parts of the land taken. The areas separately valued appear to have been accurately defined by reference to the risk of flooding on the plan put in by the City Council. We have not doubt that there was and still is some risk of flooding in respect of a considerable part of the land.

The claimants and their valuers made no attempt to assess the value of the land as farm land and we are left with little evidence of its value as such save the Government valuation. We feel that for farming purposes the land was not worth a great deal more than the Government valuation of £3,915. The difference between that sum and the sum we propose to award is in our opinion a fair allowance for the potential value attributable to the possible future use of the land for industrial or other non-farming purposes. We cannot accept Mr Mahon's final submission that the figure assessed by Mr Reid was no more than a farming value. If the claimants had wished to establish the farming value of the land the onus was on them to do so. Mr Reid and the other valuers for the City Council made what we considered to be substantially sound valuations but on inspection of the property we formed the opinion that it was somewhat better than we had supposed, and that the industrial development going on at Washdyke was also somewhat greater than we had expected. While therefore we accept Mr Reid's report as the basis for our award, we propose to allow somewhat more than his valuation.

We find the value of the subject land in December, 1962, including the areas included in both claims to be as follows:

20 acres @ £300 per acre	£6,000
10 acres @ £100 per acre	1,000
7 acres @ £65 per acre	455
1 acre @ £25	25
	£7,480
Improvements	520
	£8,000

As two separate claims have been made, we apportion this amount by awarding £7,970 for the major area and £30 for the additional area taken.

As to interest, we regret that there appears to be some difference between counsel as to a supposed agreement limiting the term for payment of interest. We accept the claim of the City Council that it has been pressing for a hearing and has at all times maintained the attitude that it would oppose an award of interest for the period of any delay in bringing the claim to a hearing. We think in the circumstances it will be just to both parties if we allow interest on £8,000 at 5% from 5 December, 1962, to 21 May, 1964, and we allow interest accordingly. We have not fixed the date last mentioned by reference to the alleged agreement, but because we think that an allowance of interest up to that date is fair to both parties.

On the question of costs, we take the view that the claim as filed was excessive and that we would be entitled on that account to disallow costs. We do not propose to do so, however, but to limit the amount allowed to somewhat less than might otherwise have been granted. We allow £150 for costs, inclusive of witnesses' expenses and disbursements.

United Sharebrokers Ltd v Landsborough Estates Ltd

High Court Christchurch
14, 18 May 1990
Tipping J

Arbitration – Award of umpire – Whether misconduct or error of law on face of document – Evidence of considerations given in market rentals for new leases – Umpire's duty

Under the lease of commercial premises, the rental payable was reviewed at two yearly intervals. The relevant clause contained a detailed and elaborate formula. The arbitrators were unable to agree and the matter went to an umpire. The plaintiff (the lessee) argued that there should be no difference in assessing current market rentals and that it was the umpire's duty to consider all relevant evidence including inducements and incentives being offered to tenants in the business area of the city. The lessor said that the rent payable during the review period should not be influenced by market forces applying to new leases. The lessee also argued that seven pages of notes made by the umpire formed part of the award.

Held, 1 There was no suggestion of procedural irregularity. It is entirely for an arbitrator or umpire as to what weight he gives to the evidence presented to him. In this case, it had not been shown that the umpire had ignored evidence, but that he had preferred the evidence of the lessor in circumstances where he was entitled to do this.

2 The seven pages of notes did not form part of the award. It is normally a matter to be inferred from the documents and the umpire had expressly directed that they were not to form part of the award.

Cases mentioned

CBI Ltd v Badger Chiyoda [1989] 2 NZLR 669.
Champsey Bhara & Co v Jivraj Balloo Spinning and Weaving Co Ltd [1923] AC 480.
FR Evans v English Electric Co Ltd (unreported, Estates Gazette, 25 February 1975).
Fencible Court Howick Ltd v Howick Borough Council (unreported, High Court Auckland, 9 June 1989).
Gillespie Bros & Co v Thompson Bros & Co (1922) 12 Lloyds Rep 519.
Manakau City Council v Fletcher Mainline Ltd [1982] 2 NZLR 142.
Mayor of Wellington v Aitken Wilson & Co (1914) 33 NZLR 897.
Max Cooper & Sons Pty Ltd v University of New South Wales (1979) 2 NSWLR 93.
Segama NZ v Penny Le Roy Ltd (1984) Estates Gazette Digest 74.
Spencer v Commonwealth of Australia (1907) 5 CLR 4198 Wellington.
Wellington City Council v National Bank of New Zealand Properties Ltd [1970] NZLR 660.

Tipping J: This is a case in which the award of an umpire in a rental arbitration is challenged for misconduct and error of law on the face of the award. The plaintiff, United Sharebrokers Ltd, is the lessee by assignment of premises owned by the first defendant Landsborough Estates Ltd. The demised premises constitute the second floor of a building situated at 287 Durham Street, Christchurch and known as Landsborough House.

Pursuant to a deed of lease dated 31 August 1987 assigned to the plaintiff by deed dated 5 December 1988, the first defendant has leased the second floor of Landsborough House to the plaintiff for a term of ten years from 1 February 1987. The rental payable by the lessee is to be reviewed at two yearly intervals, the first review being due on 1 February 1989. The parties were unable to agree upon the rental payable for the period of two years commencing 1 February 1989 and in terms of the lease the matter was referred to arbitration.

The subject is governed by clause 3(j). This constitutes a detailed and elaborate formula for determining rent reviews. This constitutes a detailed and elaborate formula for determining rent reviews. If the parties cannot agree each is required to appoint a valuer, being a member of the New Zealand Institute of Valuers, "to jointly determine the current market rent of the premises". Before proceeding with their determination the two valuers must agree upon and appoint an umpire who is also required to be a member of the said Institute. The nominated valuers are required within a month of the date of their appointment jointly to determine the current market rent of the premises "in relation to comparable premises" as at that particular date. If the valuers are unable to agree, the current market rent is to be determined by the umpire.

