## CASE NO. 87

**Edmund Barton Chambers (Level 44) Co-op v MLC**

Extract from "The Valuer", May 1990. Vol. 31, Folio 129.

In the Supreme Court of NSW, Common Law Division, 28 August 1985.

Rent Review. Current Market Rent. Admissibility of Rent Review Agreements.

---

**Editorial Note:** This decision was upheld on appeal.

**McInerney J:** Edmund Barton Chambers (Level 44) Co-operative Limited, the plaintiffs, entered into a lease to lease from the defendant, the Mutual Life and Citizens' Assurance Company Limited, the forty fourth level of the MLC Building at Sydney for a period of twenty years, the lease commencing on 1 May 1979. The lease provided an option of renewal for a further twenty one years. The terms of the lease provided for a rent review of the premises every three years, a rent review being therefore due on 1 May 1982. Disputes have arisen between the parties as to the manner of determining the current market rent which is the rent provided by the terms of the lease as the rent for the three years from 1 May 1982, and in particular whether regard can be had to other rent reviews in determining the current market rent.

The relevant lease is annexed to the Stated Case herein and provides for a procedure to determine the current market rent in the event of the failure to agree. There has been a failure to agree between the parties and pursuant to clause 4(f) two valuers were appointed, Mr. W T Kenwood by the lessor and Mr. W G Hayden by the lessee, to determine the current market rent of the premises. The two valuers could not agree and under 4(f) the valuers then appointed Mr. C Woodley, a very experienced valuer, as an arbitrator to arbitrate the points of difference that had arisen between the valuers.

After a hearing before the arbitrator the arbitrator expressed initial views on the points of difference which are contained in a statement annexed to the Stated Case marked Exhibit E. The parties have agreed that these are not by way of an interim award but a statement of the arbitrator's initial views. I was informed by both parties that the only matter to be argued before me was Point B at p. 2 of the Stated Case which is as follows:

> "As to Points of Difference 1A would I err in holding that in determining the current market rent of the demised premises regard may, given certain provisos, be had by the valuers to rentals in relation to comparable premises negotiated by voluntary bargaining between lessor and lessee or between valuers appointed by the parties pursuant to a rent review clause in a lease similar in terms to the subject lease."

The arbitrator in his Reasons for Judgment defined what he understood to be the current market rent under clause 4(f) of the lease. He found it was the rent of

Source: Australian Institute of Valuers and Land Economists (Incorporated). (1997) Third Edition. Court Decisions for examination study. Southwood Press Pty Ltd, Sydney.

the demised premises at the review date taking into account certain assumptions 1 to 4 in his Reasons for Judgment p. 2. The question of the definition of current market rent was accepted by both parties and was not argued. It was also put by Mr. Tobias, senior counsel for the defendant, that in order to consider the findings of what was current market rent the arbitrator intended the valuers to have regard to Points 1 to 4. This certainly appears clear.

Mr. St John has argued that the matter involves a simple proposition that current market means what it says, ie. current market rent, and is to be assessed by reference to current market rentals negotiated on the open market and not otherwise. He argued that the arbitrator and the valuers were bound by the decisions in *Harris v The Minister for Public Works* [1912] SR (NSW) p. 149, *Re: Gorman* (1912) 29 WN (NSW) p. 195, and *Reading v The Valuer-General* (1923) 6 LGR (NSW) 132, and that those decisions as a matter of law precluded the admission of any rent review agreements because the rent reviews were not voluntary agreements. His argument proceeded, as I understand it, on the basis that there was no discretion, that the mere term rent review precludes any consideration of them for determining current market rental.

The defendant argued that as a matter of law rent reviews were not inadmissible. Consequently the matter I have to determine here is whether as a matter of law rent review clauses are admissible for the purpose of assisting in the determination of current market rent of the premises. It is common ground that both parties accept the principles enunciated in *Spencer*'s case (see *Spencer v The Commonwealth*, 5 CLR 418) used in determining the value of land and the use that can be made of voluntary sales in so determining applies generally to the question of determining current market rental; in particular see the statement of Mr. Justice Isaacs at p. 441.

This is a classical statement of what is a voluntary sale but one can only wonder how often does such an ideal situation arise in practice.

Mr. Woodley, the arbitrator, refers to this particular problem at p. 3 of the Reasons for Judgment where he refers to the fact that ideal situations are rarely found in practice and that it could be necessary to have regard to the most suitable alternative market evidence then available and to make appropriate adjustments for comparability.

