

[IN THE COURT OF APPEAL.]

**THE DRAPERY AND GENERAL IMPORTING COMPANY  
OF NEW ZEALAND (LIMITED) v. THE MAYOR, ETC.,  
OF WELLINGTON.**

C.A.  
1912.  
April 22 :  
May 3 :  
SPOTT, C.J.  
WILLIAMS, J.  
EDWARDS, J.  
COOPER, J.

*Municipal Corporation—Lease—Renewal—“Fair Annual Ground-rent without any Buildings or Improvements” — Meaning—Wellington Corporation Leaseholds Act, 1885—Wellington City Leasing Act, 1904.*

The plaintiff company was the holder of three Corporation leases from the Wellington City Corporation. The leases all contained renewal provisions. In the case of two of them it was provided (see section 3 of the Wellington Corporation Leaseholds Act, 1885) that at the end of the term they should be put up to public auction at the upset price of the annual value of the land only, without regard to the value of any buildings or improvements; and this was to be calculated upon a valuation to be made of “the fair annual ground-rent of the said land only, without any buildings or improvements, for a further term of fourteen years from “the expiration of the term hereby granted.” In the third lease there was provision for renewal without the necessity of public auction. A valuation was to be made “of the annual rental of the said demised premises for a term of fourteen years, to commence from and after the expiration of “the term hereby granted,” and also a provision that “in ascertaining “such new rental the valuers shall not take into consideration the value “of any building or improvements then existing upon the said demised “premises, but they shall value the full improved ground-rental of the “said premises that ought to be payable during the said new term.”

*Held* by the Court of Appeal (Spott, C.J., and Williams, Edwards, and Cooper, J.J.).—

1. That, in respect of all three leases, the true basis on which the valuers must proceed was that there were no buildings or improvements on the land, and they must ascertain what a prudent lessee would give for the ground-rent of the land for the term, and on the conditions as to renewal and other terms, &c., mentioned in the lease.

2. That the valuations to be made under the said leases were submissions within the meaning of the Arbitration Act, 1908.

**ORIGINAL** summons under the Declaratory Judgments Act, 1908, for an order interpreting three certain deeds of lease dated respectively the 7th of January, 1892, the 16th of March, 1892, and the 30th of September, 1905, and particularly the

provisions therein respecting the renewal of such leases. The first two leases were granted under powers contained in the Wellington Corporation Leaseholds Act, 1885, and the third lease was in the statutory form provided in the Wellington City Leasing Act, 1904. The provisions for valuations of improvements, and for a new lease in the first two leases, were as follows:—

And it is hereby agreed and declared that not less than ten nor more than twelve calendar months before the expiration of the term hereby granted (if such term shall not have been previously determined by re-entry under the proviso for re-entry hereinbefore contained) two separate valuations shall be made by three different persons to be appointed in writing as follows:

One by the said Corporation, one by the tenant, and the third by such two appointed persons—one of such valuations to be made of all the buildings and improvements then on the said land hereby leased, and the other of the fair annual ground-rent of the said land only, without any buildings or improvements, for a further term of fourteen years from the expiration of the term hereby granted. And not less than seven nor more than ten calendar months before the expiration of the term hereby granted a lease of the said land and premises for such further term of fourteen years, containing the same covenants and provisions as are contained in these presents (including this present provision and all clauses auxiliary or in relation thereto), shall be put up by the Corporation to public auction at the upset price of the annual rent of the said land as valued without buildings and improvements, subject to the payment by the purchaser at such auction of the value of the said buildings and improvements fixed by the valuers as aforesaid. And in the event of any person or persons other than the tenant becoming the purchaser at such auction of the said lease for the said further term of fourteen years, such person or persons shall within two calendar months from the date of such auction pay in cash to the Corporation for the benefit of the tenant the amount of the value of the buildings and improvements so fixed as aforesaid, and also enter into a lease of the said premises for the said further term at the annual ground-rent at which the said premises shall have been so sold at such auction. And the Corporation (all rents and outgoings having been previously paid) shall at the expiration of the term hereby granted pay over to the tenant the amount of the value of the said buildings and improvements paid to the Corporation by the purchaser, without any deduction whatsoever.

In the third lease the provisions for renewal were:—

And it is hereby also agreed and declared that if the tenant shall, at least six calendar months before the expiration of the term hereby granted, serve upon the Town Clerk of the Corporation, or leave at the public offices of the Corporation, a notice in writing addressed to the Corporation, signed by the tenant, or signed on behalf of the tenant by its attorney or agent or solicitor, stating the desire of the tenant to have a valuation made of the annual rental of the said demised premises for a term of fourteen years to commence from and after the expiration of the term hereby granted, and naming an independent person appointed by the tenant to act as its valuer for the purpose of such valuation, and containing an address at which all notices under the provisions hereinafter contained may be served, and if the term hereby granted

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C.A. shall not have been determined by re-entry or otherwise, then and in such case the following provisions shall have effect, namely:—

1. A valuation shall be made to ascertain the said annual rental. Such valuation shall be made by three independent persons, one appointed by the tenant as aforesaid, one to be appointed by the Corporation (of which appointment notice in writing under the common seal of the Corporation, or signed by the Town Clerk or otherwise on behalf of the Corporation, shall be served upon the tenant, or left at the address for service contained in the notice served by it as aforesaid, at least five calendar months before the expiration of the term hereby granted), and the third valuer to be appointed by the two valuers appointed as aforesaid by writing under their hands before proceeding to the Wellington valuation.

