Rates - shopping centre - allocation of rates among individual lessees/shops in shopping centre - whether shops should be rated individually or in aggregate - whether rateable value of each shop should be determined by annual lease or by sum of rateable values of all shops divided according to individual lettable floor area - prima facie rates liability of individual lessees/shops - apportionment of rateable values on valuation roll - power of Council to make apportionment - Rating Powers Act 1988, ss 123 and 202.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

HC No 165/94

UNDER	the Land Valuation Proceedings Act 1948
IN THE MATTER	of two objections against Valuations under the Valuation of Land Act 1951
BETWEEN	AUCKLAND CITY COUNCIL Appellant
AND	THE BIG FRESH FOOD COMPANY LTD First Respondent
AND	THE FARMERS TRADING COMPANY LIMITED Second Respondent
Hearing:	11 April 1995
Counsel: Appellant	P. Salmon QC & D.A. Kirkpatrick for
	R.E. Bartlett for First Respondent
	J. Carter for Second Respondent
Judgement:	6 July 1995

RESERVED DECISION OF FISHER J

Solicitors:

Simpson Grierson Butler White, DX 92, Auckland for Appellant

Ellis Gould, DX 156, Auckland for First Respondent

Carter & Partners, DX 166, Auckland for Second Respondent

Introduction

The appellant ("the Council") appeals against a determination of the Land Valuation Tribunal concerning the manner in which rates are allocated among individual lessee/retailers at St Luke's Shopping Centre. The question is whether the shops should be rated individually or in aggregate. In more detail the question is whether the rateable value of each leasehold shop is to be determined solely by determing the annual value of that particular lease in isolation or whether the sum of the rateable values of all the individual leasehold shops should be divided amonng the retailers according to the proportion which the lettable floor area of each individual shop bears to the total lettable floor area of the complex as a whole. Obscure though the question sounds, the parties say that the outcome will affect the rating of many other cases in which operating expenses are shared among groups of lessees.

Background

St Luke's Shopping Centre is a collection 114 shops and an administration office in Mt Albert, Auckland. The fee simple is owned by St Luke's Square Limited. Each individual shop is the subject of a separate lease for terms ranging from four to twenty years. By its lease each retailer gains exclusive possession of the shop in question together with the right to share in the use of common areas. The complex is managed from a management office on site. Operating expenses for the whole complex are shared according to standard provisions in the lease. Each lease also contains a specific provision for the lessee's liability to pay rates, typical being clause 3.07 of the standard lease which provides:

> "The Lessee shall pay the local body rates (including water rates if any) levied in respect of the Premises PROVIDED THAT if there shall be no separate assessment the Lessee shall pay to the Lessor such proportion of the rates levied in respect of the Land and/or the Centre as may fairly be apportioned to the Premises on a Floor area basis such rates to be apportioned (if need be) at the beginning and end of the term."

The rent per square metre varies from one shop to another. Generally speaking the larger the shop the lower the rent per square metre. Two of the larger retailers are the respondent in the present case. Big Fresh has a lease of twenty years from 8 May 1990 and Farmers seven years from 7 November 1990. Because of their size, the rent per square metre for these two shops is significantly less than that of the smaller specialty shops.

St Luke's is in the district of Auckland City which operates an annual value rating system in terms of s 95(l)(a) of the Rating Powers Act 1988. The Council had a City Valuer duly appointed under s 5B(l) of the Valuation of Land Act 1951. On 1 September 1992 the City Valuer exercised his power to alter the City's valuation roll under s 12 of the Valuation of Land Act by introducing fresh entries for the shops which Big Fresh and Farmers leased at St Luke's. As required by s 18(1) of the Valuation of Land Act the Council issued notices of valuation to Big Fresh and Farmers. The notice of valuation to Big Fresh identified Big Fresh as the ratepayer, St Luke's Square Limited as the owner, 80 St Luke's Road as the situation, Big Fresh's particular shop as "description of rateable property", and gave the new entry its own number on the valuation roll. It then went on to state:

"RATEABLE VALUE (ANNUAL VALUE)	RATES POSTPONEMENT VALUE OR SPECIAL RATEABLE VALUE OR SPECIAL VALUE (WHERE APPLICABLE)
$771,731	$1,381,662".