The valuers in deciding whether or not the criteria of *Spencer*'s case is established would have to have close regard to the negotiating positions of both parties and a number of other interrelated factors and circumstances to determine whether or not the sales are such to comply with *Spencer*'s case. Similarly it is argued by the defendant that the valuer would have regard to what use could be made of other rent review agreements appropriately adjusted.

A valuer it is said should seek all the guidance he can and in doing so should have regard to a wide range of transactions and, having done so, use his expertise, experience and judgment in determining what is of assistance and what use can be made of such material. See, for example, *Brewarrana Pty. Limited v Commissioner for Highways* (No. 1) 32 LGRA 170 at pp. 179/180.

In the case so strongly relied upon by Mr. St John, re Harris, Mr. Justice Pring said at p. 155:

> "In valuation no absolute value can be placed on any piece of land. Its value depends entirely on the opinion of experts who may easily regard it from different points of view. No one piece of land is exactly similar to any other piece and in this respect land differs from every other thing which is the subject of sale. There is no difficulty in ascertaining the value of a ton of tea or sugar or any other trade commodity because one ton of the same kind is just as good as another. So where a tribune is attempting to ascertain the value of a piece of land it is necessary to test the opinion of experts and other witnesses by every possible means".

Mr. Justice Pring again in his judgment adopted Baron Martin's remark in *Sheehan v Brinsted* where he said that the true principles in aid of a determination of facts is to extend rather than restrict the admissibility of evidence.

Adopting these principles to city buildings it would be true to say that no two floors of the same building re the same, eg. height of the floor above ground level, views from the floor, accessibility to lifts and many other criteria have to be taken into account in assessing comparable market rent. When comparing one building with another additional factors such as accessibility to the business centre, prestige of the building and other criteria would cause the valuer to use his knowledge and experience in determining a current market rental.

It was argued by the plaintiff that other current rent review agreements could not be voluntary and therefore were inadmissible. The lessee it is said generally would be in the main in a less advantageous position having to deal with a wealthy landlord.

It was further argued that, for example, where the tenant had entered into a lease for a period of twenty years, any agreement on the current market rental to be paid under the rent review clause is not likely to be a voluntary agreement because the tenant cannot shop around and test the so-called market. He cannot compare other offers because he is not in a position to accept such offers, which position is known to the landlord. The tenant in addition would almost certainly have spent sums of money on setting up the premises and would have established a business or profession in the premises with special relationship built up in and around those premises.

The argument is summed up by saying how can you equate the situation of a tenant inferior to the landlord in monetary resources having spent money on the premises, having built up certain goodwill in those premises with an incoming tenant? It is said that the lessee is not free to accept or reject the premises as an incoming tenant is, there is no competition for the lessee from other landlords, the lessee is bound to treat with the present lessor and vice versa. The lessee is not free to vacate the premises and move elsewhere. It is argued that if the rent asked by the lessor is regarded as being too high, the lessee is likely to accept the rent demanded rather than enter long and expensive negotiations involving the advice of valuers or require the rent be determined or arbitrated under the lease.

If the present situation is typical it cannot be said that the above is a true statement. The defendant says that these arguments are far too general and cannot be accepted as stating the norm in all the circumstances. It is argued therefore by the plaintiff however that having regard to such agreements they could not in any circumstances be said to be voluntary.

Harris' case was strongly relied upon in support of the above contention. The facts of that case, however, are far removed from the present in my opinion, and

dealt with an entirely different state of affairs. The land in question had been resumed and evidence was sought to be tendered of the value of a forced sale of resumed land. At p. 156 of the report Mr. Justice Pring said:

> "Evidence as to sales is admissible subject to certain restrictions. Agents place their value on a piece of land on prices which have been paid for similar land in similar localities and they use their commonsense and ability".

His Honour went on to state that great caution should be used in admitting such evidence and that only evidence of voluntary sales of similar land in the same locality should be admitted being of such a type that there were negotiations between a willing vendor and a willing purchaser. He then stated that in general it should exclude sales by the sheriff, sales in bankruptcy, resumptions and similar sales where the owner is not free to do as he likes. This type of transaction is a far cry from persons voluntarily entering into a twenty one year lease and consenting to rent reviews each three years. Surely such parties must have had in contemplation that regard would be had to other rent review agreements in assessing current market rent when they entered into such a lease.