Clause 3(j)(vi) provides that in determining the current market rent the valuers or the umpire shall:

(aa) be deemed to be acting as expert(s) and not as arbitrator(s);
(bb) consider any other use to which the premises may be lawfully put;
(cc) have regard to the (sic) abnormal use of the building or premises and/or services by thelessee;
(dd) exclude the value of any goodwill attributable to the Lessee's business and the value of the lessee's fixtures and fittings in the premises and shall also exclude any deleterious condition of the premises if such condition results from any breach of any term of this lease by the lessee;
(ee) have regard to the terms and conditions of this lease and in particular to any liability on the part of the lessee in terms of this lease to pay a contribution to the operating expenses of the building.

By letter dated 20 March 1989 the solicitors for the lessor set out certain elementary points which had been agreed in addition to the matters covered by the relevant provisions of the lease. By this time the lessor had appointed Mr R H Fright as its valuer and the lessee had appointed Mr R K Baker. In their letter the lessor's solicitors set out what was to happen procedurally and also the time frame within which the proceedings before the umpire were to be conducted, should the valuers on either side be unable to agree. In particular, it was provided:

"The umpire is to undertake to make his determination in writing to both sides by 30 April 1989 giving reasons for and the basis of his determination".

As it transpired Messrs Fright and Baker were unable to agree and the matter went to their umpire the Second Defendant Mr J N B Wall of Wellington. The procedure before the umpire was followed and in due course Mr Wall published an award which is in fact undated but nothing turns upon that. Accompanying his award was a document constituting seven typed pages headed "notes to Landsborough House Second Floor Christchurch Arbitration". The first paragraph of the notes said that they were not intended to be nor should they be taken as part of the award. As will appear later an issue arises between the parties as to whether or not these notes do in fact form part of the award.

In its original statement of claim the plaintiff lessee appeared to be relying solely on allegations of misconduct on the part of the umpire, that word having in this field an extended meaning not necessarily implying misconduct in the strict sense. At the hearing Mr O'Brien tendered an amended statement of claim seeking to allege error of law on the face of the award as well as misconduct. Mr Maling was prepared to meet this additional attack on the award and consequently I gave leave to file the amending pleading. Mr O'Brien made it plain that although he was not abandoning his allegations of misconduct, the main thrust of his client's case was that there was an error of law on the face of the award.

The statement of claim describes the main purport of the cases presented to Messrs Fright and Baker to the umpire as follows. Mr Fright's submission and evidence was that within the Christchurch market there were three rental levels, namely new leasings, renewals of existing leases and rent reviews within existing leases. It was Mr Fright's argument, supported by evidence, that there should be a different approach and different considerations should be taken into account

when an umpire was assessing current market rentals under the different alternatives. It was his contention that in the present case the rent payable during the review period in question should not be influenced by or determined in the light of factors or market forces applying to new listings or renewals of existing leases.

Mr Baker, the valuer for the lessee, contended however that both at law an in equity there should be no difference in assessing current market rentals whichever of the three alternative situations the umpire was considering. It was submitted that it was the umpire's duty to consider all relevant evidence, including evidence relating to new leases and renewals of existing leases and certain payments and inducements and other incentives or concessions that it was alleged were being offered to tenants in the Christchurch business area who were contemplating taking on new leases or renewing an existing lease. The need for such incentives and concessions was said to derive from the amount of vacant office space available in the Christchurch business district.

The plaintiff's argument is that in reaching his decision the umpire accepted the submissions of Mr Fright and either failed to consider the matters raised by Mr Baker or failed to give them sufficient weight. It is then contended that in reaching his decision in this way the umpire misconducted himself or the arbitration by failing to take into account or failing to give sufficient weight to the submissions of Mr Baker in that the umpire is said to have failed to take into account all relevant matters or to have taken into account irrelevant matters. I do not see how it can possibly be said that the umpire took into account irrelevant matters because there is no suggestion that the points put up by the valuers on either side were irrelevant to the issue before the umpire. Indeed Mr O'Brien in his submissions did not seem to me to advance the allegation that the umpire had taken into account irrelevant matters.

The plaintiff then contends that the umpire determined his award on the basis of an incorrect application of the law and/or the relevant evidence, with the result that the rent fixed has been incorrectly determined and is higher than the current market rent payable in terms of the lease. There is then the bald pleading that there is an error of law on the fact of the award. I shall deal with the rival contentions under three headings, first misconduct, second what constitutes the award and third whether there is an error of law on the face of the award.

Misconduct

As already indicated the word "misconduct", which is to be found in s 12(2) of the Arbitration Act 1908, has a special and extended meaning for the purposes of arbitration law. The circumstances in which an arbitrator may be found to have misconducted himself or the proceedings are conveniently collected in *Halsbury* 4th edition volume 2 at paragraph 622. There the learned author says that it is difficult to give an exhaustive definition of what may amount to misconduct on the part of an arbitrator or an umpire. It is true to say however that most heads of misconduct have a procedural flavour.

There is in the present case no suggestion of procedural irregularity. It seems to me that the lessee's complaints on this aspect of the case boil down essentially to the proposition either that the umpire effectively ignored the submissions and evidence presented by Mr Baker or that he gave insufficient weight to them. I asked Mr O'Brien whether he had any authority to support the proposition that it was misconduct if an umpire could be shown to have ignored, in the sense of giving no or insufficient weight to certain evidence. Mr O'Brien indicated that he had no authority directly on that point.

