IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV.2005-404-84

UNDER	the Arbitration Act 1996
BETWEEN	ALMA CAUDWELL, DAVID TE HORIHANGANUI WHATA, ALEXANDER KAMETA AND KEITA KATHERINE EMERY ALL OF ROTORUA, AS TRUSTEES OF THE HAUMINGI NO.3 TRUST Plaintiff
AND	RAYMOND AUBREY GOSLING of Rotorua, Retired Real Estate Agent Defendant

Hearing: 29 April 2005

Appearances: D F Dugdale and G J Dennett for plaintiffs
R T Fenton for defendant

Judgment: 9 May 2005

JUDGMENT OF WILLIAMS J

In accordance with r 540(4) of the High Court Rules I direct that the Registrar endorse this judgment with the delivery time of... **3:45pm** ... on the ... 9th ... day of ...**May... 2005.**

Solicitors:
Dennets, Rotorua for plaintiffs
Fenton McFadden, Te Puke, for defendant

Copy for:
Donald F Dugdale, P O Box 46281, Auckland, for plaintiffs

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Issues

[1] On 22 October and 10 December 2004 Mr P J Trapski sitting as arbitrator respectively published rental and costs awards relating to disputes between the plaintiff lessors in this proceeding (trustees of Haumingi No.3 Trust) and the defendant, Mr Gosling, as lessee.

[2] The trustees of the Haumingi No.3 Trust issued these proceedings in the Commercial List on 11 January 2005 pursuant to the Judicature Act 1908 s 24B alleging the arbitrator breached the rules of natural justice in making his awards and seeking they be set aside.

[3] Mr Gosling denies the arbitral Tribunal breached natural justice and opposes setting aside though, as an alternative, should the Tribunal be found to have been in breach, suggests remitting the awards to the Tribunal for correction in accordance with the Court's directions.

Breaches of Natural Justice Alleged

[4] The trustees say the Tribunal breached natural justice in the following three respects :

a) In allegedly treating itself and the parties as bound by findings of fact in an award published by Hon Sir David Tompkins QC on 18 August 2003 in another rental arbitration in the same general area (the Whangamoa Award) or regarded that award as relevant and admissible in the award in question.

b) Giving weight to expressions of discontent expressed by six other lessees from the Haumingi No.3 Trust.

c) After the conclusion of the hearing and without giving the parties an opportunity to comment, making investigations into a matter which

was relevant to the arbitration and relying on those investigations in the awards.

Lease

[5] All the properties discussed in the award under review and in nearly all the other awards mentioned in this judgment are on the shores of Lake Rotoiti. The Haumingi No.3 Trust land is at what is called Gisborne Point on the southern shore.

[6] The lease in question was dated 14 November 1997. The original lessee was a Mr Brownrigg but he sold the land to Mr Gosling in early 2000. The land is Lot 6 on DP33125 (CT.34A/1) and the term of the lease is 25 years from 1 June 1998 with a right of renewal for a further 25 years. The initial rent was $8,500 pa plus GST reviewable quinquennially (cl 9). It was not in question that the rental review machinery in cl 9 was complied with and that what the Tribunal was required to set was the "fair current market rent of the leased land at the rent review date". That means, in terms *Granadilla Ltd v Berben* (1999) 4 NZConvC 192,963, 192,966 :

> [6] ... the question is not so much what rental would give the lessor proper interest upon the value of the land but, rather, what rental would a prudent lessee give for the land for the term and subject to the conditions of the lease (*Ziman v Auckland Grammar School Board* [1929] GLR 208). In the application of this test or standard the rent is to be determined on the basis of the open market – a rent which is fair for the premises. What would the hypothetical prudent lessee pay for these particular premises available for the term for which they are available to the actual lessee and on the lease terms and conditions (other than rent) which are to be applicable to the actual lease? ...
>
> [7] Accordingly, the valuer is to be concerned only with matters which would affect the mind and ultimately the judgment of the prudent lessee in making an offer of rental to the lessor. It is the motives which would inspire such a hypothetical person, willing but not anxious, which are relevant. They include of course a consideration of the use to which the lessee may put the premises consistently with any restriction in the lease or the District Plan. Looking at the matter from the hypothetical willing but not anxious lessor's perspective, it is what that party can reasonably expect to be offered which must be assessed, not what that party would like to receive (*Wellington City Council v National Bank of New Zealand Properties Ltd* [1970] NZLR 660 (CA)). In the *Wellington City* case Turner J, in this Court (at p 670) commented helpfully, if somewhat apologetically, upon the economics of rent fixing in the open market. He observed that the amount which tenants are willing to pay, not the return to lessors on their investment, is the factor which, economically speaking, determines rental. "The level of rent is fixed, according to economists, purely by the margin of advantage

> which the given land enjoys over marginal land." Even when no other comparable property is available, Turner J said, so that "rent may be regarded as similar to the price of a monopoly ... it is demand which ultimately exclusively determines the price level." Whilst accepting the validity of this position, it is necessary to add the qualification that in practice evidence of comparable rental arrangements may not be available or those ground rents which can be found may themselves have been set by a different method. In the absence of such evidence the valuer necessarily has to proceed by an approach which determines from comparable recent transactions a market value for the property and applies to it a percentage appropriate to the circumstances to arrive at a figure for the rental to be paid. A perusal of relevant decisions suggests that because relatively few new long-term ground rent leases are established, this approach may have become the predominant method of fixing ground rents on renewals of perpetual leases. The umpire called it the traditional approach.