2. At least three calendar months before the expiration of the term hereby granted, and not afterwards, the said three valuers, or any two of them, shall make their valuation, and reduce the same in duplicate into writing, and sign each of such writings, and also at least three calendar months before the expiration of the term hereby granted, and not afterwards, serve one of such writings upon the Town Clerk of the Corporation, or leave the same at the public offices of the Corporation, and serve the other writing upon the tenant, or leave the same for it at the address for service contained in the notice served by it as aforesaid.

3. In ascertaining such new rental the valuers shall not take into consideration the value of any building or improvements then existing upon the said demised premises, but they shall value the full improved ground-rental of the said premises that ought to be payable during the said new term.

4. If the Corporation shall fail or neglect to appoint and notify the appointment of its valuer in manner aforesaid at least five calendar months before the expiration of the term hereby granted, then and in such case the valuer appointed by the tenant shall, at least three calendar months before the expiration of the term hereby granted, and not afterwards, make, reduce into writing, sign, and serve the valuation in manner hereinbefore provided alone.

5. Each party shall pay the fee of the valuer appointed by such party and half the fee of the third valuer.

The Court was asked to answer the following out of the questions put in the summons:—

As to the first two leases,—

4. Is the fair annual value of the said land to be ascertained by arriving at its fee-simple value as if no building existed thereon, and fixing the fair annual ground-rent at some percentage on such freehold value without any regard to any valuable building actually existing thereon or to the purpose for which any such building is designed, suitable, and used?

7. What, under the provisions of each of the said two leases, is the true basis on which the valuers should ascertain the fair annual ground-rent of the land included in the said lease only, without any buildings or improvements, for the renewed term?

As to the third lease,—

8. In the case of the lease of the 30th of September, 1905, the like questions arise as to the interpretation of the words

“the full and improved ground-rental of the said premises that ought to be payable during the said term.”

As to all three leases,—

9. Whether the valuations of ground-rents to be made under the provisions of the said leases respectively are arbitrations as opposed to valuations, and the said leases are arbitrations “within the meaning of the Arbitration Act, 1908, and whether the valuers are arbitrators within the meaning of the said Act.

C. P. Sherratt, K.C., and W. H. D. Bell, for the plaintiff.—

The first two leases (7th of January, 1892; 16th of March, 1892) were granted under the Wellington Corporation Leaseholds Act, 1885, sections 3 and 5 of which are important. The words of importance in section 3 are, “shall be put up to public auction at the upset price of the annual value of the land only, without regarding the value of any buildings or improvements thereon.” (See also provisions for renewal in leases.) The dominant words in the renewal provision are, “the fair annual ground-rent of the said land only, without any buildings or improvements, for a further term of fourteen years from the expiration of the term.” The principle is that at the expiration of the term the tenant is to get full value for his improvements. There are no implied covenants for repair and insurance, the reason being that the buildings are regarded as belonging to the tenant. As to the last lease (30th of September, 1905), this is granted under the Wellington City Leasing Act, 1904. The Act was passed to do away with the necessity of public auction, which was found to be inconvenient and to lead to injustice to tenants. This lease has a provision for building. (See also provisions for valuation on expiry and renewal.) The lease is in the statutory form given in the Act. (See section 4 of Act, first proviso, “Fair annual ground-rent.”) These leases are building leases, with no restriction as to the class of building. The safeguard to the Corporation is that the tenant will make the best use of the land. There is no distinction between the three leases. In the first leases, in the renewal provisions the word “without” does not mean “disregard,” but simply “exclusive of.” If the word does not mean “disregard,” then the true principles of the leases are these: that the tenant is to get the full value for his

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*T. F. Martin and O'Shea*, for the defendant:—

The principle and the basis of the lease was an attempt to divorce land from buildings on it. The land belongs to the Corporation, and the buildings to the tenant. The first two leases are not strictly building leases, for there are no covenants for building, repair, insurance, &c. The tenant is left to put the land to any purpose he pleases. The construction of the plaintiffs necessitates the reading into the renewal clause a provision by which the arbitrators would have to take into consideration the buildings on the land, and the use to which they are put. If the use to which a building

is put is to be the guide, that might operate to tenants' disadvantage. The land must be considered as if vacant; the loss during erection is part of the capital cost of the building, and is not to be taken into consideration when assessing the rent.

[*Stewart, C.J.*—But some deduction must be made for this, whether considered as loss of rent or capital expenditure.]