That is hardly surprising because in my judgment it is entirely for an arbitrator or umpire as to what weight, if any, he gives to the evidence presented to him and indeed to the submissions which are tendered on each side, see inter alia the recent unreported judgment of Fisher J in *Fencible Court Howick Ltd v Howick Borough Council* 12 Lloyds Rep M481/87 Auckland Registry (unreported, 9/6/89) at page 21. It is not misconduct to come to a decision considered by the Court to be wrong on the facts or indeed on the law. In *Gillespie Bros & Co v Thompson Bros & Co* (1922) 519 at page 524 Atkin,

LJ said:

"It is no ground for coming to a conclusion on an award that the facts are wrongly found. The facts have got to be treated as found . . Nor is it a ground for setting aside an award that the conclusion is wrong in fact. Nor is it even a ground for setting aside an award that there is no evidence on which the facts could be found, because that would be mere error of law, and it is not misconduct to come to a wrong conclusion in law and would be no ground for ruling the award unless the error in law appeared on the face of it. . . ."

The position is put this way in *Russell on Arbitration* 20th edition (1982) at page 422 where the learned authors say:

"It is misconduct on the part of an arbitrator to come to an erroneous decision, whether his error is some of fact or law and whether or not his findings of fact are supported by evidence."

Reference can also be made to *Commercial Arbitration* by Mustill & Boyd 2nd edition (1989) at page 560 to the same effect and *The Vasso* (1983) 2 Lloyds Rep 346 at 350.

In New Zealand this line of authority is exemplified by the decision of the Court of Appeal in *Manakau City Council v Fletcher Mainline Ltd* [1982] 2 NZLR 142 where at page 146 Woodhouse P adopted the statement from *Russell* mentioned above. The unwillingness to characterise perceived errors of fact as amounting to misconduct goes back in New Zealand at least as far as the decision of Stout CJ in *Mayor of Wellington v Aitken Wilson & Co* (1914) 33 NZLR 897.

Mr O'Brien was quite right when he suggested that the plaintiff was to succeed at all it must on the ground of error of law on the face of the award. There is absolutely no foundation in the present case for any finding of misconduct by the umpire and the plaintiff's submissions in this respect are rejected.

What Constitutes The Award?

In this case the umpire's formal award simply recites the procedural history and then awards the sum of $84,799 per annum as being the current market rental of the demised premises in accordance with the lease document for the review period in question. In his award the umpire records that he has fully considered the lease document, the procedural matters referred to in the letter from the lessor's solicitors, the valuers' initial submissions and their counter-submissions and he then goes on to set the rental figure. Mr O'Brien contended that the seven pages outlining the umpire's approach to the matter and his process of reasoning did in this particular case form part of the award. He recognised that he started off with a preliminary difficulty in that the umpire indicated right at the start of the notes that they were not intended to be nor should they be taken as part of the award.

Mr O'Brien pointed to the fact that in the letter of instructions the umpire was required to make his determination in writing giving reasons for and the basis of his determination. It was suggested that if the umpire had not published reasons he would have been guilty of misconduct but that does not necessarily mean that the published reasons were required as part of the award. Mr O'Brien recognised that a statement such as that made by the umpire in the present case to the effect that the accompanying reasons were not intended to be part of the award, would often be decisive of the matter. He referred to *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669 at 673 per Cooke P. However in that case the submission document required reasons to be stated but expressly provided that they should not form part of the award.

Here the parties agreed that reasons should be given but did not expressly state whether they should form part of the award. The umpire has construed his instructions as not requiring that his accompanying reasons be incorporated in the award. The parties did not make the point clear and in my judgment the umpire was perfectly entitled to adopt the course which he did. For there to be an error on the face of the award there must be an error by express exposition, not merely by inference. The error must appear either in the award itself or in a document actually incorporated therein, for instance a note appended by the arbitrator stating the reasons for his decision: see

Champsey Bhara & Co v Jivraj Balloo Spinning & Weaving Co Ltd [1923] AC 480, 486 PC and *Wellington City v National Bank of New Zealand Properties Ltd* [1970] NZLR 660, 669 per North, P.

In the more recent decision of the Privy Council in *Max Cooper & Sons Pty Ltd v University of New South Wales* [1979] 2 NSWLR 257, it was held that whether a collateral document forms part of the award depends primarily on the arbitrator's intention. It is normally a matter to be inferred from the documents which he has prepared. It was further said that even if the award itself refers to the existence of another document that in itself refers to the existence of another document that in itself is neutral; it raises no presumption that such other document is incorporated as part of the award. Importantly their Lordships were of the view that unless the intention to incorporate is clear there should be a presumption against incorporation.

Essentially therefore the test is whether or not the arbitrator or umpire intended the collateral document to be part of his award: see the judgment of Somers J in *Manakau City v Fletcher Mainline* where his Honour said at page 160:

"There can be no doubt that the issue is one of intention."

It is abundantly clear that in the present case the umpire far from intending that his several pages of notes should form part of the award, expressly directed that they should not, should they be taken to be part of the award. As to Mr O'Brien's point that the umpire may have been guilty of misconduct in that, having been required to state the reasons for his determination, he has ended up by stating reasons in a way which deliberately kept them out of his award, there are two answers to that both of them advanced by Mr Maling. First the plaintiff did not plead any such misconduct on the part of the umpire, in spite of the fact that misconduct generally was pleaded. Secondly the lease is entirely silent as to whether or not the arbitrator or umpire must deliver a speaking award.