Course of Arbitration

[7] The Court did not have the notes of evidence or record of the arbitration proceedings before it but the award said at the initial hearing on 30 July 2004 Mr McDowell, a valuer, gave evidence on behalf of the Haumingi No.3 Trust and another valuer, a Mr Ferguson, gave evidence for Mr Gosling. Of some importance to this matter, as part of his evidence Mr McDowell produced an award made by a Mr Parker on 2 December 2002 in relation to two other properties owned by the Haumingi No.3 Trust, lots leased to Messrs Brownrigg and Liggins, an award followed by Mr McDowell in his rental assessment for the next eight Haumingi sections. Six of those lessees, according to Mr McDowell accepted rentals on the basis of 4.75% of the unimproved value of the land. Mr McDowell then put the Whangamoa Award in evidence. That set rentals for thirty lots at Whangamoa, also on Lake Rotoiti. The Whangamoa Award discussed the Brownrigg and Liggins award at Haumingi plus rental awards for two sections at Haroharo and two others at Okere Falls.

[8] On 2 August 2004 the Tribunal emailed the parties asking for additional information about sales trends of property at Lake Rotoiti in the period 2001-04.

[9] Mr McDowell provided that information on 4 August and there was then a further hearing on 5 August at which Mr McDowell was re-called, another valuer, a Mr Townsend, completed evidence he had commenced on 30 July and Mr Gosling

and another Haumingi lessee, Ms Briars, gave evidence following which submissions were presented.

Rent Award

[10] The Award began by noting the trustees owned 11 residential sections at Gisborne Point on the southern shore of Lake Rotoiti, nine of which were on the lake side with the remaining two a section further back behind the lake shore sections. Mr Gosling's section is one of those fronting the lake.

[11] The review procedure was triggered by a rent review notice from the trustees dated 10 June 2003 specifying the new rent for lot 6 of $14,962.50 pa.

[12] After describing the Gisborne Point development, its zoning, relevant lease terms and citing *Granadilla* the Tribunal's conclusions on the correct approach to follow was in the following terms :

> ... it is generally accepted that there are two recognised methods for assessing the current market rent of land excluding any improvements –
>
> (i) the "classical method" of comparing the subject property with comparable properties where ground rents have been fixed by the market, so that the ground rent of a particular property is arrived at after making any adjustments to the rent of comparable properties by allowing for differences in those properties, their lease terms, planning considerations, available uses, location, size, time differences and the like. This method, as has been said in *Modick* [*R C v Mahoney* [1992] 1 NZLR 150] preferably uses freely negotiated rents on new lettings as the market indicators to arrive at the current market rent but also allows rents on renewal fixed by agreement or by arbitration to be indicators of the market rent, albeit not as persuasive as freely negotiated rents on new leases.
>
> (ii) The "traditional method" of assessing the rent as a percentage of the unimproved freehold value of the land, a value that should be arrived at having regard to sales of comparable freehold land with adjustments that take account of differences between the subject land and the comparable land. It is recognised that comparable sales of unimproved land, that is land in its natural state, will be rare so that to be comparable, sales may need to be adjusted to take account of the respect in which the land is not in its natural state and that the percentage to be applied will differ according to such factors as the term, rights of renewal, frequency of rent

reviews, right of compensation for improvements and other lease terms.

> But of these two methods there can be no doubt that the classical method is to be preferred, if it is feasible to use it – if there are appropriate comparable properties where ground leases have been fixed by the market and there are sufficient similarities between these properties and the subject property.

[13] The Tribunal then discussed the rental history of the Haumingi land including the initial rents in 1996-98 and the percentage Mr Gosling's initial rent bore to the land value by comparison with some of the Whangamoa rents. After reviewing the sales history, including those for Brownrigg and Liggins, Mr McDowell's proposed rent and the lessees' objections on a number of grounds - principally that the trustees were seeking to fix rent both by accepting the land's increase in rateable value which would produce rental increases in any case but also seeking to increase the percentage return from 2.5% to 5.5% - the Tribunal then dealt with the Parker arbitration, including reference to the Whangamoa sections. He noted Mr Parker took 4.75% as the appropriate rate of return for Brownrigg and Liggins and Mr McDowell had chosen 4.75% in his rent review notice for Mr Gosling.

[14] Over the next 13 paragraphs of the award the Tribunal dealt in detail with the Whangamoa Award. Since this section of the award is that which forms the subject of the first claimed breach of natural justice, it is pertinent to note that, speaking of the Whangamoa Award, the Tribunal said :

> "The determination made in that arbitration had a major effect on the methodology of reviewing rents of leased land generally in the Rotorua area and in this arbitration."

[15] The Tribunal then discussed the circumstances giving rise to the Whangamoa Award, variations between the percentage return claimed and those settled, other factors taken into account by Sir David Tompkins, other valuation evidence and evidence given to that arbitration by three lessees, particularly of efforts to sell their leases.

[16] The Tribunal then summarised Mr McDowell's evidence before him. It asserted a lack of directly comparable rental evidence thus leading to his adoption of a percentage approach. He had included detailed reference to a number of sites

around Lakes Rotorua, Rotoiti - including Whangamoa - and Taupo. The Tribunal recounted the trustees' explanation for the figures in the rent review notices.