Farmers' notice of valuation followed the same pattern, the two figures being $515,735 for the rateable value (annual value) and $1,620,849 for the other value. It is common ground that in each case the first figure represented the annual value calculated in

accordance with the definition of "annual value" in s 2 of the Valuation of Land Act. In accordance with conventional valuing principles, the value was arrived at having regard not only to the physical confines of the shop in question but also to the bundle of rights flowing from the lease including the right to use the common areas and facilities. That process had resulted in the figures of $771,731 for Big Fresh and $515,735 for Farmers.

In each case the second of the two figures represented the result of adding the values of all the various leases which made up St Luke's Square, dividing the total by the total lettable area of the whole centre and multiplying the dividend by the floor area of each lease. More simply, it can be described as the value arrived at on a pro rata net lettable area basis. It is not disputed that on that basis the result was the $1,381,662 for Big Fresh and $1,620,849 for Farmers.

As can be seen from the figures, the effect of valuing on a pro rata net lettable area basis rather than a direct annual value basis was to dramatically increase the rates bills of the two respondents. In round terms it doubled the figure for Big Fresh and tripled it for Farmers. For rates purposes the large retailers were losing the benefit of their lower square metre rental rates. Correspondingly, the effect of the pro rata net lettable area approach was that small retailers enjoyed major reductions in the rates which they would otherwise have paid. This can be illustrated by the shop known as "Long John Silver" whose rateable value was reduced from $49,785 (actual rent paid) to $9,070 (less than one-fifth of actual rent paid). So the effect of the pro rata net lettable area approach was to take from large retailers with one hand and give to smaller ones with the other.

The large retailers were not prepared to take this lying down. Exercising their rights under s 18(2) of the Valuation of Land Act the present respondents Big Fresh and Farmers filed objections. These were declined by the City Valuer under s 20(1) of the Valuation of Land Act. As required by the respondents the objections were then heard by the Land Valuation Tribunal on 30 May 1994.

Proceedings before Land Valuation Tribunal

The only issue before the Land Valuation Tribunal was whether the Council and its Valuer were correct in principle in opting for the pro rata net lettable area approach which had produced the higher figures for Big Fresh and Farmers. At an earlier point Big Fresh had objected to the quantum of the direct annual value of $771,731 but by the time the matter reached the Tribunal a substituted figure of $707,784 had been agreed upon between the parties.

The Council contended that a pro rata net lettable area approach was dictated by s 202(3) of the Rating Powers Act in combination with provisions in these leases apportioning rates among the lessees on a floor area basis. The Tribunal rejected that contention. It found that the effect of the first two lines of the primary clause as to rates in each lease

> "The Lessee shall pay the local body rates (including water rates if any) levied in respect of the Premises..."

(clause 3.07 in the standard lease) was to require that where direct rating occurred there was to be no reapportionment among lessees. The provision for a floor area reapportionment under the proviso to that clause would apply only where there was no separate assessment. The parties had the option of seeking direct assessments of lessees or apportionment of rates by the owner on a floor area basis. Having opted for the former, the floor area formula under the proviso could have no application. The Tribunal concluded that "the total effect of this decision is to uphold the annual rateable values as fixed for Big Fresh Limited at $707,784 as negotiated and for FTC at $515,735 as assessed".

Grounds of appeal

Before this court the Council's basic case was that whenever a lease provides for a reapportiomment of rates among a group of lessees whose leasehold properties have a common lessor, s 202(3) requires the Council to apportion and levy rates in accordance with the provisions of the leases notwithstanding the result which might otherwise have occurred on a direct rating basis. The Council further submits that in the present cases the leases did so provide. Before turning to those contentions it will be necessary to establish the prima facie rates liability which individual lessees would have had but for s 202 and also the legal significance of including the special "pro rata" figure in the valuation notice.