The sale relied on in *Harris'* case it was said, could not have the character of a sale on the open market and no one could seriously dispute such an assertion. It is argued that that case aids the rejection of evidence in rent review cases because they do not fulfil the criteria of sales in the open market. It is my view that when the judges were discussing voluntary sales in *Harris'* case they had in mind sales that were clearly involuntary and forced sales such as resumptions, bankruptcies, etc, and not other types of transactions.

In *re Gorman* (1912) 12 WN (NSW) p. 195, the land in question was resumed under the provisions of the *Closer Settlements Act* and the *Murrumbidgee Irrigation Resumption Act* 1910. The issue to be determined was a fair market value of the land. At the hearing it was sought on behalf of the owners to tender evidence of settlements between the Crown and certain other owners of resumed land nearby. Mr. Justice Rich stated the issue to be determined before the court was the fair market value of the land as at a certain date, excluding any enhanced or added value given to the land by the construction of the works in question. He was apparently of the view that the settlements in question in some respects had added value as a result of the proposed works. He stated further that it was impossible for a court to enquire into the circumstances surrounding settlements that took place between various landholders or to consider the reasons or motives that brought them about. I would have thought, with respect, that this is the very exercise that experienced valuers would be called upon to consider in many cases.

The real basis, however, it appears of his decision is that if evidence of this type were to be allowed it would put a stop to settlements taking place between the Crown and the owners, or at the very least seriously hamper officials of the Crown negotiating settlements, and if any such evidence were to be admitted values would proceed on an ascending scale. Mr. Justice Rich in any event was of the opinion that in relation to collateral matters it was a question of discretion whether the evidence should be admitted or not. I do not feel that this case is of much assistance.

*Reading v The Valuer-General* (1923) 6 LGR (NSW) 132 was relied upon. Mr.

Justice Pike stated that in his view because the Crown was threatening to take the land it did not leave the parties free within the ruling in Spencer's case to sell as they wished. This is again a case decided on its own particular facts and well within the guidelines laid down in *Harris'* case and of little assistance in this case.

*Beard v The Director of Housing* (1969) 1 LGRA was also relied upon. This was a case of compulsory acquisition under the *Tasmanian Public Authorities Land Acquisition Act* 1949 (as amended) and it was held there that the prices paid in other compulsory acquisitions are normally to be excluded from evidence and were not admitted as they did not reflect a voluntary sale being a desirous purchaser and a not unwilling vendor.

It was argued therefore on behalf of the plaintiff that the decision in *Harris'* case is binding authority that compulsory sales are inadmissible as comparable sales and that alternatively compulsory sales are only admissible if there is no other evidence available, and even then must be viewed with caution. It was submitted that agreements made between parties pursuant to a rent review clause are similar to sales made pursuant to a resumption or land under the threat of resumption or bankruptcies. It was said that whatever qualifications are properly to be applied in relation to compulsory sales should apply a fortiori to agreements made pursuant to a rent review clause. In addition, the element of compulsion common to both, together with the ongoing relationship of landlord and tenant, constitutes in itself a further distorting factor rendering rent review agreements unreliable as evidence of market value.

The defendants on the other hand argue that the arguments of the plaintiffs are too general, have no substance and the matter in particular is one for the discretion of the valuers in all the circumstances. The plaintiffs, it is said by the defendants, have painted a very gloomy picture of the lessee being in a very disadvantageous position compared to the lessor and likely to cave in to the excessive demands of the lessor. It was pointed out that there was no element of compulsion however, when the parties entered into the agreements and that the agreements are voluntary ones including the term in the said agreements.

It is trite to say that there are many advantages to a lessee having a lease such as the present, that there may be disadvantages to the lessor in such a lease, and one cannot generalise: see *United Scientific v Burnsleigh Council* [1978] AC p. 904. In that case, Lord Salmon at p. 948 pointed out the desirability from both points of view of having such leases. It was pointed out there by his Lordship that what was a proper rent three years ago in modern conditions may not be an economic rent now. Tenants who are anxious for security of tenure require a term of reasonable duration of twenty one years or more.

His Lordship then went on to say, at p. 948:

> "To my mind it is totally unrealistic to regard such clauses as conferring a privilege on the landlord or as imposing a burden on the tenant. Both the landlord and the tenant recognise the obvious, that is that such clauses are fair and reasonable to each of them. I do not agree with what has been said in some of the authorities, namely that a rent review clause is for the benefit of the landlord alone and not at all for the benefit of the tenant. It is plainly for the benefit of both of them. It is for the benefit of the tenant because without such a clause he would never get the long lease he requires and under modern conditions it would be grossly unfair that he

> should. It is for the benefit of the landlord because he ensures that for the duration of the lease he will receive a fair rent instead of a rent far below the market value of the property which he demises. Accordingly the landlord and tenant by agreement in this lease provide that at stated intervals during the term, the rent should be brought up to what is then a fair market rent. The revision clause lays down the administrative procedure by which the fair market rent shall be ascertained".