[17] The Tribunal then went on to discuss the views of the Haumingi No.3 Trust lessees. Since that section is one of those on which the trustees principally relied in support of the second claimed breach of natural justice, it is appropriate to cite the passage. It reads :

> I am told that six of those eight lessees [from the Haumingi No.3 Trust] accepted the new rent proposed in the rent review notices. If that information was to indicate in some way that this was the action of prudent lessees accepting the new rent proposed; of willing but not anxious lessees taking a ground rent that reasonable but prudent lessees thought proper to give for land and lease terms that were similar or comparable to Gosling's, then I must reject that proposition.
>
> In the first place I bear in mind the caution of Cooke P in *Modick* (supra) that figures fixed by arbitration or rent reviews as between "captive" parties are not necessarily a reliable guide; that they do not represent the unfettered play of market forces but rather a valuer's view of an arbitrator's assessment of what market forces should produce, a caution that has been proved to be all too true in this particular instance. For I have been fortunate to receive evidence, in one way or another, from all but one of those lessees and their situations truly reflect their captive position. But secondly their evidence would seem to indicate clearly that they entirely reject any suggestion that they have been prudent or that they are happy or contented with the decision or their lot such that I now review and record the evidence that has been so presented.

[18] As indicated, the Tribunal considered the evidence from the other Haumingi lessees, particularly citing from correspondence with the trustees expressing the lessees' frustration and annoyance at the rent review process they had undergone and difficulties several had in trying to sell their leases. The award also dealt with correspondence between the trustees and the Haumingi Lessees Group before turning to Mr Gosling's evidence. That evidence, too, relied heavily on the Whangamoa and Parker Awards and their comparability with his position.

[19] Specifically with reference to Mr Gosling's position, the Tribunal noted his lengthy involvement in Rotorua real estate and in Rotoiti and his feeling forced to rent his home in early 2004 to meet his Haumingi lease obligations.

[20] Both with reference to the Gosling dispute but with some reference back to the first claimed breach of the rules of natural justice, the Tribunal commented on Mr McDowell's evidence saying :

> The methodology that McDowell adopted to set the new rents for the [Haumingi] rent review notices and the Trustees' justification of that assessment were effectively debunked in the subsequent Whangamoa arbitration in August 2003 as not being in accordance with the principles that had so consistently been laid for setting "market rents".
>
> But in any case I am far from satisfied that the leasehold properties at Hinehopu can in any way be regarded as comparable with the Trustees' leasehold properties, largely for the reasons set out in McDowell's own description of that land and more particularly when there are other properties that are much more directly comparable.
>
> As for the other properties at Rotoma and Okere Falls, and maybe the Pukeroa Trust and Rotorua District Council properties, it seems that they have their own formula for review of rent – something other than the formula of "fair current market rent" as is required for the Trustees' leases.
>
> But in spite of his initial view that there was a lack of any directly comparable rental evidence McDowell then went on , in his evidence, to analyse the Haroharo leases on State Highway 30. I deal with those comparisons later as I consider that to be the correct approach.

[21] He then turned to Mr Townsend's evidence for the trustees, divided by the valuer into three categories of open market and new leasings, reviewed rents around Lake Rotoiti and reviewed rents at Gisborne Point. The first category also considered the Haroharo leasings to Messrs Couch and Freedale, properties at Okere Falls leased by Messrs Cornes and Payne, all of which were considered in the Whangamoa Award. Mr Townsend then dealt with the Whangamoa sites at some length, the Hinehopu rents which were settled and the eight Haumingi sites. The Tribunal noted that Mr Townsend's assessment was unsupported by reasons and that he had "real difficulty in concluding that Townsend's assessment in any way complies with the principles he acknowledged", particularly through the absence of necessary adjustments in considering comparable leasings.

[22] Again of relevance to the first claimed breach of the rules of natural justice, the Tribunal, under the heading "Comparable Rentals", considered the "four properties that were regarded as comparables in the Whangamoa arbitration." Each was described in detail. Mr Dugdale, leading counsel for the trustees, was correct in

saying that the Tribunal's description of three of those properties, Messrs Cornes, Payne and Couch, were descriptions taken almost verbatim from the Whangamoa Award including citations from valuation evidence of Mr Jensen in relation to them. However, at least in relation to the Cornes and Payne properties, the Tribunal noted :

> "Both of these properties are indeed inferior to the Gosling property but they are in my view comparable to the extent that they both provide a base of recent, new lakeside lettings but two years earlier from which adjustments can be made for time, area – they are half the size of Gosling's – lake frontage and fronting onto the state highway. Using the traditional approach they certainly indicate something more equating to 2% of the unimproved land value than 4.75%."

The Tribunal then considered the Haroharo properties and concluded those rents were freely negotiated on the open market.

[23] He then recorded Mr McDowell's detailed comparison between the Couch and Freedale sites on the one hand and Mr Gosling's on the other to conclude :

> "I am of the view that the Couch and Freedale sites are indeed closely comparable with the Gosling site."

despite differences, particularly the proximity of a stream on the Couch boundary and greater lake frontages. His reasons for taking the view that the McDowell assessment was incorrect included the difference in time between the Couch and Freedale assessments on the one hand and the Gosling assessment on the other. That led him to say that :

> "Time is somewhat heavy especially when I take account of the water quality controversy".

[24] That led into a discussion under the heading the "Rotorua Lakes" which is the basis of the third claimed breach of the rules of natural justice because, at the commencement of that section, the Tribunal cited from an Environment Bay of Plenty/Bay of Plenty Regional Council publication "Bay Trends 2004" describing the Rotorua Lakes and, more specifically, the deteriorating water quality of Rotoiti. He continued by saying that "my investigations" showed acceleration of the deterioration of Rotoiti water and the algal bloom problem from which it and other Rotorua lakes had suffered. He then summarised Mr McDowell's evidence on the topic as to increasing sales problems for lake properties. He also considered

comments in the Whangamoa Award about lake water quality and concluded that a number of Mr McDowell's comments about that topic were inapplicable to Gisborne Point and Mr Gosling's property in particular. He said the "question of the quality of the lake's water was raised by Gosling as being a matter of considerable importance and one that did affect the value of the properties", a view the Tribunal accepted as affecting sale prices. On this topic, the Tribunal concluded :