The requirement of giving reasons was introduced in the procedural letter from the lessor's solicitors already mentioned. That letter did not expressly require the reasons to be given as part of the award. In the same way as in a case of doubt the Court will presume that an arbitrator did not intend to incorporate his reasons in the award so in my view if the parties simply state that reasons are to be given without expressly stating whether or not the reasons should form part of the award, the arbitrator or umpire will not have misconducted himself by coming to the view that the reasons are to be given outside the award.

It is my judgment therefore that the umpire's award in the present case does not include the seven pages of notes. That being so Mr O'Brien acknowledged that he could not advance his submissions any further there is beyond doubt no error of law on the face of the arbitrator's award, if one excludes the seven pages of notes. I shall however, in case I be wrong, proceed to consider what the position would have been if the seven pages of notes had formed part of the formal award.

Error of Law on the Face of the Award

In paragraph 7 of his notes the umpire recorded the two valuations which had been submitted to him by Messrs Fright and Baker. He expressly recorded Mr Baker's contention that the rental figure should be discounted by 10% because Mr Baker was of the view that the current rental market for comparable premises was not normal, there being a great deal of surplus office accommodation. Mr Baker had produced evidence of discounted rentals for this reason and also of inducements given by lessors to lessees in other ways. The umpire went on to say that on the surface in the current (February 1989) Christchurch leasing market it might be relevant to apply a discounting factor in certain circumstances to arrive at the market rental.

He then recorded the submissions of Mr Fright on the point and indeed the evidence produced by Mr Fright and recorded further Mr Baker's strong submission that both at law and in equity there should be no difference in assessing rentals under the three alternative situations, namely new leases, renewals of existing leases and reviews of rental within existing leases. The umpire then went on to say :

"With respect to Mr Baker's view that situation, however equitable it may be, is not supported by the evidence of Mr Fright which he clearly documents, and on that evidence I am convinced there is a difference in the rental that a landlord can expect under a rent review as at February 1989 compared with the leasing of vacant space in particular and to a lesser degree rental renewals."

He added:

"Having accepted that this situation exists in Christchurch as at the beginning of the 1989 year, the difference between the valuers is narrowed considerably."

Without the 10% discount Messrs Fright and Baker were: $1.70 per square foot apart. With Mr Baker's 10% discount, for the reasons he advanced, the valuers were $3.20 per square foot apart.

Mr O'Brien suggested that the lease itself did not define the way in which "current market rent" was to be assessed. With respect this is not correct. Clause 3(j)(vi) set out above gives fairly precise directions to the valuers or the umpire as to what matters they shall take into account in determining current market rent. They are deemed to be acting as experts and not as arbitrators. Then follow the other matters of which a crucial point is that the umpire must have regard to the terms and conditions of the lease. So there is significant guidance to the valuers or the umpire, as to the matters to be taken into account, albeit that there is not, I acknowledge, any specific definition of the expression "current market rent."

Mr O'Brien referred to a number of cases starting with he decision of the High Court of Australia in *Spencer v Commonwealth of Australia* (1907) 5 CLR 418. That was a case involving the assessment of the value of land taken back under statutory powers and it adopted the familiar willing vendor/willing purchaser approach. Coming closer to the present time Mr O'Brien mentioned the decision of Donald-son J in *F R Evans v English Electric Co Ltd* (1977) Estates Gazette (judgment 25/2/75). That case involved what was described in the lease as "the full yearly market rental". That definition was expanded to include the rental which the demised premises were worth to be let with vacant possession on the open market as a whole between a willing lessor and a willing lessee. That is completely different from the present case.

In the *Evans* case Donaldson J indicated that the formula adopted in the lease before him involved an assessment of what a hypothetical willing lessee would agree to pay and what a hypothetical willing lessor would agree to accept. As already observed in the present case one of the factors to be taken into account is the terms of the lease between the parties. The parties in the *Evans* case had provided their own dictionary for the arbitrators. In this case a dictionary has been provided to an extent, but it is a different exercise altogether. Mr O'Brien then referred to the case of *Segama N V v Penny Le Roy Ltd* (1984) Estates Gazette Digest 74. That was an appeal heard by Staughton J from arbitrators. In that case also the crucial expression "the market rent" was the subject of an internal definition involving premises with vacant possession. The case seems to have been involved primarily with questions of the admissibility and ambit of evidence.

Coming back to the essential question I do not see any of these authorities as aiding Mr O'Brien's submission that there is an error of law on the face of the award, treating the award as including the seven pages of notes for present purposes. Mr O'Brien was in essence driven to submitting that the error of law which was apparent was that the umpire had effectively ignored the evidence as to rates set for new leases and renewals. The evidence of market rentals in cases of new leases or renewals then one will end up with a higher rental figure than is justified.

It seems to me that if clause 3(j)(iv), which speaks of comparable premises, is read together with the umpire's obligation to have regard to the terms and conditions of the instant lease, he, the umpire is certainly entitled to take particular heed of comparability, both in respect of the premises themselves and in respect of similarity of tenure. In other words, to get a truly comparable situation one needs to look at premises as similar as possible to the subject premises and cases where the lessees is the subject of a rent review rather than the subject of a new lease or the renewal of an existing lease.

In my judgment it is not a case where the umpire has been shown to have ignored Mr Baker's submissions or his evidence. It is a case where he has preferred the approach of Mr Fright in circumstances where he was perfectly entitled to do both as a matter of assessing competing considerations and by dint of the fact that he had been appointed to do he adjudication because of his qualifications and expertise in the field. There is no foundation whatever for the proposition that Mr Baker's evidence and submissions were put on one side without being considered. Mr Baker's points were obviously considered by the umpire. The fact that they were not adopted is unfortunate for the plaintiff but cannot possibly amount to an error of law.

