CASE NO. 89

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

Extract from "The Valuer", May 1990. Vol. 31, Folio 133.

In the Supreme Court of NSW, Court of Appeal, 9 October 1986.

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

Hope JA: I agree with the orders proposed by Glass JA and with his reasons.

Glass JA: The appellant and the respondent are respectively lessee and lessor of Level 44 MLC Centre, Martin Place, Sydney, pursuant to a lease commencing 1 May 1979 for a term of twenty one years. The lease provides for a review every three years of the rental payable under the said lease. The rent review due on 3 May 1982 has not yet been completed owing to a dispute between the parties concerning those matters which may properly be taken into account in determining the "current market rent" of the premises.

By means of a case stated by C A Woodley, arbitrator, a question of law was raised for decision by the Supreme Court in the following terms:

> "Would I err in law 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 stated case came on for hearing before McInerney J who answered the question in the negative. The lessee has appealed to this court contending that his decision was wrong.

It is not necessary to specify the procedural steps which preceded the formulation of the stated case. It is sufficient to say that the valuers respectively appointed by the parties failed to agree whereupon a third valuer was appointed to determine as an arbitrator the points of difference between them. Nor do I propose to set out the relevant terms of the lease. The dry question of law isolated by the stated case may be paraphrased as asking whether in determining the "current market run" of premises subject to a rent review clause the rent review rentals of comparable premises constitute relevant evidence.

Mr. Gee QC, who appeared for the lessee and contended for a negative answer, presented an argument which consisted of three steps.

1. The value of a parcel of land is the sum which would have been mutually acceptable to a vendor willing but not anxious to sell and to a purchaser willing but not desperate to buy. The assumption is further made that each is equipped with knowledge of the relevant circumstances and will not disregard those business considerations which favour him. *Spencer v The*

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

Commonwealth (1907) 5 CLR 418 at 432, 437, 441, *Deputy Federal Commissioner of Taxation v Gold Estates of Australia* (1934) 51 CLR 509 at 515.

2. The same test is applicable when determining the rental value of premises. *Legal and General Life of Australia v A Hudson Pty. Ltd.* [1985] 1 NSWLR 314 at 329.
3. It is in the nature of the test that it postulates a voluntary bargaining process between two parties each of whom is free to withdraw. A lessee who is "locked into" a long term lease is not free to withdraw from the bargaining process. It follows that rent review rentals are not reached by a process of voluntary bargaining, do not express market forces and are not relevant materials in determining the current market rent.

Mr. Tobias QC, for the respondent lessor, accepted step 2 of the argument but disputed steps 1 and 3. He put the following submissions:

1. The appellant's argument confuses the test to be applied in determining value and the evidence which may be taken into account. The authorities show that in determining the sale price which would have been acceptable to the hypothetical vendor and purchaser as a pure register of market forces, it is permissible to have regard to sales in which one or other party is influenced by non-market considerations provided allowance is made for that fact.
   Examples are dispositions by a vendor under pressure from his mortgagee and by one member of a family to another or acquisitions by a purchaser whose business premises have been destroyed or a developer who needs a particular block to complete his development site.
   Some of the relevant authorities are *Woollams v The Minister* (1957) 2 LGRA 338 at 347; *Beard v Director of Housing* (1961) 9 LGRA 74 at 78-79; *Carrick v State Planning Authority*, Waddell J, 16 May 1975 (unreported) at 16; *March v City of Frankston* (1968) 15 LGRA 407 at 413; *Redeam Pty. Ltd. v South Australian Land Commission* (1977) 40 LGRA 151 at 158. *Tatmar Pastoral Company v Housing Commission of New South Wales*, Cripps J, Land and Environment Court, 17 March 1982 (unreported) at 39-42.
2. The test of the hypothetical sale or letting is not fully described as a process in which each party is free to withdraw from the negotiations. The hypothesis requires the assumption to be made that although each is free to withdraw a bargain nevertheless results.
3. The rentals struck between a lessor and an incoming tenant are said by the appellant to give full expression to market forces and to constitute the only material relevant to current market rent. However, a lessor seeking to fill a new building may be under a host of constraints which force the rentals it will take below current market levels. Nevertheless these constitute acceptable evidence to which adjustments will be made in applying the criterion of the rental which would be agreed in a hypothetical letting responsive to pure market forces.
4. In principle, therefore, rent review rentals constitute material relevant to the determination of current market rent. In the process of evaluating such material the distortions due to non-market forces will necessitate some

adjustment. The relevance of such material subject to this qualification has been expressly decided by the Queen's Bench Division in England and the Supreme Court of Victoria, *Segama NV v Penny Le Roy Ltd* (1984) 269 EG 322, *Broken Hill Proprietary Co. Ltd. v Australian Mutual Provident Society*, Nicholson J, 17 April 1986 (unreported).

Mr. Gee failed to make good a submission that these decisions should be treated as distinguishable. He did, however, put a further submission which should be upheld based upon the terms of the question in the stated case. A reference to "rentals regulated by . . . voluntary bargaining between the parties . . . pursuant to a rent review clause" should not authorise the treatment of such rentals as the product of market forces. For reasons inherent in the situation of parties bound by a rent review clause those rentals require adjustment up or down in the process of determining current market rent.

In my view the respondent's submissions should be accepted and the appellant's submission rejected. Owing to the course taken by the argument on appeal neither counsel referred to the judgment below. I am satisfied, however, that had a different course been taken, it was immune from any valid criticism.

The appeal should be dismissed with costs.

McHugh JA: The Appeal should be dismissed with costs for the reasons given by Glass JA.