> In ascertaining the matters that would affect the mind and judgment of the prudent lessee in making an offer of rental to the Trustees for lot 6 I am unable to dismiss from my mind the dramatic and well publicised deterioration in the quality of Rotoiti's water and in this respect I find Townsend's views more acceptable than the somewhat more dismissive views expressed by McDowell.

and determined :

> In my view a prudent lessee – a willing but not anxious lessee – of lot 6 would firstly be appalled at the suggestion of a rent increase of 76% in five years and would simply hail that as grossly unfair. But that lessee, expecting to pay an increased rent over that period, would then have regard to what was being paid in the market place by other lessees of other comparable land and would in the course of negotiating and discussing with it's [sic] lessor make appropriate adjustments to those comparable rents and settle with the lessor for a rent of $11,250 per annum for the five year period commencing 1 June 2003 on the terms set out in the Gosling lease and that could well accord with a checking of comparable returns being obtained by other prudent lessors of comparable land around Rotoiti through market rents.
>
> On that basis I determine that the fair current market rent of lot 6 as at 1 April 2003 is $11,250 per annum and I award accordingly.

Costs award

[25] In the costs award delivered on 10 December 2004, the Tribunal summarised the opposing submissions, the fact Mr Gosling had been successful in the arbitration, gave reasons for concluding that costs should follow the event and held the trustees were entitled to rely on the views of a registered valuer but said "the valuer declined to use the long-endorsed classical method of assessing" rent but "persisted in seeking for the trustees a rent that would give them proper interest on the current value of their land" an approach only justifiable where there were no comparable rents. He said, in a passage on which Mr Dugdale relied in relation to the second claimed breach of the rules of natural justice, that :

> He [Mr Gosling] was entitled to proffer himself, and his fellow lessees, as prudent lessees, and to suggest that their views were appropriate to the question in hand. More particularly Gosling was entitled to offer his own particular knowledge and experience as a real estate agent in the area in resolving the question that faced him as lessee and the Trustees as lessor.

[26] Costs of $12,750 were awarded to Mr Gosling.

Submissions and Discussion

[27] Mr Dugdale noted that the only pleaded basis on which the trustees sought recourse against the Award was for breach of natural justice (Arbitration Act 1996 First Schedule Art 34(2)(b)(ii) (6)(b)) and what natural justice requires, as far as is relevant to this matter, is as appears in *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452, 463 :

> ... (b) The detailed demands of natural justice in a given case turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of arbitrators known to have special expertise. ...
>
> ... (e) In the absence of express or implied agreement to the contrary, the arbitrator will normally be precluded from taking into account evidence of argument extraneous to the hearing without giving the parties further notice and the opportunity to respond.

(See also *Methanex Motunui Ltd v Spellman* [2004] 1 NZLR 95, 134 para [149]).

[28] The requirements of natural justice for those exercising quasi-judicial functions meant, Mr Dugdale submitted, their factual conclusions must be based on logically probative evidence (*R v Deputy Industrial Injuries Commissioner ex parte Moore* [1965] 1 QB 456, 488; *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662, 671). The public policy requirement of Art.34 imposes a high threshold rather similar to substantial miscarriage of justice (*Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554, 570 para [84]).

[29] Mr Dugdale encapsulated the claimed breaches of the rules of natural justice as :

a) Whether an arbitrator deciding contested issues of fact may rely on findings of fact in an earlier award to which those involved in the later arbitration were not parties.

b) Whether an arbitrator may allow his judgment to be influenced by assertions by lessees who are not parties to the arbitration of discontent concerning their leases.

c) The extent to which an arbitrator may carry out investigations without affording the parties an opportunity to comment.

[30] In criticising the extent to which the Tribunal, in Mr Dugdale's submission, relied on the Whangamoa Award, he pointed to the fact neither Messrs Gamby nor Jensen gave evidence at the Gosling arbitration and no copy of their evidence was produced yet, despite that, the Tribunal said the Whangamoa Award had had a "major effect" on rent reviews in Rotorua "and in this arbitration". He was also critical of the Tribunal's description of Mr McDowell's approach as having been "effectively debunked" in the Whangamoa Award.

[31] Before turning to a detailed consideration of each of the claimed breaches of the rules of natural justice, it should be recalled that this was an arbitration, not a Court proceeding, by an experienced former Judge chosen by the parties to adjudicate on their disputes pursuant to the Arbitration Act 1996. Accordingly the Tribunal had all the powers appearing in the Act and its Schedules including the power to determine the rules of procedure including the admissibility, relevance, materiality and weight of any evidence (First Schedule Art 19(2)), the obligation, later considered in greater detail, to communicate evidentiary documents on which the Tribunal might rely to the parties (First Schedule Art 24(3)) and all powers conferred on the Tribunal by Art 3 of the Second Schedule relating to conduct of the proceedings including the right to adopt inquisitorial processes and draw on the Tribunal's own knowledge and expertise. Those powers and obligations must be given due weight and should not be read down in considering the trustees' claims that the Tribunal breached the rules of natural justice.