In any event even if I were satisfied that the umpire was in error, and I am far from being so satisfied, it seems to me that at best from the plaintiff's point of view the umpire would have made an error of fact rather than an error of law. There is no recognised principle of law which the umpire is shown not to have followed. The umpires crucial finding, as demonstrated by his reasons, is the proposition that he was convinced in the evidence that there was a difference in the rental that a landlord could expect under a rent review compared with the leasing of vacant space and to a lessor degree the case of rental fixed on a renewal. There was no room in my judgment for the umpire to adopt an unvarnished hypothetical lessor/lessee exercise because the reality of the matter was that the lessor and the lessee were contractually bound in respect of the subject premises for the balance of the term.

No doubt what constitutes current market rental is not an easy matter to determine in those circumstances, but I do not regard that essential question as being simply a question of law. It is in reality a mixed question of fact and law. The key point for present purposes is that the umpire is not shown to have misdirected himself in law, or to have overlooked any relevant principle of law in coming to his assessment of current market rent. Indeed the matters which an expert umpire is obliged to take into account in a case of this kind are essentially a question for his expert assessment after having listened carefully to the evidence and representations that the parties wish to put to him. In short I can discern no error of law on the face of the umpire's award, even treating the seven pages of notes as incorporated therein.

Neither of the grounds upon which the plaintiff as lessee seeks to have the umpire's award set aside have been established. The application is accordingly dismissed. I record that Mr Forbes appeared at the commencement of the hearing on behalf of the umpire who had been joined as second defendant. He indicated quite properly that the umpire wished to abide the decision of the Court but sought the right to be heard on questions of costs. As requested all questions of costs are reserved. If agreement cannot be reached memoranda may be filed or the parties, if preferred, may arrange to have the matter re-listed for argument on the point.

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

15/6

C.P. No.298/89

B/1212D

BETWEEN UNITED SHAREBROKERS LIMITED

Plaintiff

A N D LANDSBOROUGH ESTATES LIMITED

First Defendant

959
961

A N D JOHN NEVILLE BEAUFORT WALL

Second Defendant

Hearing: 14 May 1990

Counsel: P.L. O'Brien for Plaintiff
S.R. Maling for First Defendant
A.J. Forbes for Second Defendant (Leave to withdraw)

Judgment: 18 [illegible] 1990

JUDGMENT OF TIPPING, J.

This is a case in which the award of an umpire in a rental arbitration is challenged for misconduct and error of law on the face of the award. The Plaintiff, United Sharebrokers Ltd, is the lessee by assignment of premises owned by the First Defendant Landsborough Estates Ltd. The demised premises constitute the second floor of a building situated at 287 Durham Street Christchurch and known as Landsborough House.

Pursuant to a deed of lease dated 31 August 1987 assigned to the Plaintiff by deed dated 5 December 1988, the First Defendant has leased the second floor of Landsborough House to the Plaintiff for a term of ten years from 1 February 1987. The rental payable by the lessee is to be reviewed at two yearly intervals, the first review being due on 1 February 1989. The parties were unable to agree upon the rental payable for the period of two years commencing 1 February 1989 and in terms of the lease the matter was referred to arbitration.

The subject is governed by clause 3(j). This constitutes a detailed and elaborate formula for determining rent reviews. If the parties cannot agree each is required to appoint a valuer, being a member of the New Zealand Institute of Valuers, "to jointly determine the current market rent of the premises". Before proceeding with their determination the two valuers must agree upon and appoint an umpire who is also required to be a member of the said Institute. The nominated valuers are required within one month of the date of their appointment jointly to determine the current market rent of the premises "in relation to comparable premises as at that particular review date". If the valuers are unable to agree, the current market rent is to be determined by the umpire.

Clause 3(j)(vi) provides that in determining the current market rent the valuers or the umpire shall:-

> "(aa) be deemed to be acting as expert(s) and not as arbitrator(s);
> (bb) consider any other use to which the Premises may be lawfully put;

(cc) have regard to the (sic) abnormal use of the Building or Premises and/or services by the Lessee;

(dd) exclude the value of any goodwill attributable to the Lessee's business and the value of the Lessee's fixtures and fittings in the Premises and shall also exclude any deleterious condition of the Premises if such condition results from any breach of any term of this Lease by the Lessee;

(ee) have regard to the terms and conditions of this Lease and in particular to any liability on the part of the Lessee in terms of this Lease to pay a contribution to the Operating Expenses of the Building."

By letter dated 20 March 1989 the solicitors for the lessor set out certain supplementary points which had been agreed in addition to the matters covered by the relevant provisions of the lease. By this time the lessor had appointed Mr R.H. Fright as its valuer and the lessee had appointed Mr R.K. Baker. In their letter the lessor's solicitors set out what was to happen procedurally and also the time frame within which the proceedings before the umpire were to be conducted, should the valuers on either side be unable to agree. In particular it was provided:-

> "The umpire is to undertake to make his determination in writing to both sides by 30 April 1989 giving reasons for and the basis of his determination".

As it transpired Messrs Fright and Baker were unable to agree and the matter went to their umpire the Second Defendant Mr J.N.B. Wall of Wellington. The procedure agreed for the proceedings before the umpire was followed and in due course Mr Wall published an award which is in fact undated but nothing turns upon that. Accompanying his award was a document constituting seven

typed pages headed "Notes to Landsborough House Second Floor Christchurch Arbitration". The first paragraph of the notes said that they were not intended to be nor should they be taken as part of the award. As will appear later an issue arises between the parties as to whether or not these notes do in fact form part of the award.

