GUS Properties Ltd v Tower Corporation

Court of Appeal
4, 5 February, 13 March 1992
Cooke P, Richardson, Gault JJ

Arbitration – Rent review – Deed varying terms of lease – Reference to arbitrator – Whether reference contained questions of law – Whether reviewable by court

A commercial property was leased by the respondent to GUS Properties in 1981. The market value of the premises was determined and by the operation of percentages specified in the lease, the rent was automatically fixed for two three year periods. Under the lease a procedure for arbitration was set out. This was varied by deed between the parties which referred to submission to a single named arbitrator for particular purposes.

A High Court proceeding was brought by the respondent challenging the award and the award was set aside on the grounds of error of law on the face of the award which was reviewable as it was not a case where a question of law had been referred to the arbitrator. GUS Properties appealed.

Held. 1 The appeal was allowed. When the deed was analysed in more than a purely literal or superficial way it was apparent that in reality and substance specific questions of law were submitted. It was a carefully constructed reference whereby the parties submitted defined issues of interpretation to the arbitrator. The case fell under the specific reference head and review of the award for error of law on the face was excluded.

2 The lease required at the review date the arbitrator to ascertain the market value of the land and all buildings and improvements thereon. That meant a valuation of the fee simple interest, not merely the lessors interest; it included only the land buildings and improvements, not any contractual rights by way of subleases. In assessing the market value of the fee simple at the review date, the valuer has to assume that no contractual rights then exist.

3 The basic question is always what would be agreed between a willing but not anxious vendor and a willing but not anxious purchaser as the fair price of the fee simple at the relevant date. This is essentially a practical question not to be overlaid by philosophical or legal niceties.

4 As part of the factual matrix, the actual occupancy level of the mall shops as at the review date must be evidence of the market demand and supply; the land therefore had letting potential even though the particular contractual rights were not relevant to an inquiry into the market value of the land buildings and improvements.

5 Dangers lie in the replacement of the willing buyer – willing seller test by more specific and detailed tests applicable to particular categories of cases.

Cases mentioned
Attorney-General v Offshore Mining Co Ltd [1983] NZLR 418
Coleman v Myers [1972] NZLR 225
Jacobsen Holdings Ltd v Drexel [1986] 1 NZLR 324
Hatrick v Commissioner of Inland Revenue [1963] NZLR 641
Holt v Holt [1987]1 NZLR 85, [1990] 3 NZLR 401
IRC v Crossman [1937] AC 26
Kelantan Government v Duff Development Co [1923] AC 395
re King and Dureen [1913] 2 KB 32
Manakau City Council v Fencible Court Howick Ltd [1991] 3 NZLR 415
Powell v Powell [1987]1 NZLR 192
Vyricherla v Revenue Divisional Officer, Vizagapatam [1939] AC 302
Wellington City Council v National Bank of NZ Properties Ltd [1970] NZLR 660

Source: New Zealand Institute of Valuers (1993). Land valuation cases 1965-1992. Hutcheson Bowman & Stewart Ltd, Wellington.

Cooke P: This appeal from a judgment of Tipping J delivered on 27 June 1991 raises two questions. The case relates to land, buildings and improvements in Christchurch being in substance the Hornby Mall and leased for 24 years less one day from 12 June 1978 by the respondent (Tower) to the appellant (GUS) by memorandum of lease dated 25 June 1981 as varied by a memorandum of variation dated 30 July 1982. By an award dated 19 July 1990 the late Mr J R Fox of Christchurch, Barrister and Solicitor, determined the market value of the premises at 11 June 1984 as $5,542, 238 and at 11 June 1987 as $7,822,897. The operation of percentages specified in the lease then automatically fixed the rent for the two material three-year periods. The arbitrator gave reasons for his award and expressly incorporated them as part of the award. In a High Court proceeding brought by Tower challenging the award, the Judge held, first, that it was not a case in which a specific question of law had been submitted to the arbitrator, and hence the award was reviewable in the courts for error of law on the face; secondly, that there was indeed error of law on the face. He set the award aside and ordered remission to another arbitrator. GUS appeals on both questions.