Prima facie rates liability before turning to s 202

It is not disputed that as these leases had terms of twelve months or more the lessees have a primary statutory liability to pay direct to the Council those rates incurred with respect to their particular premises. That follows from a series of provisions in the Rating Powers Act (the definition of "occupiers" in s 2; s 121 as to primary liability of occupier, the definition of "rates records" in s 2; particulars of occupiers to be taken from the valuation roll under s 113(4); the meaning of "valuation roll" in terms of ss 2 and 105(2)) and in the Valuation of Land Act 1951 (City Valuer to prepare annual value valuation roll under ss 8(1A) and 28(2)(a); that roll to be used for rating purposes under s 28(b)). The lessor St Luke's Square Limited has no primary statutory liability to pay rates levied against individual shops. It incurs that liability only if and when the retailer concerned defaults in its primary obligation to pay: see s 139(1) of the Rating Powers Act. It is common ground that the premises of each individual shop constitutes a "separately rateable property" as that expression is used in s 2 of the Rating Powers Act and that in practice, valuation of each as a separate entity for the purposes of s 8(1A) and 28(2)(a) has. presented no difficulty.

Consistent with that position, each individual lease contains a provision for the payment of rates direct from the lessee to the Council. The wording of each lease differs slightly but not in respects which are material for present purposes. In each case the clause reflects clause 3.07 from the standard lease quoted earlier. The primary effect of that provision is to impose upon the lessee a direct liability to pay rates levied in respect of those premises occupied by that lessee. I agree with the Tribunal that the formula in the proviso for apportionment on a floor area basis is limited to situations in which there is no separate assessment. On the facts applicable in this case there must be a separate assessment for each individual shop in accordance with the statutory provisions I have just traversed. Consequently the governing provision in this case is the introductory statement "[t]he Lessee shall pay

as they fall due the local body rates (including water rates if any) levied in respect of the Premies not the formula found in the proviso. There is therefore a contractual reinforcement of the statutory provisions to which I have referred. Both as a matter of statute and as a matter of contract, each lessee was to pay rates for that lessee's shop direct to the Council. So far as rates levied against individual shops were concerned, the Lessor did not come into the picture unless and until an individual lessee defaulted.

It turns out that for a period the Council did not proceed on the direct rating basis which the statutes and the leases envisaged. Instead it sent a global rate demand to St Luke's Square Limited. That company paid the global demand to the Council in the first instance and then turned to the retailers for reimbursement in, the form of contributions to the whole centre's operating expenses. That practice was rectified in 1992 and nothing now turns on it. At the times material to this appeal it was rightly appreciated that the rates liability for each individual shop was the primary statutory responsibility of the retailer in question. Nor could it be doubted that for each individual shop, rates liability turned upon the rateable value of that individual shop. That value was to be its "annual value" within the meaning of that expression as defined in s 2 of the Valuation of Land Act

Before turning to s 202 of the Rating Powers Act therefore, it is clear that Big Fresh and Farmers were directly liable to the Council for rates assessed upon the rateable values of their individual premises. It is common ground that the rateable values were $707,784 and $515,735 respectively, not the pro rata net lettable area figures of $1,381,662 and $1,620,849. The next question is whether s 202 produced a different result.

Legal significance of including the extra pro rata figures in the valuation notices

The Council had adopted an annual value rating system for its district. In a district with that system the local authority appoints its own Valuer pursuant to s 5B(1) of the Valuation of Land Act. Pursuant to s 8(1A) of that Act the Valuer must prepare an Annual Value Valuation Roll. On request of the local authority under s 28(2) this is periodically supplied and used as the valuation roll for rating purposes. The roll can be altered from time to time under s 12 of the Valuation of Land Act with rights of objection under s 18(2).

As to the contents of that roll, s 8(1A), of the Valuation of Land Act provides:

"(1A) An annual value valuation roll shall also be compiled by the Valuer for any district of a territorial authority where the annual rating system is in force, and shall in the prescribed form contain for each separate property the following particulars:

(a) The name of the owner:

(b) The name of the occupier

(c) The situation and desciption of the property

(d) The annual value:

(e) Where applicable, the rates postponement value or the special rateable value, as the case may require:

f) Such other particulars as may be prescribed

I do not think that there is any legal foundation for including apportionment values under s 202 on a rating roll nor on notices prepared on the strength of the roll. It is not suggested that the apportionment figures entered upon the valuation notices sent to Big Fresh and Farmers were authorised by s 8(1A). In particular, they did not constitute an "annual value", "rates postponement value", or "special rateable value". Nor did they fall within any other particulars prescribed pursuant to s 8(1A)(f). The values which appear on the valuation roll are important. The valuation roll provided by the Valuer under s 28(2)"'shall be the valuation roll of the local authority for the purposes of ratings (s 28(2)(b)) and (subject to s 123(4) to which I will come in a moment) "every rate made by a local authority shall be levied in accordance with the values ... appearing in valuation roll" in terms of s 123(1) of the Rating powers Act.