In its original statement of claim the Plaintiff lessee appeared to be relying solely on allegations of misconduct on the part of the umpire, that word having in this field an extended meaning not necessarily implying misconduct in the strict sense. At the hearing Mr O'Brien tendered an amended statement of claim seeking to allege error of law on the face of the award as well as misconduct. Mr Maling was prepared to meet this additional attack on the award and consequently I gave leave to file the amended pleading. Mr O'Brien made it plain that although he was not abandoning his allegations of misconduct, the main thrust of his client's case was that there was an error of law on the face of the award.

The statement of claim describes the main purport of the cases presented by Messrs Fright and Baker to the umpire as follows. Mr Fright's submission and evidence was that within the Christchurch market there were three rental levels, namely new leasings, renewals of existing leases and rent reviews within existing leases. It was Mr Fright's argument, supported by evidence, that there should be a different approach and different considerations should be taken into account when an umpire

was assessing current market rentals under the different alternatives. It was his contention that in the present case the rent payable during the review period in question should not be influenced by or determined in the light of factors or market forces applying to new leasings or renewals of existing leases.

Mr Baker, the valuer for the lessee, contended however that both at law and in equity there should be no difference in assessing current market rentals whichever of the three alternative situations the umpire was considering. It was submitted that it was the umpire's duty to consider all relevant evidence, including evidence relating to new leases and renewals of existing leases and certain payments and inducements and other incentives or concessions that it was said were being offered to tenants in the Christchurch business area who were contemplating taking on new leases or renewing an existing lease. The need for such incentives and concessions was said to derive from the amount of vacant office space available in the Christchurch business district.

The Plaintiff's argument is that in reaching his decision the umpire accepted the submissions of Mr Fright and either failed to consider the matters raised by Mr Baker or failed to give them sufficient weight. It is then contended that in reaching his decision in this way the umpire misconducted himself or the arbitration by failing to take into account or failing to give sufficient weight to the submissions of Mr Baker

in that the umpire is said to have failed to take into account all relevant matters or to have taken into account irrelevant matters. I do not see how it can possibly be said that the umpire took into account irrelevant matters because there is no suggestion that the points put up by the valuers on either side were irrelevant to the issue before the umpire. Indeed Mr O'Brien in his submissions did not seem to me to advance the allegation that the umpire had taken into account irrelevant matters.

The Plaintiff then contends that the umpire determined his award on the basis of an incorrect application of the law and/or the relevant evidence, with the result that the rent fixed has been incorrectly determined and is higher than the current market rent payable in terms of the lease. There is then the bald pleading that there is an error of law on the face of the award. I shall deal with the rival contentions under three headings, first misconduct, second what constitutes the award and third whether there is an error of law on the face of the award.

Misconduct

As already indicated the word "misconduct", which is to be found in s.12(2) of the Arbitration Act 1908, has a special and extended meaning for the purposes of arbitration law. The circumstances in which an arbitrator may be found to have misconducted himself or the proceedings are conveniently collected in Halsbury 4th edition volume 2 at paragraph 622. There the

learned author says that it is difficult to give an exhaustive definition of what may amount to misconduct on the part of an arbitrator or an umpire. It is true to say however that most heads of misconduct have a procedural flavour.

There is in the present case no suggestion of procedural irregularity. It seems to me that the lessee's complaints on this aspect of the case boil down essentially to the proposition either that the umpire effectively ignored the submissions and evidence presented by Mr Baker or that he gave insufficient weight to them. I asked Mr O'Brien whether he had any authority to support the proposition that it was misconduct if an umpire could be shown to have ignored, in the sense of giving no or insufficient weight to certain evidence. Mr O'Brien indicated that he had no authority directly on that point.

That is hardly surprising because in my judgment it is entirely for an arbitrator or umpire as to what weight, if any, he gives to the evidence presented to him and indeed to the submissions which are tendered on each side: see inter alia the recent unreported judgment of Fisher, J. in Fencible Court Howick Ltd v. Howick Borough Council M.481/87 Auckland Registry (judgment 9/6/89) at page 21. It is not misconduct to come to a decision considered by the Court to be wrong on the facts or indeed on the law. In Gillespie Bros & Co v. Thompson Bros & Co (1922) 13 Ll.L.Rep. 519 at page 524 Atkin, L.J. said:-

> "It is no ground for coming to a conclusion on an award that the facts are wrongly found. The facts have got to be treated as found.... Nor is it a ground for setting aside an award that the conclusion is wrong in fact. Nor is it even a ground for setting aside an award that there is no evidence on which the facts could be found, because that would be mere error in law, and it is not misconduct to come to a wrong conclusion in law and would be no ground for ruling aside the award unless the error in law appeared on the face of it...."

The position is put this way in Russell on Arbitration 20th edition (1982) at page 422 where the learned authors say:-

> "It is not misconduct on the part of an arbitrator to come to an erroneous decision, whether his error is one of fact or law and whether or not his findings of fact are supported by evidence."

Reference can also be made to Commercial Arbitration by Mustill & Boyd 2nd edition (1989) at page 560 to the same effect and The Vasso [1983] 2 Lloyds Rep. 346 at 350.

In New Zealand this line of authority is exemplified by the decision of the Court of Appeal in Manakau City Council v. Fletcher Mainline Ltd [1982] 2 N.Z.L.R. 142 where at page 146 Woodhouse, P. adopted the statement from Russell mentioned above. The unwillingness to characterise perceived errors of fact as amounting to misconduct goes back in New Zealand at least as far as the decision of Stout, C.J. in Mayor of Wellington v. Aitken Wilson & Co (1914) 33 N.Z.L.R. 897.

Mr O'Brien was quite right when he suggested that if the Plaintiff was to succeed at all it must on the ground of error of law on the face of the award. There is absolutely no foundation in the present

case for any finding of misconduct by the umpire and the Plaintiff's submissions in this respect are rejected.