Of the material documents it is desirable to set out first clause 4(a) of the lease as varied:

> *4. It is hereby further mutually agreed and declared* as follows:
>
> (a) *Three Yearly Rent Reviews:* That the respective yearly rental payable hereunder for each of the successive three (3) yearly periods (computed from the first revision date) (and for a shorter period immediately prior to the expiration of this Lease) shall be whichever is the greater of the two amounts following namely:
>
> (i) The amount of the yearly rent payable hereunder at the rate payable immediately prior to the period under rev iew for rent (after including therein any increases in rent that may have been agreed upon by the parties hereto pursuant to the terms of this Lease or by any other arrangement); or
>
> (ii) Whichever percentage rate of the market value of the land described in the First Schedule hereto and all buildings and improvements thereon that is applicable in relation to the appropriate period namely:
>
> For the period 11th June 1981 to the 10th June 1984 nine decimal four per cent (9.4%) of such market value.
>
> For the period 11th June 1984 to the 10th June 1987 nine decimal four three per cent (9.43%) of such market value.
>
> For each of the three yearly periods falling between the 11th June 1987 until the expiration of this lease ten decimal three two per cent of such market value.
>
> For the purposes of this clause the market value of the land described in the first schedule and all buildings and improvements thereon shall be determined as at the commencement date of each review period by agreement between the Lessor and the Lessee and in default of such agreement then such market value as determined by arbitration in the manner provided in Clause 5(f) hereof *but* in no case shall such determination include any alterations fixture or fittings paid for and owned by the Lessee.

Next, clause 5(f):

> 5(f) *Disputes:* All differences and disputes which may arise between the parties hereto touching or concerning these presents or any act or thing to be done suffered or omitted in pursuance hereof or touching or concerning the construction of these presents shall be referred to the arbitration in New Zealand of two arbitrators (one to be appointed by each party) and an umpire (to be appointed by the arbitrators before their entering upon the reference) in accordance with the Arbitration Act 1908 or any amendment thereto or re-enactment thereof for the time being in force.

As to the rent reviews for the three-year terms beginning respectively on 11 June 1984 and 1987, the parties each appointed arbitrators, who were professional valuers. The arbitrators never formally appointed an umpire, nor did they hold any formal hearing. In discussion and negotiation *inter se* they made considerable progress. The result is reflected in a deed between the parties which, up to

the point where it has completed dealing with the 1984 review, should be reproduced *in toto*. This is essential, notwithstanding the length of the quotation, for the deed with its schedule is an integrated whole, its import only to be absorbed when it is read fully.

A DEED made this 9th day of May 1990

BETWEEN TOWER CORPORATION, a statutory corporation (hereinafter referred to as "Tower") of the first part

AND GUS PROPERTIES LIMITED a company duly incorporated having its registered office at Christchurch (hereinafter referred to as "GUS") of the other part

WHEREAS Tower and GUS are lessor and lessee respectively of certain land and buildings and lessee and sub-lessee of certain other land and buildings and lessee and sub-lessee of certain other land and buildings pursuant to a memorandum of lease between them entered into on 25 June 1981 for 24 years (less one day) from 12 June 1978 (hereinafter referred to as "the lease").

AND WHEREAS the lease was varied by memorandum of variation of lease and sub-lease entered into on 30 July 1982 (hereinafter referred to as "the variation").

AND WHEREAS the rent payable in relation to the lease is to be reviewed as at 11 June 1984 and 11 June 1987.

AND WHEREAS the lease and the variation provide for a formula pursuant to which the reviewed rental from each date is to be calculated which formula requires a determination of the market value of the premises specified in the lease.

AND WHEREAS the market value is to be determined in each case by agreement between Tower and GUS and in default of agreement by arbitration.

AND WHEREAS Tower and GUS each appointed valuers and arbitrators (hereinafter referred to as "the valuers").

AND WHEREAS the valuers have reached a measure of agreement as to establishing the market value of the premises but have failed to resolve to outstanding issues (the extent of the agreement and the extent of the outstanding issues being specified in the schedule hereto) and have therefore failed to determine the market value of the premises at either review date.