First Claimed Breach of the Rules of Natural Justice

[32] Mr Dugdale submitted the Tribunal fell into error in relation to the first claimed breach of the rules of natural justice, by basing his conclusion, indeed effectively adopting as binding, the Whangamoa Award conclusions as to the threshold issue: whether there were sufficient comparable lettings to justify adoption of the classical method or whether the traditional approach of deriving an appropriate percentage return on the value of the properties was correct. He relied on Sutton and Gill: *Russell on Arbitration* 22nd ed 2003 para 6-210 p2129 where the learned authors observed that :

> Save where a third party agrees to be bound by it, an award is generally only effective as regards the parties to it and persons claiming through or under them. It cannot generally be relied on in proceedings involving a third party as evidence either of the facts found or of reputation.
>
> (References to supporting authority omitted)

[33] That particularly applied, Mr Dugdale submitted, in rent arbitrations because, as it was put in *Land Securities plc v Westminster City Council* [1993] 4 All ER 124 126 holding an arbitrator's award inadmissible in evidence in another rent review arbitration relating to a comparable property, "an arbitration award ... is an arbitrator's opinion ... of the rental at which the premises could reasonably have been let" but "the letting is hypothetical not real" and is accordingly "not direct evidence of what was happening in the market".

[34] However, he very properly brought to the Court's attention that the law in the United Kingdom and in New Zealand may have diverged somewhat on this issue since in *Modick* (supra at 155), a rent review case, Cooke P held :

> The question is what figure would notionally be agreed upon by the parties, acting freely and adequately informed. Figures fixed by arbitration or rent reviews as between captive parties are not necessarily a reliable guide, since they do not represent the unfettered play of market forces, but rather the arbitrator's assessment (assuming that he has applied himself to the task correctly) of what market forces should produce. It is only a freely negotiated rent on a new letting that can confidently be taken to be truly comparable, provided of course that there are also sufficient similarities in site and otherwise.

and in the very recent decision of the Court of Appeal in *Casata Ltd v General Distributors Ltd* (CA84/04 13 April 2005) *Land Securities* was cited and earlier arbitral awards had been admitted by the arbitrators. On this point, the joint judgment of Glazebrook and Hammond JJ noted (at [31] [67]) the trial Judge's finding that there was a discretion to admit earlier arbitral awards in evidence thus making their admission a question of weight not admissibility and held (at [87]) :

> [87] With regard to ... the admission of evidence of earlier arbitral awards, we agree with Ellen France J that this question relates to the weight to be given to evidence and thus is not sufficiently serious to warrant a second appeal. In accordance with art 19(3) of the First Schedule to the Arbitration Act, it was for the arbitrators to determine the admissibility, relevance, materiality and weight of any evidence.

[35] That notwithstanding, Mr Dugdale submitted that the views expressed in the Whangamoa Award were only those of a private arbitrator, however eminent, selected by persons who were not parties to the Haumingi arbitration to determine their dispute on the evidence they presented. Accordingly the findings in that arbitration on the threshold issue should have played no part in the Haumingi dispute.

[36] For Mr Gosling, Mr Fenton made the point that it was Mr McDowell who produced the Whangamoa Award in the present case and that he not only discussed that arbitration but the others earlier mentioned, as did Mr Townsend. He submitted the Haumingi Award showed the Tribunal exercised an independent judgment on the comparability of the various matters discussed. He made the point that both arbitrators were bound to apply the same legal principles.

[37] It is clear from *Casata,* supported, even if obiter, by *Modick,* that at least in New Zealand other arbitral awards of comparable properties are admissible in evidence in a later arbitration, leaving weight as a matter for the subsequent tribunal. That, of itself, would be sufficient to dispose of the trustees' first alleged breach of the rules of natural justice unless it is shown that the Tribunal in this case paid such slavish attention to the Whangamoa Award as to regard himself as effectively bound by it, thus abdicating independent judgment on the issues for his decision.

[38] The Whangamoa Award was clearly important in the Rotorua area since it involved a large number of lessees and was a fully considered award touching, as had others, on what was clearly the vexed question of rental valuations for lakeside or near lakeside properties in the area. It was particularly important on the threshold question of availability of comparable rents. In the Haumingi arbitration the Tribunal certainly gave considerable space to reviewing the Whangamoa Award and its findings against Mr McDowell's approach, even expressing its views in fairly colourful language. But, that notwithstanding, a close reading of the Tribunal's treatment of the Whangamoa Award showed the Tribunal did not abandon its independent judgment in reaching its views.

[39] It is to be remembered that the critical question was whether there were sufficient comparable lettings to justify the classical approach or whether, as Mr McDowell contended, there was insufficient evidence on that score so that the traditional approach was the only one open. Detailed consideration of Mr McDowell's evidence in the Whangamoa Award and in others in which he had been involved was to be expected in those circumstances.

[40] The Tribunal also discussed the Townsend evidence in somewhat similar terms to those relating to McDowell before declining to accept both valuers' approaches.

[41] It is true, as earlier noted, that in describing the four comparable properties the Tribunal, in large measure, simply quoted from the Whangamoa Award or citations contained in it, but there was no need for him to camouflage his source and, more importantly, on several occasions he expressed his individual view and his reasons for the conclusions he reached on comparability and a setting of rents by reference to the open market.

[42] Further, it is to be recalled that it was Mr McDowell himself who put the Whangamoa Award in evidence. He could only have done so in the belief it was relevant to the Haumingi arbitration. In effect, therefore, it became similar to an exhibit which, as far as the Tribunal's findings were concerned, whilst it may merely

have been an expression of his opinion, nonetheless contained a convenient précis of what he found to be comparable properties.

[43] Seen in that light, the Tribunal's comment about the effect of the Whangamoa Award on Rotorua rents and "in this arbitration", must be seen not as an abdication of the Tribunal's independent fact finding responsibility but simply as a reflection of the factual matters discussed, particularly in relation to comparable properties, which the Tribunal found of assistance in reaching his own views about the valuation evidence put before him. In short, he admitted the Whangamoa Award, as he was entitled to, and gave it what he regarded as appropriate weight in reaching his own views. Again, that was his entitlement.

[44] The conclusion must accordingly be that no breach of the rules of natural justice sufficient to amount to the findings being contrary to public policy has been demonstrated. The first ground on which this proceeding is brought is accordingly rejected.