What Constitutes the Award?

In this case the umpire's formal award simply recites the procedural history and then awards the sum of $84,799.00 per annum as being the current market rental of the demised premises in accordance with the lease document for the review period in question.

In his award the umpire records that he has fully considered the lease document, the procedural matters referred to in the letter from the lessor's solicitors, the valuers' initial submissions and their counter submissions and he then goes on to set the rental figure. Mr O'Brien contended that the seven pages of notes outlining the umpire's approach to the matter and his process of reasoning did in this particular case form part of the award. He recognised that he started off with a preliminary difficulty in that the umpire indicated right at the start of the notes that they were not intended to be nor should they be taken as part of the award.

Mr O'Brien pointed to the fact that in the letter of instructions the umpire was required to make his determination in writing giving reasons for and the basis of his determination. It was suggested that if the umpire had not published reasons he would have been guilty of misconduct but that does not necessarily mean that the published reasons were required to be published as part of

the award. Mr O'Brien recognised that a statement such as that made by the umpire in the present case to the effect that the accompanying reasons were not intended to be part of the award, would often be decisive of the matter. He referred to CBI N.Z. Ltd v. Badger Chiyoda [1989] 2 N.Z.L.R. 669 at 673 per Cooke, P. However in that case the submission document required reasons to be stated but expressly provided that they should not form part of the award.

Here the parties agreed that reasons should be given but did not expressly state whether they should form part of the award. The umpire has construed his instructions as not requiring that his accompanying reasons be incorporated in the award. The parties did not make the point clear and in my judgment the umpire was perfectly entitled to adopt the course which he did. For there to be an error of law on the face of the award there must be such an error by express exposition, not merely by inference. The error must appear either in the award itself or in a document actually incorporated therein, for instance a note appended by the arbitrator stating the reasons for his decision: see Champsey Bhara & Co v. Jivraj Balloo Spinning & Weaving Co Ltd [1923] A.C. 480, 486 P.C.and Wellington City v. National Bank of New Zealand Properties Ltd [1970] N.Z.L.R. 660, 669 per North, P.

In the more recent decision of the Privy Council in Max Cooper & Sons Pty Ltd v. University of New South Wales [1979] 2 N.S.W.L.R. 257 it was held

that whether a collateral document forms part of the award depends primarily on the arbitrator's intention. It is normally a matter to be inferred from the documents which he has prepared. It was further said that even if the award itself refers to the existence of another document that in itself is neutral; it raises no presumption that such other document is incorporated as part of the award. Importantly their Lordships were of the view that unless the intention to incorporate is clear there should be a presumption against incorporation.

Essentially therefore the test is whether or not the arbitrator or umpire intended the collateral document to be part of his award: see the judgment of Somers, J. in Manakau City v. Fletcher Mainline where His Honour said at page 160:

> "There can be no doubt that the issue is one of intention."

It is abundantly clear that in the present case the umpire far from intending that his several pages of notes should form part of the award, expressly directed that they should not, nor should they be taken to be part of the award. As to Mr O'Brien's point that the umpire may have been guilty of misconduct in that, having been required to state the reasons for his determination, he has ended up by stating reasons in a way which deliberately kept them out of his award, there are two answers to that both of them advanced by Mr Maling. First the Plaintiff did not plead any such misconduct on the part of the umpire, in spite of the fact that

misconduct generally was pleaded. Secondly the lease is entirely silent as to whether or not the arbitrator or umpire must deliver a speaking award.

The requirement of giving reasons was introduced in the procedural letter from the lessor's solicitors already mentioned. That letter did not expressly require the reasons to be given as part of the award. In the same way as in a case of doubt the Court will presume that an arbitrator did not intend to incorporate his reasons in the award so in my view if the parties simply state that reasons are to be given without expressly stating whether or not the reasons should form part of the award, the arbitrator or umpire will not have misconducted himself by coming to the view that the reasons are to be given outside the award.

It is my judgment therefore that the umpire's award in the present case does not include the seven pages of notes. That being so Mr O'Brien acknowledged that he could not advance his submissions any further because there is beyond doubt no error of law on the face of the arbitrator's award, if one excludes the seven pages of notes. I shall however, in case I be wrong, proceed to consider what the position would have been if the seven pages of notes had formed part of the formal award.

Error of Law on the Face of the Award

In paragraph 7 of his notes the umpire recorded the two valuations which had been submitted to

him by Messrs Fright and Baker. He expressly recorded Mr Baker's contention that the rental figure should be discounted by 10% because Mr Baker was of the view that the current rental market for comparable premises was not normal, there being a great deal of surplus office accommodation. Mr Baker had produced evidence of discounted rentals for this reason and also of inducements given by lessors to lessees in other ways. The umpire went on to say that on the surface in the current (February 1989) Christchurch leasing market it might be relevant to apply a discounting factor in certain circumstances to arrive at the market rental.

He then recorded the submissions of Mr Fright on the point and indeed the evidence produced by Mr Fright and recorded further Mr Baker's strong submission that both at law and in equity there should be no difference in assessing rentals under the three alternative situations, namely new leases, renewals of existing leases and reviews of rental within existing leases. The umpire then went on to say:-

> "With respect to Mr Baker's view that situation, however equitable it may be, is not supported by the evidence of Mr Fright which he clearly documents, and on that evidence I am convinced there is a difference in the rental that a landlord can expect under a rent review as at February 1989 compared with the leasing of vacant space in particular and to a lesser degree rental renewals."

He added:-

> "Having accepted that this situation exists in Christchurch as at the beginning of the 1989 year, the difference between the valuers is narrowed considerably."