AND WHEREAS the parties, rather than continue with the arbitration procedure contemplated by the lease and the variation have agreed to refer to the arbitration procedure contemplated by the lease and the variation have agreed to refer to the arbitration of Jonathon Roger Fox of Christchurch barrister and solicitor (hereinafter referred to as "the arbitrator") the determination of the market value of the premises as at 11 June 1984 and 11 June 1987.

NOW THEREFORE THIS DEED WITNESSETH as follows:

1. THE parties hereby submit to the arbitration of the arbitrator the following issues:

(a) For the purposes of the lease and the variation what was the market value of the land described in the first schedule to the lease and all buildings and improvements (but not alterations, fixtures or fittings paid for and owned by the lessee) thereon as at 11 June 1984?

(b) For the purposes of the lease and variation what was the market value of the land described in the first schedule to the said lease and all relevant buildings and improvements (but not alterations, fixtures or fittings paid for and owned by the lessee) thereon as at 11 June 1987.

These issues are to be determined in accordance with the agreement reached between the valuers as specified in the schedule hereto.

2. THE arbitration is to take place on 9 and 10 May 1990 (and such other dates as may be necessary to allow the hearing to be concluded) at Christchurch at premises to be determined by agreement between the parties and in default of agreement to be specified by the arbitrator.

3. THE arbitrator may receive all relevant evidence notwithstanding any rules of law as to the admissibility of evidence.

4. TOWER and GUS are at liberty to call as witnesses before the arbitrator the valuers originally appointed by each as arbitrators.

5. THE arbitrator is to make his award in writing with reasons within six weeks of the conclusion of the hearing subject to the power of the arbitrator by memorandum in writing to enlarge the time for a period not exceeding four weeks.

6. THE parties shall each bear half the costs in connection with this arbitration.

IN WITNESS WHEREOF these presents were executed the day and year first hereinbefore written.

THE COMMON SEAL of TOWER)
CORPORATION was hereunto)
affixed in the presence of:)

(Signed)
Authorised Officer
(Signed)
Authorised Officer

THE COMMON SEAL of GUS)
PROPERTIES LIMITED was)
hereunto affixed in the presence of)

(Signed) Director
(Signed) Secretary

SCHEDULE

A. 1984 Review

1. The valuers agree that subject to the outstanding issues specified below in prargraphs 3 and 6 the market value of the premises if $5,959,780.00 and the contractual rent to be fixed on review is $562,007.00

2. In establishing this figure the valuers have relied on the following calculations:

(a)	Gross rents	599,502.00
(b)	Deductions	22,734.00
(c)	Net rent	576,768.00

(d)	Capitalisation rate	9.68%	
(e)	Market value		5,959,780.00
(f)	Contractual return	9.43%	
(g)	Contractual rental		562,007.00

3. The valuers disagree as to whether the market value for the purposes of the lease is to be so calculated. The valuer appointed by GUS contends that the premises should be valued on the assumption that a head lease (not necessarily the existing head lease) is in place and that the assessment of market value for the purposes of a rent review should allow for the existence of a head tenant's margin. Whether these contentions are correct are "outstanding issues" referred to in the deed of submission to arbitration of which this schedule forms a part.

4. The valuers are agreed that if the valuer for GUS is correct then subject to the outstanding issues specified below in paragraph 6 the market value of the premises is $5,542,238.00 and the contractual rental to be paid is $522,633.00

5. In establishing this figure the valuers have relied on the following calculations:

(a) Gross rents (if let to a head tenant with a head tenant's margin of $40,408.00) 559,094.00

(b)	Deductions		22,734.00
(c)	Net rents		536,360.00
(d)	Capitalisation rate	9.68%	
(e)	Market value		5,542,238.00
(f)	Contractual return	9.43%	
(g)	Contractual rental		522,633.00

6. The valuer for GUS also maintains that the premises should be valued on the basis that they are vacant and not subject to any leases. If this approach is right then he contends that the market value of the premises established by either of the above approaches must be reduced by an allowance for initial vacancy, leasing commissions, and advertising and promotional costs. The valuer appointed by Tower does not accept that these are appropriate assumptions to be made. Whether the "no leases" and vacant possession assumptions should be made and if so, the consequential effect on what would otherwise be the market value of the premises are outstanding issues.