"Unimproved value" is defined in the Valuation of Land Act, 1908, and the principle of that Act is very much the same as the principle for assessment of rent under these leases. A case somewhat in point is *Duthie v. Valuer-General*(1), decided under the Valuation of Land Act. If the tenant has had the misfortune to erect a building which afterwards becomes unsuitable, the loss falls on him, and not on the owner. With regard to the third lease, it is a perpetual lease with a variation of rent every fourteen years. The words "full and improved ground-rental" only mean the best rent obtainable. There is nothing as to the use to which buildings are to be put. Another question arises, as to whether the ascertainment of rent is to be by way of valuation or arbitration. Our Arbitration Act is different to English Acts, and English cases do not apply. The words in the New Zealand Act are, "under a submission," and that includes a valuation. *In re Wallace*(2) is a decision to the contrary, but His Honour's attention was not called to the amendment of the Act of 1900 by the Act of 1904.

[*Mr. Skerrett* does not dispute that a valuation is now a submission to arbitration.]

English cases are: *In re Williams and Stepany*(3); *In re Wilson and Eastern Counties Navigation Company*(4). In the term "fair annual ground-rent," "annual" means "same rent throughout the term." "Fair rent" has been discussed in following cases under Irish Crofters Acts: *Adams v. Dunscaith*(5); *Gosford v. Alexander*(6); *Nolan v. Leef*(7). "Ground-rent" is defined in *Stewart v. Alliston*(8); *Bartlett v. Salmon*(9); *Beardmore v. Fox*(10); *Williams' Vendors and Purchasers*(11); *Dart's Vendors and Purchasers*(12).

(1) 20 N.Z. L.R. 585.

(2) 14 Gaz. L.R. 86.

(3) [1891] 2 Q.B. 257.

(4) [1892] 1 Q.B. 81, at p. 84.

(5) 10 L.R. Ir. 119.

(6) [1902] 1 Ir. 139.

(7) [1904] 1 Ir. 20.

(8) 1 Mer. 26.

(9) 6 DeG., M. & G. 33, at p. 36.

(10) 8 Term R. 214.

(11) 2nd ed. Vol. i, p. 398.

(12) 7th ed. 135.

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*Sherwell, in reply:—*  
Rental is to be the fair rent a man would give if it were  
*Cur. adv. vult.*

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STOUT, C.J., delivered the judgment of the Court, as follows:—

This is an originating summons issued under the authority of the Declaratory Judgments Act, 1908, raising certain questions as to the construction of three instruments of lease. The plaintiffs are lessees, and in two leases there is provision that a valuation is to be made "of the fair annual ground-rent of the said land only, without any buildings or improvements, for a further term of fourteen years from the expiration of the term hereby granted." The questions in this summons which the parties desire answered are,—

"4. Is the fair annual value of the said land to be ascertained by arriving at its fee-simple value as if no building existed thereon, and fixing the fair annual ground-rent at some percentage on such freehold value without any regard to any valuable building actually existing thereon or to the purpose for which any such building is designed, suitable and used?

"7. What, under the provisions of each of the said two leases, is the true basis on which the valuers should ascertain the fair annual ground-rent of the land included in the said lease only, without any buildings or improvements, for the renewed term?"

As to the third lease, there is a provision ascertaining the proper annual ground-rent for a part of the term. That provision is, "In ascertaining such new rentals the valuers shall not take into consideration the value of any building or improvements then existing on the demised premises, but they shall value the full and improved ground-rental of the said premises that ought to be payable during the said new term." There is also provision for ascertaining the ground-rent in the case of a renewal—viz., "In ascertaining such new rental the valuers shall not take into consideration the value of any building or improvements then existing upon the said demised premises, but they shall value the full and improved ground-rental of the said premises that ought to be payable during the said new term."

Paragraph 8 of the summons states,—

"8. In the case of the lease of the 30th of September, 1905, the like questions arise as to the interpretation of the words 'the full and improved ground-rental of the said premises that ought to be payable during the said term.'"

There is this further question,—

"9. Whether the valuations of ground-rents to be made under the provisions of the said leases respectively are arbitrations as opposed to valuations, and the said leases are 'submissions' within the meaning of the Arbitration Act, 1908, and whether the valuers are arbitrators within the meaning of the said Act."

As to question 4, the Court is of opinion that the proper answer is "No." The interpretation of the clauses referred to will appear in answer to question 7.

As to question 7, the true basis on which the valuers must proceed is that there are no buildings or improvements on the land. They must ascertain what a prudent lessee would give for the ground-rent of the land for the term, and on the conditions as to renewal and other terms, &c., mentioned in the lease. They must put out of consideration the fact—if it be a fact—that there are buildings or improvements on the land.

As to the questions raised in paragraph 8, we are of opinion that there is no difference in the mode that has to be followed in valuing the ground-rents under the third lease from that of the other two leases.

As to question 9, it was admitted that the provisions as to valuations are "submissions" in the meaning of the Arbitration Act, 1908.

Solicitors for the plaintiff: *Chapman, Sherwell, Wylie, & Tripp* (Wellington).

Solicitor for the defendant: *J. O'Shea, City Solicitor* (Wellington).

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