Subss (1) and (4) of s 123 then provide:

"(1) Every rate made by a local authority shall be levied in accordance with the values or, where the rate is made on the area system, the areas of properties appearing in the valuation roll, corrected as at the end of the financial year immediately preceeding the beginning of the year in respect of which the rate is made and the rate shall not be affected by, any alterations in value during the financial year in respect of which the rate is made.

...

(4) Nothing in subsections (1) to (3) of this section shall prevent -

(a) The levying of any rate in accordance with an apportionment of the value of the property in accordance with section 120 or section 202 of this Act ... "

The fact that under s 123(4) it was thought necessary to make an apportionment under s 202 an express exception to levying rates on the basis of the values shown in valuation rolls under s 123(1) would seem to reinforce the view that apportionment values under s 202 will not appear on the valuation roll itself. If they already appeared on the valuation roll the s 123(4)(a) reference to s 202 would have been unnecessary. There is no explicit statutory basis for including s 202 apportionment values on a rating roll or notices based thereon.

Although there is no legal foundation for doing so I can see no particular harm in including on a rating roll a notation that apportionment values have been assessed under s 202, and the result of that assessment, but if that is done it seems important that the nature of the added figures be clearly stated. They do not represent the "annual value", "capital value", "land value", "rateable value", "special rateable value" or "rates postponement value". They are not even part of the valuation roll in the strict sense. In my view much of the confusion in the present case was due to the inclusion of s 202 apportionment figures in the valuation notices, and presumably therefore the roll as well, without proper explanation and with a misleading label attached to the figures.

Independently of the valuation roll, however, there is certainly the power to apportion rateable values between different parts of a given rateable property. In that regard s 202 of the Rating Powers Act provides:

"202. Apportionment of rateable values between parts of property - (1) Where it is to apportion the rateable value of any rateable property between 2 or more portions of the property, the rateable value shall be apportioned in such man-

ner as the Valuer-General or, as the case may be, the Valuer for the district thinks fit so that the rateable value of each when added to the rateable value of the remaining portion or portions of the property shall equal the rateable value of the whole property.

(2) Each such occupier may object to such apportionment as if it were a valuation, and the provisions of the Valuation of Land Act 1951 relating to objections, as far as they are applicable and with the necessary modifications, shall apply accordingly.

(3) Notwithstanding anything in the foregoing provisions of this section, where the occupier of a portion of any rateable property is the lessee or licensee under a lease or licence or has entered into an agreement with the owner, and the lease or licence or agreement specifies the portion of the rates in respect of the whole property that are to be paid by that occupier, the rateable value of that portion of the property shall be the sum which bears to the rateable value of the whole property the same proportion that the portion of the rates payable by the occupier pursuant to the lease or licence or agreement bears to the total amount of the rates payable in respect of the whole property."

It will be seen from s 123(4)(a) referred to earlier that an apportionment under s 202 can provide the basis for levying rates. But apportionments under s 202 stand outside the valuation roll system itself. Consistent with that approach, s 202(2) confers independent right of objection to the apportionment. Those rights of objection relating to entries in the valuation roll proper (principally ss 18 and 19 of the Valuation of Land Act) do not extend to s 202 apportionments.