There follow provisions on an identical pattern, save for the figures, relating to the 1987 review. It is enough for present purposes to concentrate on the 1984 review, as the result of the appeal will necessarily be the same for the 1987 one.

In essence Mr Fox as the arbitrator determined that the contentions of the valuer for GUS stated in para 3 of the schedule were correct and that therefore the market value of the premises was $5,542,238; but he rejected the contentions of the same valuer stated in the first sentence of para 6 of the schedule. Hence in the arbitrator's view no further reduction was required, nor was it necessary for him to consider the points raised in the remaining part of para 6. But "if I am wrong in that view and the matter goes further" (words of the arbitrator which cannot give rise to a right in either party to review by the Court if none exists otherwise) he went on to indicate his views as to the appropriate result if the premises were notionally treated as completely vacant. On that assumption he would have reduced the market value of $5,959,780 by leasing commissions ($89,925) and advertising and promotion expenses ($25,000) to $5,844,855.

Reviewability

As to whether the award is reviewable for error of law on the face, the principles were considered and applied by this Court in *Attorney-General v Offshore Mining Co Ltd* [1983] NZLR 418, and it is unnecessary in dealing with this appeal to go beyond that case and the authorities there cited.

In his judgment Tipping J made extensive quotations from the *Offshore* judgments, but, perhaps significantly, he did not mention the actual result of that case. The decision there was that, although

considered in isolation the reference to the arbitrator might appear to be in terms of a general reference of a dispute, the documents placed before him by the parties showed that their difference was solely as to the construction of their contract, and therefore in reality and substance what was referred was a specific question of law. Since Mr Camp for the present respondent has largely founded his argument on it, I must quote the following passage from my own judgment at 422:

> "In deciding on which side of the line a given case falls it must be essential to identify accurately the dispute that the parties referred to the arbitrator. The actual language of the reference will be important but a purely literal approach could not be enough. The court must surely look for the reality and substance of the reference agreed on by the parties. I do not think that the use of such words as 'in express terms' and 'as such' by Lord Wright in his speech in *Absalom* at p 615 can have been meant to suggest otherwise. At the same time, if at the outset the parties have referred a dispute covering a number of issues to an arbitrator in general terms, admissions of fact during the hearing should not normally, it seems to me, be treated as converting the reference to a specific reference of a question of law – even although in the end the dispute may reduce to construction. One would still have to be satisfied that there was an agreement to alter the reference itself. Otherwise counsel making a sensible concession on fact might unwittingly deprive a client of ordinary remedies in law."

It is the latter part of that paragraph which Mr Camp invokes. He contends that the measure of agreement reached by the valuer arbitrators and Mr Fox's determination should be seen as linked stages of a continuous arbitration, under a general reference, culminating in the fixing of the market value. On that approach Mr Fox would be treated as in substance the umpire appointed by the arbitrators. Undeniably the deed shows that he was appointed by the parties, but Mr Camp suggests that this may be dismissed as a mere matter of machinery – a device resorted to so that the valuer arbitrators could give evidence before Mr Fox. The argument is a development of an observation by Tipping J in his judgment that the remarks in *Offshore* invoked by Mr Camp "have distinct relevance to the present case".

The Judge's main reasoning is best put in his own words:

> "Although the points encapsulated in paragraphs 3 and 6 of the schedule are by description distinct and self contained points, the way the reference is constructed makes them to an extent anyway inter-dependent. Exactly the same comments apply to part B of the schedule dealing with the 1987 review which is constructed in the same way. It is not as if the parties have asked the arbitrator what in terms of their contract is meant by the expression 'market value of the premises'."
>
> Although I agree with Mr Young that the dominating point, however one looks at the matter, amounts to a point of construction of the lease, I am not persuaded that the parties have referred to the arbitrator a specific question of law. While it is undoubtedly true that a point of law, namely the correct construction of the material provisions of the lease, will necessarily and obviously arise during the course of the reference, the way in which the reference is constructed and indeed the substance of the matter, seem to me to militate against the view that the parties must be taken as having agreed to submit a discrete and specific question of law.
>
> On this point the Court should in my judgment be slow to impute to the parties in a case of this size and consequence the intent to accept the views of the arbitrator on the point of construction, even "if the arbitrator is shown to have erred in law on the face of the award. It seems to me that parties committing a dispute to a private tribunal will usually expect the tribunal to observe the law and not commit patent errors. Prima facie they will intend to preserve their right to complain of errors of law on the face of the award. As Cooke J said in *Offshore Mining* they are certainly fee to abandon such right if they wish but they must do so clearly enough to leave the Court satisfied that this was their intention."