Second Claimed Breach of the Rules of Natural Justice

[45] Mr Dugdale submitted the views of other Haumingi lessees called as witnesses as to discontent with the rents they agreed to pay or which had been imposed on them was irrelevant and inadmissible. He accepted, in reliance on *Modick*, that in a search for comparable rents those agreed by captive tenants should be treated cautiously but submitted this Tribunal went too far. He relied on *ARC Ltd v Schofield* [1990] 2 EGLR 52 where one of the grounds of appeal following a rental arbitration was whether as a matter of discovery the tenants' accounts were admissible and accordingly relevant. Millett J observed (at 55) that :

> "There must be some limit to the kind of evidence which is admissible, and this must be related to the value of the property, however this is to be ascertained, and not to the parties' willingness or reluctance to pay a particular rent."

a comment which was obiter in the circumstances.

[46] Mr Dugdale also relied on *Modick* where one of the questions was whether evidence as to profitability was admissible. In that regard, Hardie Boys J held (at 156, 157) that :

> Rental review clauses were designed to protect a lessor under a long-term lease against increases in the value of property or decreases in the value of money. A ratchet provision guarded against any aberration. There was an underlying assumption that the lessee would be able and willing to pay the increase needed to bring the rent up to date; or that if he were not, someone else could and would.
>
> ...
>
> The relevance of evidence as to profitability must necessarily be limited. The important distinction is between evidence that is related to the rental value of the property as between lessor and lessee on the one hand, and evidence as to the ability or willingness or reluctance of the lessee to pay a particular rent on the other. A recent judgment Millett J in *ARC Ltd v Schofield* (1990) 9038 EG 113, is helpful in this respect. Evidence of the latter kind is generally irrelevant, for the underlying assumption to which I have referred must remain. It was subject to this distinction that evidence of the tenant's financial results was admitted in *Harewood Hotels Ltd v Harris* [1958] 1 All ER 104.

[47] Mr Dugdale submitted that in this case the Tribunal went much further than the cautions expressed in those authorities and treated the evidence of captive tenants as probative, thus leading to the conclusion that their rent was not what a willing but anxious lessee would pay. He submitted that was an issue given additional prominence by the Tribunal in the costs award.

[48] Mr Fenton noted the lessees' evidence had been admitted without objection and two had been cross-examined. He also submitted that Mr Townsend had relied on evidence of rent levels at Gisborne Point in his evidence so, he submitted, the Tribunal was bound to ascertain whether those witnesses were "captive parties". He reached the view that such was the case and accordingly the rent they had, however grudgingly, agreed to pay was no indication of the fair market rent for Mr Gosling.

[49] The Court's view is that there is nothing in this suggested breach of the rules of natural justice. Although this Court does not have the submissions of the parties, plainly Mr Gosling was entitled to assume the trustees might well rely on the fixing of the rent payable by six of his fellow Gisborne Point lessees as evidence of the fair market rent for his own property. Anticipating that, he called evidence from those

lessees either in person or by letter. As the Tribunal observed in his review of the evidence, it was plain they were discontented with the levels set and did not regard them as the fair market rent for their properties. Given Mr Townsend's reliance on other Gisborne Point rents, it was prudent for Mr Gosling to meet Mr Townsend's evidence on that topic in advance.

[50] The Tribunal received the evidence, as it was entitled to do, discussed it and gave it such weight as was thought appropriate. He concluded from that evidence that, for the reasons he gave, the setting of the other lessees' rents on review was not an indication of the fair current market rent even for their sites or, more particularly, for Mr Gosling's property. In that, there was no breach of the rules of natural justice.

[51] The second suggested breach of the rules of natural justice is accordingly likewise rejected.

Third Claimed Breach of the Rules of Natural Justice

[52] The allegation in this case is that after the conclusion of the hearing the Tribunal made his own investigation into the question of water quality of Lake Rotoiti, did so privately, never told the parties of his activities and never gave them an opportunity to comment.

[53] Mr Dugdale submitted that was a gross and elementary breach of natural justice, the materiality of which was plain on reading the award, particularly the observation that the Tribunal was "unable to dismiss from my mind the dramatic and well publicised deterioration in the quality of Rotoiti's water". He submitted there was no foundation in the evidence for that observation.

[54] The Court's consideration of this issue was assisted by the Tribunal, unusually, filing an affidavit saying that he had received the Environment Bay of Plenty publication "Bay Trends 2004" unsolicited through the mail. It was a document which was generally available and he relied on some of that material in preparing some six paragraphs of the award.

[55] Mr Fenton said the Tribunal's comment that the Rotorua lakes were "world-renowned natural assets of great beauty" came from the caption to one section of the booklet, the references in the award to the Rotorua District Plan came from a valuer's report attached to Mr McDowell's brief and it was Mr McDowell who spoke in his evidence of recent publicity about Lake Rotoiti water quality and his efforts to analyse its effect on lakeside values. Mr Townsend also spoke of water quality and in particular said :

> "Going back to the due date of June 2003 it is evident that while a deteriorating condition of the lake water was known, the evidence of it and the publicity given to it was significantly less than it is now."

[56] Mr Fenton submitted that water quality problems in the Rotorua lakes had been so widespread and serious over recent years that no rent review arbitration in the area could omit the topic.

[57] He submitted that, though not a case of strict judicial notice, it was open to the Tribunal to take notice of local conditions. Judges, he submitted, are entitled to act on facts of which they have general knowledge or those gleaned "from inquiries to be made by himself for his own information from sources to which it is proper for him to refer": *Commonwealth Shipping Representative v Peninsular and Orient Branch Services* [1923] AC 191, 212; Mathieson et al *Cross on Evidence* NZ ed para 6.2 p10,001. Mr Fenton also relied on the Evidence Act 1908 s 42 entitling persons acting judicially to refer for the purpose of evidence in matters of history, science or art to such published material as they consider authoritative.