The respondents in this case were unclear as to the precise statutory basis upon which their objections had been lodged. They were not founded upon s 19 as suggested at one point. That provision is limited to roll revisions. The alterations to the roll notified in the notices of valuation of 1 September 1992 were given in a form which was plainly assumed by those concerned to flow exclusively from alterations to the roll in terms of s 12 of the Valuation of Land Act with a consequent notice under s 18(1) of that Act. If in that way the objection were brought under s 18(2), it could be brought on the basis that the pro rata figure had been improperly included in the valuation roll and ought to be deleted. In substance, however, when the Council sent out the notice of valuation I think that it was simultaneously advising the respondents of an apportionment effected under s 202. Presumably it did so with a view to the future levying of rates in accordance with s 123(4)(a) of the Rating Powers Act and with the consequence that the respondents had an independent right of objection under s 202(2) of the Rating Powers Act. That objection could be seen as relating not to entries on the valuation roll but rather to the independent apportionment. Merely to achieve a deletion from the valuation roll would not achieve anything for the respondents since it would not preclude the future levying of rates under s 123(4)(a). What is needed therefore, if it be warranted on the merits, is an alteration to, or a striking out of, the apportionment pursuant to s 202(2). There would seem to be ample power in ss 26(4) and 37 of the Land Valuation Proceedings Act 1948 for the Land Valuation Tribunal and, on appeal, this court, to direct the necessary deletion in the valuation roll and to quash the apportionment under s 202 in the event that that is justified on the merits.

The position therefore is that as the records presently stand, and notwithstanding the confusing state of the Council's valuation roll the City Valuer has clearly purported to effect an apportionment under s 202. The next question is whether the City Valuer was entitled to make an apportionment under s 202 at all and, if so, on what basis.

Did the Council have the power to make any apportionment under s 202?

Section 202 provides that "where it is necessary to apportion the rateable value of any rateable property between two or more portions of the property" the apportionment is to be effected in a certain manner. It will be noted that s 202(1) does not create any power to apportion where none already existed. The provision picks up a given case at the point where an apportionment has already become "necessary" for some reason not adverted to in the section. The section merely outlines the formula to be applied in that situation.

An example of a situation in which such an apportionment can prove necessary is a property to which differential rating attaches. Thus ss 105(4) and (5) relevantly provide:

"(4) Where land is differentially rated the Valuer-General or the Valuer shall from time to time in each case where parts of a separately rateable property are allocated to different types or groups of property, specify in the valuation roll supplied to the local authority.

...

(b) Where the land is or is proposed to be rated on the land value, or the capital value, or the annual value system, apportion the rateable value of the property among the portions thereof and supply particulars of that portion to the local authority.

...

(5) Where any valuation is apportioned in terms of subsection (4) (b) of this section, the provisions of section 202 of this Act shall apply."

For present purposes the point is that where two or more classes of differential rating apply to the same property the necessity for apportionment is derived from s 105, not from s 202. Section 202 is confined to consequential procedures and methods once an apportionment has become necessary for some other reason.

It is not suggested that in the present case apportionment was for some reason rendered "necessary" for the purpose of s 202(1). Mr Salmon accepted that it was not but submitted that s 202(3) represents an independent source of jurisdiction. He submitted that whenever the conditions for apportionment expressly referred to in subs (3) are "necessary" in terms of s202(1).

It seems to me that two considerations count against such an interpretation. The first is that when s 202 is read as a whole, the more natural interpretation is that as a general rule where an apportionment is necessary the Valuer-General or the Valuer for the district will apportion in such manner as he or she thinks fit (s 202(1)) but that there is an exception to this where the parties have already determined the basis of apportionment by their own contract (s

202(3)). At least in this context the phrase "notwithstanding anything in the foregoing provisions of this section" in subs (3) represents a qualification to the more general proposition in subs (1). That is not the only way in which the language could be interpreted but it is the most obvious and natural one.

Secondly, the starting point is that at least without any contractual reapportionment, occupiers have a direct statutory rates liability to the local authority (see the discussion of statutory provisions earlier and in particular s 121 of the Rating Powers Act). Prima facie, one might think, the local authority would not be interested in a contractual arrangement which a ratepayer might have made with others giving that ratepayer a whole or partial indemnity for that ratepayees statutory liability. Mr Salmon's interpretation of s 202(3) would allow ratepayers to override by contract the statutory liability which they would otherwise have had. No reason has been suggested for thinking that the legislature would have contemplated this. It is one thing to say that where another provision in that statute makes an apportionment of rates necessary in any event, the process of apportionment can be based upon concensual arrangements made between the ratepayees on that topic. It is another to suggest that whether or not an apportionment is rendered necessary by other provisions in the statute, the parties should be given the power by private contract to alter the incidence of their own statutory tax liability.

