law on the face of the award means ... that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrators stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."

Superannuation Investments contended that Mr Gribble's determination contained such an error of law on its face because, by making an allowance in the Base Rent not for the Turnover Rent but for the fact that Woolworths was also obliged to pay a Turnover Rent, his determination gave rise to the possibility that the Base Rent could be less than that "*payable for the immediately preceding rental period*". The point was made that where the turnover for the supermarket was such that no Turnover Rental was payable, Superannuation Investments would have been receiving less than the Base Rental fixed by Mr McGough, had it not been for the ratchet clause, because Mr Gribble's Base Rental contained the deduction for the Turnover Rental obligation.

In terms of money, Mr Gribble assessed the Base Rental at $354,547pa which he increased to $360,000 because of the ratchet clause. Had he made no deduction for Woolworths payment of turnover rental, it seems likely that he would have fixed rent at $374,547pa for the three year term, perhaps rounded off to some slightly lesser figure. It follows that this dispute is about a maximum of some $42,000.

In approaching the question whether Mr Gribble fell into error of law making his award, it is convenient to start with the terms of the sublease. They plainly require Woolworths to pay "*A rental that is the total of ... Base Rental and ... Turnover Rental*" plus goods and services tax, ground rent and the other outgoings for which the sublease provides. By stipulating for a turnover rent comprising the amount by which 1.75% of Woolworths annual turnover exceeds the Base Rent, the parties must be taken to have contemplated that in any year when Woolworths

turnover did not exceed that figure, no turnover rent would be payable in addition to the Base Rent, the ground rent and the other outgoings. However, the effect of the ratchet in clause 7.4(a) means that the parties never contemplated that the amount payable by Woolworths could fall below the Base Rent payable in the preceding rental period. The minimum payable by Woolworths under the sublease is the Base Rent plus ground rental, GST and outgoings. The maximum is that sum plus Turnover Rent as defined by clause 2.5(a)(ii).

However, as appears from the pivotal passage in the award earlier cited, Mr Gribble would have fixed a Base Rent below Mr McGough's Base Rent had the terms of the lease permitted it, by deducting the equivalent of $20,000pa for the fact that Woolworths had to pay the turnover rent. But he then brought his calculated figure up to Mr McGough's Base Rent. That result was arrived at by the application of valuation principles to Mr Gribble's assessment, not as a result of his misconstruing the sublease. On the contrary, he complied with the sublease by finding the parties and himself bound by the ratchet and Mr McGough's Base Rent. Put another way, if the application of valuation principles to the determination of the Base Rent for a sublease containing terms such as this requires a deduction from what would otherwise have been the Base Rent for the fact that the sublease contains a provision requiring the payment of turnover rental in certain circumstances over and above the Base Rent, but with the Base Rent providing a floor to the calculation, then it does not appear that an umpire falls into error of law if he makes proper allowance in accordance with those valuation principles for the fact that turnover rental may be payable, provided the result does not offend against the terms of the sublease itself.

Put another way again, this is not a case where Mr Gribble applied the wrong legal principles, but one where he applied principles which are apparently accepted by valuers in relation to the assessment of Base Rent in subleased premises where turnover rent may also be payable and, having done so, then applied the terms of the lease to the result.

This may be contrasted with the case where what was held to be an erroneous approach in law was applied by an arbitrator to the assessment of rent under a ground lease (*Auckland CC v SEG Holdings Ltd* 7/5/96, Williams J, HC Auckland CP435/95) but to be in accordance with the authorities to which counsel drew attention, particularly *Feltex International v JBL Consolidated Ltd* (1988) 1 NZLR 668 and *Sextant Holdings Ltd* (Supra). In Feltex the award was of an "*annual rental*" reviewable every five years and the arbitrator had regard to rent payable under leases of comparable properties held on differing terms, mainly three years. An application to set aside the award for error of law on the face of the record was dismissed. Henry J held that the arbitrator should have regard to all the terms of the lease, to the fact that the lessee had the benefit of a five year term without rent increases and to the fact that (672) "*It is proper valuation practice, and in accordance with legal principle ... to have regard to comparable properties.*" He declined to accept a submission that the arbitrator had in effect, varied the terms of the lease. In *Sextant Holdings* the lease required the assessment to be of the "*annual rent*" of the land on a five year term. The Court of Appeal made it clear that that required the application of ordinary principles of valuation.

The Court has already held that it appears that Mr Gribble applied the ordinary principles of valuation. In this sublease the parties did not encumber themselves or their arbitrators or umpire, with an obligation to set "*fair*" or "*reasonable*" rent, but simply to set "*market rent*". Mr Gribble set "*market rent*" by the application of acknowledged valuation principles and in this Court's view, there is no error of law on the face of the record.

Turning to the second cause of action, although the parties were agreed that issue estoppel, or estoppel *per rem judicatum* may arise in arbitration proceedings (*Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630, 643), they were at odds as to

whether it applies in rent reviews.

The elements of that branch of estoppel *per rem judicatam* now generally called issue estoppel are, for New Zealand, as set out in the decision of the Court of Appeal in *Shiels v Blakeley* [1986] 2 NZLR 262 (as recently reviewed in *X v Y* 1996 2 NZLR 196, 201).