With the above comments I agree. Mr. Tobias, adopting Lord Salmon's propositions, argues that the gloomy predictions put forward on behalf of the lessees are too general, one sided and of no assistance. He points out that there are certain inhibiting features as far as the landlord is concerned. He may have preferred to have leased his premises to another person, he cannot test the market in relation to the proper market value of the premises by throwing open his premises to the open market, the tenant may be in a much stronger monetary position than the landlord, eg. he may be dealing with a multi-national corporation.

The defendant says that in order to properly determine the value of the current market rent the valuer must receive the maximum assistance from the market place and should have regard to a wide range of transactions, and it is for the valuer to apply his skill knowledge and expertise to each situation, he may, of course, after consideration reject them, but it does not follow as a matter of laws that they are inadmissible.

The argument further is that rent review lettings may, in certain circumstances, be better comparables than new floor lettings. Rent reviews may be by agreement, for example, between the parties without resort to valuers or arbitrators following negotiations between the parties. The tenant as well as the landlord is at a risk of his offers being rejected. Both are bound to continue in the lease and if the negotiations fail the rent may be fixed at a higher or lower rent as the case may be. They may consider what an arbitrator may do if driven to consider the current market rent. What is the difference, it is argued, in essence between a typical vendor and purchaser where there is often an element of compromise between them both? In circumstances such as a rent review there is no prospect of them not agreeing, they are bound under the terms of the lease to arrive at a figure for the period or a third party or parties will do it for them.

Both the lessee and lessor are at risk of incurring costs of a determination of an arbitrator. Both parties would have to take this into account and one point not to be overlooked is that in protracted negotiations the lessor does not receive the rent during the period of negotiations. In these circumstances the lessor may enter into a compromise by taking a lower rent because he loses the interest whilst the lessee has the use of his money during this period.

When one examines floor lettings it is true to say that the figures there may have to be adjusted so as to accurately reflect the current market value. The lessor may be subject to substantial financial risk. The lessor in these circumstances is a real lessor, not the hypothetical one. He is real with real situations such as cash flow problems, etc, importunate mortagees. He has probably invested a large sum of money in the building. He requires an immediate cash flow and he may grant tenancies lower than the current market rent.

New buildings in particular pose difficult problems for the owners. The success of the new enterprise may depend on the long-term cash flow, the good

standard of lessees, high rate of occupancy, etc. The lessor, in order to achieve these desirable goals may sacrifice his short-term profit by renting below the current market rental in order to achieve the above results in the belief that after three years he will obtain the current market rental.

It may be stated that lessees may not be easy to find. A lessee considering moving into new premises has to normally abandon his old premises and make in some cases a large capital outlay on his new premises. The tenant's cash flow problems are probably most severe at the commencement of his lease and a reasonable demand may be for some concessions from the landlord. If the rent is too high in his opinion he may decide to stay where he is or go to a less prestigious building. In order to attract him the lessor may offer him a rent lower than the current market rent. It may be argued therefore that if anything the new letting may be below the current market rent and therefore the valuers may have to adjust the figures for new leggings in order to ascertain the current market rental. This would be an exercise in principle no different from evaluating rent review clauses.

The cases relied upon by the plaintiffs in argument do not seem to have prohibited other judges from regarding themselves as bound to reject such matters as a matter of law. In *Woollams v the Minister* (1957) 2 LGRA 338, Hardie J at p. 347 was satisfied that there was no principle of law requiring him to reject completely sales to an instrumentality even though the vendors were aware the Authority had a statutory power of resumption and would exercise it if a negotiated sale was not possible. It is to be noted that Mr. Justice Hardie said that he used this for a limited purpose as a check on the valuer as to the proper value but he admitted the evidence. In his judgment he referred to *Royal Sydney Golf Club v the Federal Commissioner of Taxation* (1957) 2 LGRA 203 where the High Court had regard to a sale to the Council when the Council acquired the property by resumption after the sale the Council having a statutory power of resumption known to the vendor at the time of the sale.