[58] He also relied on Art.19(2) of the First Schedule to the Arbitration Act 1992 and to Art.3 of the Second Schedule, both summarized earlier. Responding to the assertion of a failure to disclose the material to the trustees, Mr Fenton drew attention to the way in which Art.24(3) of the First Schedule – the obligation to communicate all information supplied by one party to an arbitration to another, together with expert reports or evidentiary documents on which the Tribunal may rely – was dealt with in *Methanex* (supra at 133 para [147]) which reads :

> [147] My conclusion is that arts 18 and 24(3) require notice of, and opportunity to respond to, material provided to the arbitrator if it is:

(a) Evidence and argument provided by other parties to the arbitration;

(b) The report of an independent expert specific to the dispute in question;

(c) A document which may be used as proof of the truth of human assertions made therein with respect to the facts in issue or the credibility of a witness; or

(d) A document whose existence or nature represents a new source of information bearing upon the facts in issue or the credibility of a witness.

Whether these categories extent to marginal cases may well be affected by the particular contractual intention of the parties to be determined in the particular case.

An appeal was dismissed (*Methanex Motonui Ltd v Spellman* [2004] 3 NZLR 454).

[59] "Bay Trends 2004" not having come from either party and being a document of general application rather than an expert report, the essential question is whether it was an "evidentiary document" on which the Tribunal might rely within the meaning of Art.24(3). On that point, the Court of Appeal held in *Methanex* (at 487 para [153], 488 para [159]) :

[153] ...the passages referred to in the travaux and the report indicate that "evidentiary document" was substituted for "other document" in art 24(3) as a more narrowly focused term, with the purpose of conveying that only certain kinds of additional documentary information that the Tribunal might rely on had to be disclosed to the parties. That focus was not on what the Tribunal might gather internally from its own processes. Nor was it on methods of analysis of evidence such as computer modelling. It was rather on material generated by third parties that came before arbitrators, which might be relied on in decision making. The legislative history suggests that the term "evidentiary document" in art 24(3) was of no wider significance than that.

...

[159] It follows that material produced by the arbitrator, or his or her staff, is excluded from the scope of the term "evidentiary document", even if it records information gathered by the arbitrator that is in the nature of primary evidence. As there is no evidence that a third party was involved in the production of the reservoir simulation model, it follows that the independent expert was not required to disclose it by art 24(3) of the First Schedule to the Act. Because of the result we have reached, it is unnecessary for us to consider in detail Fisher J's further discussion of the types of documents to which the term

> "evidentiary document" applies. We are, however, satisfied that it does not cover research works of general application, matters of which judicial notice could be taken, or legal precedents and articles used as part of the internal reasoning processes of the arbitrator.

[60] What is permissible of arbitral tribunals acting outside the evidence without reference to the parties was concisely put by Dunn LJ in *Fox v Wellfair Ltd* [1981] 2 Lloyds Rep 514, 528 :

> ... it seems to me that an expert arbitrator should not in effect give evidence to himself without disclosing the evidence on which he relies to the parties, or if only one to that party. He should not act on his private opinion without disclosing it. It is undoubtedly true that an expert arbitrator can use his own expert knowledge. But a distinction is made in the cases between general expert knowledge and knowledge of specific facts relevant to the particular case. ...

[61] What is allowable is neatly encapsulated in two cases discussed in *Russell* (op.cit. para 4-160 p 145). In *Top Shop Estates Ltd v C Danino* [1985] 1 EGLR 9, 11, an arbitrator in a rent review, without telling the parties, undertook pedestrian counts outside the shops with which the arbitration was concerned and utilised that material in the award. The award was set aside, the Court observing :

> It does not seem to me to be profitable to seek to select epithets appropriate to describe the conduct of the arbitrator in such circumstances. If he was acting over-zealously, then more relevantly, he was, in my judgment, also acting under a misapprehension of his function as an arbitrator, which is not to play the part of Perry Mason where he feels that the submissions or evidence of the parties might usefully be supplemented.

[62] On the other hand, an award was not set aside in *Lex Services PLC v Oriel House BV* [1991] 2 EGLR 126. There an arbitrator in a rent review took account of matters known to him and which were contrary to the parties' experts views but the award was not set aside because the weight accorded was not stated and in any event, as a matter of discretion, it did not amount to technical misconduct or procedural mishap.

[63] In this case, the Tribunal hardly needed to go to the "Bay Trends 2004" booklet for a description of the attractiveness of the Rotorua lakes and was not open to criticism in the way in which he analysed the expert evidence. The particular focus of Mr Dugdale's criticism were the following paragraphs :

> My investigations show that the long term deterioration of Rotoiti has in recent years accelerated to an extent that has attracted intense discussion, lobbying and significant publicity that reached a high point in 2001 when health warnings were issued and ameliorating action was demanded. At that time Rotoiti was among the five worst affected lakes in the district with high levels of algae and bacteria being noted and recorded. When those health warnings were issued Gisborne Point and Otaramarae featured high in the scale of bacteria levels.
>
> The last algae bloom was in the late summer of 2003, just prior to Gosling's rent review date and resulted in further health warnings being issued. Bay Trends 2004 reports that trophic level index tests taken at that time showed that the water quality of Rotoiti had deteriorated since 2001 and that as a result of the survey that the Regional Council took at that time it learned that people regarded pollution of the area's lakes and streams as their most damaging environmental issue and that most respondents identified Rotoiti as being the most-polluted water body in the area.
>
> But not all of the Rotorua lakes have suffered deterioration of their water quality to the same extent. Rotoma, Tarawera and Tikitapu (the Blue Lake) in particular have not experienced the same level of pollution as that faced in Rotoiti, Rotoehu, Rotorua, Okaro and Okareka.. Strategies for the protection and restoration of the five worst affected lakes are now in place but Rotoiti is not at the top of the list of priorities, despite the results of the 2003 survey. The Regional Council has indicated that action plans for Rotoiti and Rotorua were to be initiated in early2004, after Okareka, Rotoehu and Okaro and that urgent actions for Rotoma and Rotoiti have been time-framed for 2004/2005.