Without the 10% discount Messrs Fright and Baker were $1.70 per square foot apart. With Mr Baker's 10% discount, for the reasons he advanced, the valuers were $3.30 per square foot apart.

Mr O'Brien suggested that the lease itself did not define the way in which "current market rent" was to be assessed. With respect this is not correct. Clause 3(j)(vi) set out above gives fairly precise directions to the valuers or the umpire as to what matters they shall take into account in determining current market rent. They are deemed to be acting as experts and not as arbitrators. Then follow the other matters of which a crucial point is that the umpire must have regard to the terms and conditions of the lease. So there is significant guidance to the valuers or the umpire, as to the matters to be taken into account, albeit that there is not, I acknowledge, any specific definition of the expression "current market rent".

Mr O'Brien referred to a number of cases starting with the decision of the High Court of Australia in Spencer v. Commonwealth of Australia (1907) 5 C.L.R. 418. That was a case involving the assessment of the value of land taken back under statutory powers and it adopted the familiar willing vendor/willing purchaser approach. Coming closer to the present time Mr O'Brien mentioned the decision of Donaldson, J. in F.R. Evans v. English Electric Co Ltd (1977) Estates Gazette (judgment 25/2/75). That case involved what was described in the lease as "the full yearly market rental". That definition

was expanded to include the rental which the demised premises were worth to be let with vacant possession on the open market as a whole between a willing lessor and a willing lessee. That is completely different from the present case.

In the Evans case Donaldson, J. indicated that the formula adopted in the lease before him involved an assessment of what a hypothetical willing lessee would agree to pay and what a hypothetical willing lessor would agree to accept. As already observed in the present case one of the factors to be taken into account is the terms of the lease between the parties. The parties in the Evans case had provided their own dictionary for the arbitrators. In this case a dictionary has been provided to an extent, but it is a different exercise altogether. Mr O'Brien then referred to the case of Segama N.V. v. Penny Le Roy Ltd (1984) Estates Gazette Digest 74. That was an appeal heard by Staughton, J. from arbitrators. In that case also the crucial expression "the market rent" was the subject of an internal definition involving premises with vacant possession. The case seems to have been involved primarily with questions of the admissibility and ambit of evidence.

Coming back to the essential question I do not see any of these authorities as aiding Mr O'Brien's submission that there is an error of law on the face of the award, treating the award as including the seven pages of notes for present purposes. Mr O'Brien was in essence driven to submitting that the error of law which was

apparent was that the umpire had effectively ignored the evidence as to rates set for new leases and renewals. The essence of the Plaintiff's complaint is that if one leaves out of account evidence of market rentals in cases of new leases or renewals then one will end up with a higher rental figure than is justified.

It seems to me that if clause 3(j)(iv), which speaks of comparable premises, is read together with the umpire's obligation to have regard to the terms and conditions of the instant lease, he, the umpire is certainly entitled to take particular heed of comparability, both in respect of the premises themselves and in respect of similarity of tenure. In other words, to get a truly comparable situation one needs to look at premises as similar as possible to the subject premises and cases where the lessee is the subject of a rent review rather than the subject of a new lease or the renewal of an existing lease.

In my judgment it is not a case where the umpire has been shown to have ignored Mr Baker's submissions or his evidence. It is a case where he has preferred the approach of Mr Fright in circumstances where he was perfectly entitled to do so both as a matter of assessing competing considerations and by dint of the fact that he had been appointed to do the adjudication because of his qualifications and expertise in the field. There is no foundation whatever for the proposition that Mr Baker's evidence and submissions were put on one side without being considered. Mr Baker's points were

obviously considered by the umpire. The fact that they were not adopted is unfortunate for the Plaintiff but cannot possibly amount to an error of law.

In any event even if I were satisfied that the umpire was in error, and I am far from being so satisfied, it seems to me that at best from the Plaintiff's point of view the umpire would have made an error of fact rather than an error of law. There is no recognised principle of law which the umpire is shown not to have followed. The umpire's crucial finding, as demonstrated by his reasons, is the proposition that he was convinced on the evidence that there was a difference in the rental that a landlord could expect under a rent review compared with the leasing of vacant space and to a lesser degree the case of rental fixed on a renewal. There was no room in my judgment for the umpire to adopt an unvarnished hypothetical lessor/lessee exercise because the reality of the matter was that the lessor and the lessee were contractually bound in respect of the subject premises for the balance of the term.

No doubt what constitutes current market rental is not an easy matter to determine in those circumstances, but I do not regard that essential question as being simply a question of law. It is in reality a mixed question of fact and law. The key point for present purposes is that the umpire is not shown to have misdirected himself in law, or to have overlooked any relevant principle of law in coming to his assessment of current market rent. Indeed the matters which an expert

umpire is obliged to take into account in a case of this kind are essentially a question for his expert assessment after having listened carefully to the evidence and representations that the parties wish to put to him. In short I can discern no error of law on the face of the umpire 's award, even treating the seven pages of notes as incorporated therein.

Neither of the grounds upon which the Plaintiff as lessee seeks to have the umpire's award set aside have been established. The application is accordingly dismissed. I record that Mr Forbes appeared at the commencement of the hearing on behalf of the umpire who had been joined as Second Defendant. He indicated quite properly that the umpire wished to abide the decision of the Court but sought the right to be heard on questions of costs. As requested all questions of costs are reserved. If agreement cannot be reached memoranda may be filed or the parties, if preferred, may arrange to have the matter re-listed for argument on the point.

C.P. No.298/89

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

BETWEEN UNITED SHAREBROKERS LIMITED

Plaintiff

A N D LANDSBOROUGH ESTATES LIMITED

First Defendant

A N D JOHN NEVILLE BEAUFORT

Second Defendant

JUDGMENT OF TIPPING, J.