Mr. Justice Cripps in *Tatmar Pastoral Co v The Housing Commission of NSW* (unreported) considered that he was not bound to reject resumption settlements. He referred to the absent element of voluntariness which is required to be assumed and if such resumption sales were used they should be used with considerable caution, but he did not regard himself as obliged to reject them because of the absence of voluntariness.

Mr. Justice Waddell in *Carrick v The State Planning Authority of New South Wales* (unreported, 16 May 1975) adopted a similar course and at p. 16 he said:

> "I have to decide in the light of the above evidence what market value should be attributed to the resumed land at the date of resumption. The only sales of land which are in any way directly comparable in character and situation to the subject land are those of lots 34 and 35/36 Beach Road. It is proper of course, to have regard to these sales with caution: see *Woollams v The Minister.* But it seems to me that they are of substantial importance in the assessment of the value of resumed land: *Jovist Pty. Limited v Campbelltown City Council* 19 LGRA 134 at 138; *March v The City of Frankston* [1969] VR 350. In each case a higher price was sought by the vendor. In the case of lots 35/36, first $40,000 and then $25,000 was asked and an agreement was not reached on the $20,000 offered until after a specific threat of resumption had been made. However, I think that any danger

that either of the vendors was persuaded by the express or implied threat of resumption can be allowed for".

In *Beard v The Director of Housing* (1961) 9 LGRA 74 Mr. Justice Crisp had to consider the question of certain sales made adjoining to the subject land between various private owners, and at p. 78 he said:

> "The question basically is are they voluntary sales and should they be regarded as voluntary sales and if they fail to be regarded as voluntary sales I am unable to see that the question of who raises the objection really makes any difference as a matter of prinicple.
>
> Now it is difficult to say perhaps whether the objection as to relevance is to the matter being too remote, or whether it is not simply a matter of the court's discretion to exclude matters which are not going to help it which though perhaps having some minimal relevance are not directly apt to the task in hand and therefore excluded as being unnecessary or even dangerous. Personally I think it is probably a matter of the former. However, I think there are circumstances which a court could admit such sales. Such circumstances could be where there is no other evidence of value in the locality. That seems to have been the reason advanced by Hardie J in *Woollams v The Minister* and I think I mentioned such a possibility earlier in this case but even then it is said that they would have to be treated with caution".

He said further at p. 78:

> "In any case I think I have some discretion in the matter as to whether I should or should not admit them. At the moment I do not propose to do so on the basis they are not voluntary sales".

The only case that seems to be directly on point is *Segoma NV v Penny Le Roy Ltd.* QB Div, 24 November 1983, a decision of Mr. Justice Staunton. One of the issues to be determined was whether it was proper for an arbitrator to consider evidence of rents agreed between landlords of comparable properties and their sitting tenants or whether evidence should be confined to rents agreed to premises with vacant possession. It was held by the judge that the arbitrator was entitled to have regard to rents agreed between landlord and sitting tenants: it was a matter for the arbitrator to decide how far such evidence was of assistance. Mr. Justice Staunton said this:

> "The question of law here is according to Mr. Bagnall whether market rent means open market rent or whether it includes a rent agreed between a landlord and a sitting tenant. He points to the words in the lease 'having regard to rental values current at the relevant time for similar properties let with vacant possession'."

The judge went on to say:

> "In my judgment that is not the right question. I suspect that the market rent to be ascertained for the demised premises must be a rent which would be paid in the market for those premises with vacant possession. But even if that is right it does not follow that the arbitrator must exclude from consideration any rents agreed for similar property between an existing landlord and an existing tenant. He may think it right, as one of the steps in his determination, to adjust any such rent to which it would have been for vacant possession; whether the adjustment would be up or down or none at all I do not know and Mr. Bagnall has put nothing before me to

> suggest an answer. I can see that an adjustment may be required but I do not consider that such evidence must as a matter of law be altogether excluded."

I believe Mr. Justice Staunton was correct in his approach.

I am of the opinion that as a matter of law a valuer is not bound in the circumstances of the case to disregard similar rent review clauses. The situation here is a far different situation to that in *Harris'* case. Valuers have such experience and expertise that they are particularly equipped to assess what use they will make, if any, of the material they obtain. As stated the ideal situation will be rarely found in practice and to totally disregard other rent review agreements would not be permitting access by the valuers to as much material as possible and would be not giving them that flexibility I believe that would be necessary to enable them to properly assess the current market rent. It may be in the words of Mr. Justice Staunton that they may have to adjust up or down or not at all, but that is for the valuer.