Those are two considerations which count against the interpretation relied upon by the Council. None was advanced in support of it. There appears to be nothing in the express wording of s 202 itself, the wider scheme of the statute, or the policy objectives implicit in the statute, to support the Council's argument.

I conclude that statutory recogntion of the contractual reapportionment of rates for the purposes of s 202(3) of the Rating Powers Act is possible only in circumstances where, for reasons to be found elsewhere in the statute, "it is necessary to apportion the rateable value of any rateable property between two or more portions of the property" in terms of s 202(1). It has not been suggested that in the present case it is necessary in that sense. There was therefore no power to apportion under s 202 and the pro rata figures adopted by the City Valuer must be regarded as nullities.

Other grounds for decision

My conclusion as to the proper interpretation of s 202 makes it unnecessary to go on to consider in any detail other grounds for supporting the Tribunal's decision.

However, two may be briefly mentioned.

First I think it clear from the context that "rateable property" as used in s 202(3) must refer to a single rateable property against which rates would have been levied globally but for the apportionment contemplated in the section. Apportionments are possible only if rates would otherwise be levied globally against a single rateable property. Although the phrase "rateable property" as used in s 3 and the definitions clause in s 2 is expressed in general terms, ss 202 and 123(4) in combination are concerned with the levying of rates. Rates are levied against separate properties by virtue of the introductory wording to s 8(1A) of the Valuation of Land Act and the words "each separate property" in s 123(3). There is no point in apportioning to an occupier a rateable value in respect of which that occupier is solely liable to begin with. That view is reinforced by the requirement in s 203(3) that before there could be such an apportionment there must be a lease, licence or agreement which "specifies the portion of the rates in respect of the whole property that are to be paid by that occupier". In context, this presupposes that the whole property that is under discussion is that separately rateable property in respect of which rates have been, or will be, levied on a global basis and in respect of which more than one lessee or other person will be sharing the liability. If the rateable property is already recorded on the roll as a separately rateable property, with its own. separate annual value in respect of which a separate rate will necessarily be levied pursuant to ss 121 and 122, there is nothing left to apportion under s 202. In the present case when considering the shop premises of any particular lessee, the lessee was not relevantly the occupier of a mere portion of a rateable property, it was the occupier of the whole. It is not suggested that any question of apportionment arose with respect to that property.

Secondly, before s 202(3) could apply, the lease in question had to relevantly "specify the portion of the rates in respect of the whole property that are to be paid by that occupier." These leases contained no such provision. In the factual circumstances that operated here, namely the issue of separate assessments to individual retailers, clause 3.08 did not provide for apportionment of those rates which were the subject of the separate assessments. Nor did other provisions in the lease (item 10 in the First Schedule, s 1, clause 1.01(m) to the Second Schedule and paragraph (ii) to the Fourth Schedule) extend beyond "all outgoing costs and expenses of the lessor" to rates levied directly against the individual lessees. There may or may not be other rates charged to the lessor, St Luke's Square Limited, which should properly be apportioned among the lessees pursuant to the proviso in clause 3.08 and/or the operating expenses provisions to which I have referred. But those provisions have no application to rates levied directly against individual lessees.

Had it been necessary I would have found against the Council on those grounds also.

Consequential orders

The Land Valuation Tribunal concluded "the total effect of this decision is to uphold the annual rateable values as fixed for Big Fresh Limited at $707,784 as negotiated and for FTC at $515,735 as assessed". Unlike the situation with capital values, land values and the value of improvements (as to which see s 22 Valuation of Land Act) the statute does not expressly provide that a decision of the Tribunal with respect to s 202 automatically produces a consequential amendment to the annual value valuation roll. I think it will be obvious to all concerned, however, that the effect of the Tribunal's decision is that the extraneous reference to the apportionment figures on the roll should now be removed and further that for rating purposes the apportionment is quashed without further order of this Court.

In the result the present appeal is dismissed. The appellant must pay costs to the two respondents in the sum of $3,000 each plus disbursements (if any) to be fixed by the Registrar.

RL Fisher J