While respecting both the reasoning of Tipping J and the argument of Mr Camp, I am unable to accept either. It is true that the deed of 9 May 1990 is of no little extent and complexity and in its actual

language might be said to wrap up the fact that specific questions of law were being submitted to Mr Fox. Expressions such as "on the true construction of the lease" were not used. But, as stated in *Offshore*, the reality and substance are to be looked for. As I hope to show in a moment, when the deed is analysed in more than a purely literal or superficial way it becomes apparent that in reality and substance specific questions of law were submitted. As for the continuous arbitration agreement, this flies in the face of the deed, which makes it plain that instead of pursuing an arbitration in full accordance with the lease, with two arbitrators and an umpire, the parties elected to begin afresh, accept the measure of agreement achieved by the arbitrator valuers and make a new and limited submission to Mr Fox as sole arbitrator. Quite rightly his award proceeds on exactly that footing. As he says in his reasons:

> "The Lease itself provides for disputes or differences to be referred to the arbitration in New Zealand of two arbitrators (one to be appointed by each party) and an umpire. However by mutual agreement the matters in difference have been submitted to me as sole Arbitrator.
>
> The determination of the market value as at 11 June 1984 and 11 June 1987 is both assisted and confined by the Submissions under which the parties have agreed through their valuers on certain matters."

Even the plaintiff's statement of claim, dated 27 September 1990, proceeds on the same footing. It pleads that the parties undertook rent reviews in accordance with the terms of the lease but were unable to agree on the rent payable and by an agreement dated 9 May 1990 referred the dispute to the arbitration of Mr Fox.

Turning to an analysis of the deed, one notes that it is carefully drawn, obviously with professional legal skill. The last recital expressly says that rather than continue with the arbitration procedure contemplated by the lease the parties have agreed to refer to the arbitration of Mr Fox the determination of the market value. So far that would be a general reference, a position which would remain under clause 1 of the deed, paragraphs (a) and (b), were it not for the immediately following and limiting sentence "These issues are to be determined in accordance with the agreement reached between the valuers as specified in the schedule hereto".

The cardinal starting point emerging from the schedule is that the market value is to be taken as fixed at $5,959,780 subject only to the outstanding issues specified. The first outstanding issue is specified in clause A 3. It is whether the valuer for GUS is correct in his contention that:

> ". . . the premises should be valued on the assumption that a head lease (not necessarily the existing head lease) is in place and that the assessment of market value for the purposes of a rent review should allow for the existence of a head tenant's margin."

As was evident from the arguments that we heard from both Mr Young and Mr Camp, those contentions by the GUS valuer amount to saying that, on the true interpretation of the reference to "market value" in its context in this lease, the premises should be valued on the assumption that a head lease is in place and allowing for a head tenant's margin. Certainly on both sides counsel and valuers place weight on the history of the relationship of the parties and the matrix of facts surrounding the entering into of the lease, but they are invoked as aids to construction. In the end the question is one of construction, namely – In the circumstances of this case what did the contract of the parties mean when it referred to "market value": in particular did it mean the market value of the lessor's interest in premises subject to a head lease? Therefore the question is one of law for the purpose of reviewability.

If the question is answered in favour of the GUS valuer's contentions, as it was, the automatic adjustments specified in para 4 of the schedule are to be made. Then the arbitrator is to proceed to consider the contentions of the same valuer stated in the first sentence of para 6. In the same way these require the interpretation of the "market value" reference in the light of its context and any available aids to construction. Again, for the purpose of the principles governing reviewability it is a submission of specific questions of law. If those questions are answered against the contention of the GUS valuer, as they were, the arbitrator's task is complete. He need not go on to consider the issues raised by the rest of para 6.