The elements of issue estoppel appear in the judgment of the Court (at p.266) [in *Shiels*] in the following terms:

> "The first contention advanced ... in support of the application to strike out the new action is that Mr Shiels is estopped by the judgment in the previous action ... . This is a plea of estoppel per rem judicatam. The rule is, so far as material to the present case, that where a final judicial decision has been pronounced by a New Zealand judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, is estopped in any subsequent litigation from disputing or questioning the decision on the merits. See Spencer Bower and Turner, *Res Judicata* (2nd ed, 1969) para 9. The reasons for the existence of the rule are not in doubt. They were stated by Lord Blackburn in *Lockyer v Ferryman* (1877) 2 App Cas 519, 530:
>
> 'The object of the rule of res judicata is always put upon two grounds — the one public policy, that it is in the interest of the State that there should be an end of litigation, and the other, the hardship on the individual, that he should be vexed twice for the same cause.'

In one branch of the law of res judicata the cause of action put in suit in the first proceeding passes into judgment so as no longer to have an independent existence. There is both a merger of the cause of action in the judgment and a cause of action estoppel. While in the case of what is commonly called issue estoppel a particular matter of fact or law in issue in the second proceeding is held to have been decided by the prior judgment but may or may not be determinative of the second proceeding.

... Alternatively, ... as defined by Professor Rickett in his article "*The Travails of Issue Estoppel*" (1992) 22 VUWLR 115, 116 (acknowledged by him as drawn from Mathieson, *Cross On Evidence* (4th NZ ed, 1989) (p.315-321, paras 12.8 - 12.12): ...

> 'It is generally accepted that to found issue estoppel, the following technical requirements must be established:
>
> (i) a final judgment;
>
> (ii) between the same parties and/or their privies;
>
> (iii) litigating in the same capacity;
>
> (iv) on the same issue;
>
> (v) which must be pleaded.'"

It is also instructive to bear in mind the careful distinction drawn by Diplock LJ in *Thoday v Thoday* [1964] p.181, 197-198 (adopted by the House of Lords in *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC273, 295-6) where the following appears:

> "The particular type of estoppel relied upon by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species. The first species, which I will call "cause of action estoppel" is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, ie, judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule of public policy

expressed in the Latin maxim "Nemo debet bis vexari pro una et eadem causa." In this application of the maxim "casa" bears its literal Latin meaning. The second species, which I will call "issue estoppel," is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

Applying those authorities to this case, it is clear that Mr McGough's award was a final decision between the same parties or their privies, litigating in the same capacity and this issue was pleaded in this proceeding. The sole remaining question is whether Mr McGough's method of determining the Base Rent was directly in issue and was the same issue as Mr Gribble's method.

In considering that question, it is necessary to bear in mind that Mr Gribble's approach was to make an allowance against his determination of the Base Rent, not for the turnover rent which may have been justified by Woolworths turnover, but for the fact that, under the terms of the lease, Woolworths may be required to pay Turnover Rent. That, Mr Gribble held, was a fact which the parties would consider in determining the level of Base Rent.

When that source of possible confusion is understood, the matter becomes relatively straightforward. On p.2 of his award Mr McGough expressly held that he was required to fix Market Rent and that, "*references to other payments by the lessee in the form of turnover are irrelevant*". His review of the arbitrators' approach to the matter made it clear that Woolworths' arbitrator was contending for an allowance against Base Rent for what would appeared to have been not the fact that turnover rent may have been payable, but for the turnover rent itself. Mr McGough then turned to the recognition, if any, to be ascribed to turnover but in the passage earlier recounted held that both arbitrators had "*missed the point*" in interpreting the contract and reiterated that the "*requirement is to fix market rent for the premises*". Although the contract was designed to protect the lessor against turnover fluctuations, Mr McGough concluded (p.7) that "*When the test is a market rent ... actual or projected turnovers cannot be allowed to overrule the stated intention of the parties*" and paid little attention to the arbitrators' respective approaches. His conclusion and the rent which he fixed made no allowance in the Base Rent for the fact that a turnover rent may be payable.

The issue before both Messrs McGough and Gribble was the fixing of the Market Rent which was the equivalent of Base Rent. To that extent it was the same issue before both umpires. However, in this court's view, the method by which the umpires achieved the resolution of that issue was a matter for them. In terms of *Thoday*, given the function vested by the parties in the umpire, the condition to be fulfilled in order for Superannuation Investments to establish this cause of action is the determination of the Market Rent, ie Base Rent, but the method by which that determination was achieved is not fundamental to the cause of action and, given the function of the umpire, is not a requirement common to both awards. Further,

it needs to be borne in mind that the parties have themselves contemplated regular rent arbitrations. The parties must therefore have expected that each umpire in fulfilling his or her arbitral function would assess the evidence presented, and apply their own competence in reaching their individual decisions. Each was a separate determination under the sublease. The sublease does not require the umpires to follow the same valuation methodology.

It follows that the condition which attached to the umpires' determination in this matter were not the same and the methods used by them were not fundamental to their decision. Accordingly no issue estoppel arises to preclude Woolworths relying on a rental valuation determined by an umpire by methods different from that employed by another umpire on an earlier determination.

At bottom, this is a claim where an earlier umpire accepted a sublessor's submissions as to the proper valuation method to follow in setting the Base Rent for the premises, but the sublessor was unsuccessful in persuading a later umpire that that was the correct valuation method to follow. In this court's view, neither error of law nor issue estoppel arises out of those circumstances.

The plaintiff's case is accordingly dismissed.

If the parties are unable to agree on costs, counsel may submit memoranda, that for the respondent being filed within 21 days of delivery of this judgment and that for the plaintiff being filed within 35 days of that date, with counsel in each case certifying, if they think it appropriate so to do, that the Court may determine the question of costs without the necessity for a further hearing.