[64] Of that passage, much would have been the object of public debate in the Rotorua area at the time, particularly by lessees of lakeside properties. That would include the trophic level index tests from the "Bay Trends 2004" booklet. Much of the rest is irrelevant as being merely general comments concerning water quality or action forecasted to be taken after Mr Gosling's rent review date.

[65] However, it is of importance to note that, immediately after that passage, the Tribunal went on to a detailed discussion of Mr McDowell's sales evidence adduced in accordance with the further request. That included Mr McDowell's evidence as to lessees' sales expectations. The Tribunal held that evidence inapplicable to the Haumingi Trust's land, to the properties taken as comparable and, in particular, to Mr Gosling's property. He held :

> Furthermore I am far from satisfied that these comments are relevant to any of the considerations that are involved in setting the fair current market rent for Gosling's land or for determining whether or not the quality of Rotoiti's water has had any effect on market rentals in the area.

[66] He noted that in the Whangamoa Award no valuer made any allowance for deterioration of water quality and the Tribunal upheld that view because of the date at which the rent was to be assessed. It was 14 months earlier than Mr Gosling's review, a time when publicity about the water quality was much less. The Tribunal, however, said he was "not prepared to take that view" and continued :

> The question of the quality of the lake's water was raised by Gosling as being a matter of considerable importance and one that did affect the value of the properties. I am satisfied that the demand for lake frontage properties at Rotoiti has not been at the same level of increased demand for properties fronting on to say Tarawera or indeed other lakes or water generally throughout New Zealand and that this and the state of the lake generally would undoubtedly be one of the matters that would in June 2003 affect the mind and ultimately the judgment of the prudent lessee in making an offer of rent to the Trustees.

[67] The Tribunal then continued by discussing Mr Townsend's evidence as to lake water quality in detail and in particular his evidence that "with hindsight it appears that demand for lakefront properties in Rotoiti has not experienced the same level of increased demand" as other lakes and concluded with the first passage cited in para [24].

[68] That analysis shows the only material used by the Tribunal in the section of the award under review was the booklet's description of the Rotorua lakes and a table and map giving trophic level comparisons for 2001 and 2003 for them. As mentioned, the Tribunal was there working from public sources using material that would have been well-known in the area at the time and, in particular, would have been well-known to the valuer witnesses. After rejecting Mr McDowell's approach to the water quality question, the other comments concerning that topic were derived from Mr Townsend's evidence and led the Tribunal to conclude that water quality would have affected the judgment of a prudent lessee in making a rental offer to the trustees for lot 6 at the June 2003 date. That, in the Court's view, does not suggest the Tribunal was acting over-zealously, still less that he was "playing the part of Perry Mason" or trying to supplement one party's evidence. All he was doing was exercising his expert judgment on the evidence but with the addition of a small amount of material already in the public domain. That was well within Art 19(2) of the First Schedule and Art 3 of the Second and either does not infringe Art 24(4) or infringes it only to an inconsequential degree.

[69] The Court accordingly concludes the trustees have made out no case for interfering with the award on the ground of the third alleged breach of the rules of natural justice.

Result

[70] All the trustees' clams for alleged breach of the rules of natural justice having been dismissed, the proceeding is itself dismissed.

[71] Mr Gosling is entitled to costs which, if the parties are unable to agree, may be covered by memoranda with that from counsel for the defendant being filed and served within 28 days of the date of delivery of this judgment and that from counsel for the plaintiffs within 35 days of that date.

.....

WILLIAMS J

Evan Gamby

From: RHay [RHay@morgancoakle.co.nz]
Sent: Thursday, 26 May 2005 8:44 a.m.
To: Evan Gamby; mike.jensen@cgj.co.nz
Subject: Whangamoa postscript - Haumingi Trust v Gosling appeal decision

Evan/Mike

You may have already seen a copy of this 9/5/05 High Court appeal decision but if not, here is a copy. You both get a mention...

Evan, given that:

- McDowell submitted the Whangamoa Award in his evidence to the Gosling arbitration, presumably with the Whangamoa Trust's consent, but to my knowledge without the Lessees' Groups consent (notwithstanding normal confidentiality requirement); and
- The High Court has now publicly referred to it in considerable detail in this decision and would have had a copy of the Award amongst the evidence being considered in open Court,

I think you should have no qualms about writing a paper about the arbitration for your profession etc. The Gosling arbitration and Haumingi appeal would add an interesting/useful postscript.

Regards to you both

Rob

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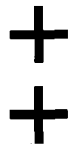

TelferYoung

Simon

I think you can use this
Award OK

Simon

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Evan Gamby

To: RHay@morgancoakle.co.nz

Subject: Gosling and Haumingi

Hi Rob,

Thanks for remembering me on this.

I wonder when I will get the chance to write this up, and it is an important topic.

Very kind of you to send me through the decision and I hope all is well. I see John Bierre from time to time appearing at hearings of one sort and another. My regards to all your team

cheers

TelferYoung

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