Those further issues would not necessarily have involved interpretation alone. They were or could have raised mixed questions of fact and law. But the scheme of the schedule was that, in the event of negative answers to the specific questions posed by the opening sentence, being questions of interpretation or construction (in this context the two terms are interchangeable), the arbitrator had to go no further.

In other words this was a carefully-constructed reference whereby the parties submitted defined issues of interpretation to the arbitrator. In the event of his determining them as he did, no further issue arose. His precautionary observations on further issues in case he should be wrong cannot alter the effect of the deed of submission. Nor can it make any difference that the issues on which he made those alternative observations were or may have been partly issues of fact. In substance the primary task imposed on him, a lawyer, by the deed and accepted by him was to answer a sequence of defined questions amounting to questions of law. In the event of answers other than those which he gave, a secondary task that could involve determining issues partly of fact was to devolve on him. It never did; but the important point, I think, is that defined issues which were in truth, albeit not in terms, questions of law were submitted. On analysis it was far from a general reference under which questions of law arose only incidentally. First and foremost it was a submission of specific questions of law.

In my opinion therefore the case falls under the specific reference head, and review of the award for error of law on the face is excluded unless (which is not suggested here) the arbitrator had fallen into one of the more fundamental kinds of illegality alluded to by Viscount Cave LC in *Kelantan Government v Duff Development Co* [1923] AC 395, 408-411. In saying this I recognise that, as is common with competing legal principles, the point at which the line should be drawn is not self-evident. On balance, however, I think that this case belongs much more naturally to the specific submission of questions of law category than to the general reference category.

On that view the award is not reviewable by the Court on the grounds of the errors of law alleged, and it might seem both needless and pointless to say anything about whether there were such errors. But further rent reviews will occur between the parties. Moreover, the questions discussed in argument on this part of the case have a bearing beyond this particular case. It may be of some use therefore to make some brief observations.

As to whether the arbitrator was right in his determination of the specific questions of law submitted to him, I agree with the Judge that he was not, and generally for the same or much the same reasons as were given by the Judge. I think that the law can be stated quite simply.

(i) What the lease required to be ascertained as at the review date was "the market value of the land . . . and all buildings and improvements thereon". That means a valuation of the fee simple interest, not merely the lessor's interest as has been contended for on behalf of GUS. It is only the land, buildings and improvements that are to be valued. That means that any contractual rights by way of a head lease or subleases that may happen to attach at the review date are not to be valued.

(ii) Depending on their terms, which are likely to reflect the state of the market and the economy when they were agreed or fixed, such contractual rights could be either a benefit or a burden to the owner or a head lessor at the review date. But in assessing the market value of the fee simple at the review date the valuers have to assume that no such contractual rights then exist.

(iii) The only relevance that the terms of existing head or subleases could have is that they might throw some light on what fee simple value would be agreed between a willing purchaser and a willing vendor on the review date. For example if (which is certainly not necessarily the case) the state of the market at the review date was such that a head lease or sublessees could be found on the same terms, that is to say terms neither more or less favourable from the point of view of the lessor or sublessor, then that will be a major consideration for the valuers. The reason is that, between a willing vendor and a willing purchaser of the fee simple, the income derivable from the premises, if fresh leases or subleases were sought to be negotiated at the review date or as soon as reasonably possible thereafter, will be a major factor in the hypothetical bargaining process.

(iv) It is not correct as a matter of law that "the premises should be valued on the assumption that a head lease (not necessarily the existing head lease) is in place and that the assessment of market value for the purposes of a rent review should allow for the existence of a head tenant's margin". The possibility of arranging a head lease and the necessity in that event to allow for a head tenant's margin is simply one to be taken into account in ascertaining what a purchaser would be willing to pay for the fee simple. The possibility of leasing shops directly to tenants has also to be considered. The relative advantages and disadvantages of the two courses have to be compared. On the evidence of the valuers it may well have been the case here that on balance neither course would have been more advantageous. The question is one of fact. But if one course happens in fact to be clearly more advantageous to the owner and practicable in the state of the leasing market, that will be reflected in the market value of the fee simple. This may be seen as an application of what valuers sometimes call the highest and best use principle, but to speak in terms of such a principle can be misleading: the basic question is always what would be agreed between a willing but not anxious vendor and a willing but not anxious purchaser as the fair price of the fee simple at the relevant date.

(v) While it is correct that the premises are to be valued as if not subject to any leases, it seems to me incorrect that they are necessarily to be valued as if vacant. Contractual rights to continued occupation are to be ignored, but the fact that all the shops were currently let could throw light on the market for notional fresh lettings. Further, sitting tenants might prefer to take fresh leases rather than to have the dislocation of moving elsewhere; this could be relevant to any suggestion of an initial vacancy allowance, a suggestion which was rejected by the arbitrator here, on the evidence, in the views expressed by him on the assumption that he was wrong in his primary conclusions. It seems to me that the needs of an existing head lessee or of sitting tenants fall to be considered in estimating market demand, just as it was held by the Privy Council in *Vyricherla v Revenue Divisional Officer, Vizagapatam* [1939] AC 302 that in assessing compensation for a compulsory purchase the needs of the particular acquiring authority for the land enhanced the value. (The latter principle is excluded by s 62(1)(d) of the Public Works Act 1981, but those provisions do not apply to a case such as the present).

(vi) There has been an apparently endemic trend in New Zealand for valuers, accountants and lawyers to seek to replace the willing seller-willing buyer test by more specific and detailed tests applicable to particular categories of cases. This Court has constantly pointed out the dangers and fallacy of this process, yet it continues, as the present case evidences. Past examples considered by this Court include *Hatrick v Commissioner of Inland Revenue* [1963] NZLR 641 (assets-value and notional liquidation method only one way of valuing shares; essential question always what would be agreed between willing but not anxious parties); *Wellington City Council v National Bank of New Zealand Properties Limited* [1970] NZLR 660 (rejection of proposition that "the tenant is entitled as to right to an accounting of the capital growth which the landlord enjoys"); *Coleman v Myers* [1972] 2 NZLR 225 (fallacious to treat value of control to takeover offeror as irrelevant in fixing price for sale of minority shares; at pp 333-340 there is a fuller statement of the approach to valuation put more briefly in the present observations); *Jacobsen Holdings Ltd v Drexel* [1986] 1 NZLR 324 (in arriving at compensation for access to landlocked land, benefit to grantee to be taken into account as well as detriment to grantor); *Holt v Holt* [1987] 1 NZLR 85 (special value of control given by single A share not to be ignored in any attempt to value that share); affirmed by the Privy Council [1990] 3 NZLR 401); *Powell v Powell* [1987] 1 NZLR 192 (prospect of very considerable future benefits from interest to be valued; nil assessment not open). The proposition as to an assumed head lease in place advanced in the present case is testimony to the difficulty of eradicating a stubborn virus.

But it must be repeated that in my opinion these observations cannot affect the outcome of the present appeal. It should be allowed; the award should be restored; judgment should be entered for the defendant in the High Court, with costs to be fixed by that Court if necessary. For costs of the appeal the appellant should have $3500, with disbursements, including the cost of reproducing the case and the reasonable travelling and accommodation expenses of one counsel, to be fixed by the Registrar. The Court being unanimous, the case will be disposed of accordingly.

Gault J: I have read in draft the judgments of Cooke P and Richardson J. I agree with them. However, because we are differing from the Judge on the first ground of appeal I will give my own brief reasons.

As has been said the relevant principles are easy to state but not always easy to apply. Where the parties have agreed to submit to arbitration what is in substance a specific question of law, the award is not reviewable in the absence of fundamental illegality of a type not here in issue.

In each case it is a matter of construction as to what was submitted to the arbitrator. There is no presumption in favour either of a general submission or a specific submission on a question of law. It may be that there is express agreement to exclude curial review. That may be implied from the submission in the circumstances in which it is made. Where on a proper construction a specific question of law has been submitted, in the absence of a clear indication that review for apparent error was contemplated, the parties are bound by the decision of the arbitrator to whom they entrusted the dispute.

The position is no different merely because the arbitrator is asked also to determine questions of fact or mixed questions of fact and law: Re *King and Dunreen* [1913] 2 KB 32, *Attorney-General v Offshore Mining Ltd* [1983] NZLR 418, 432.

The relevant part of the deed by way of submission, with the schedule, is set out in the President's judgment. I have found nothing in the factual matrix which dictates any different view from that emerging from the terms of the document.

Tipping J expressed his view as follows:

> "While it is undoubtedly true that a point of law, namely the correct construction of the material provisions of the lease, will necessarily and obviously arise during the course of the reference, the way in which the reference is constructed and indeed the substance of the matter, seem to me to militate against the view that the parties must be taken as having agreed to submit a discrete and specific question of law."

He said:

> "What they did was to submit the question of market value of the premises to the arbitrator and in the process they advised him that they, or more accurately their valuers, had reached certain agreements on certain hypotheses but had been unable to resolve the matter overall."

In relying on the way in which the reference is constructed I take the Judge to mean, as Mr Camp submitted, that the arbitrator was asked to step into a partially completed rent review and that his role was to complete what must be seen as the single process of determining the rent for each of the two review periods. His part of the process was to complete determination of the market value of the land and buildings in light of the agreement reached on certain points. He was required, therefore, to undertake a process of valuation necessarily involving a series of steps being the determination of the issues raised in clauses 3 and 6 of the schedule and, if required in light of his conclusions on prior issues, to assess the quantum of any adjustments found to be appropriate under clause 6. When his duties are viewed as a single decision-making process in this way, it is said, the specific issues raised by the disagreement of the valuers should be seen as questions of construction arising incidentally in the process of determining the market value and not as discrete questions of law submitted for determination. Mr Camp further argued that it is artificial to break up the sequence simply because the reference is constructed in such a way as to bring in at the appropriate stages the points of agreement which should be seen simply as suitable concessions to facilitate the process.

On analysis, however, it is apparent that in substance the arbitrator, in a fresh reference, was called upon to determine two questions of law in respect of each review. The first arising from clause 3 of the Schedule was whether the premises are to be valued on the assumption that a head lease is in place. The second arising from clause 6 is whether the premises must be valued on the basis that they are vacant. It is only after those two questions have been answered that the further determinations called for in clause 6 (if they arise) are to be determined.

Thus in substance there are clearly identified two specific questions of law for determination. They were put to and determined by the arbitrator. They were not so much issues in a process he was to undertake but rather the principal issues for his determination, being outstanding issues on which the previous arbitrators had been unable to agree. In effect his role was to resolve the two issues of law which underlay the disagreement as to the market value.

Accordingly I agree that this case falls into the class in which error on the face of the award is not reviewable.

If it had been open to review the award I would have agreed in substance with Tipping J that the requirement in the lease for determination of the market value of the land and buildings does not call for any assumption of a head lease or head lessee's margin as a matter of law. It will, of course, be for the arbitrator on any particular review to determine the market circumstances with which the willing buyer and seller are presented. I agree also that the valuation exercise is not to be confined by existing contractual rights. They may reflect a manner of use of the premises which the hypothetical buyer and seller would contemplate but that is a factual matter for the arbitrator.

Similarly, I find no justification for postulating as a matter of law a complete retenanting of the vacant shopping mall on each review date without consideration of encumbants as existing potential tenants in the assessment of market demand. It will be a matter for the arbitrator to determine whether, in the relevant market circumstances, allowance is necessary for filling vacant premises and, if so, the appropriate quantum.

I would allow the appeal.

Richardson J: The threshold question arising on this appeal is whether the award of the late Mr Fox as arbitrator was and is reviewable for error of law on the face of the award. The general principles are well settled and have been discussed by this Court in *Attorney General v Offshore Mining Ltd* [1983] NZLR 418 and *Manukau City Council v Fensible Court Howick Ltd* [1991] 3 NZLR 415. If the parties have asked the arbitrator to decide a specific question of law, in principle the answer is not amenable to review. In that case the proper inference is that the parties put the point of law to the arbitrator on the footing and intending that the arbitrator's decision would be binding on them. But, if there is a general reference or a composite question of mixed law and fact, the award is reviewable for error of law even though in the course of the answer points of law are necessarily identified and decided. In that situation there is no basis for inferring that the parties agreed to be bound by errors of law on the face of the award. Further, if the parties have asked a series of questions one of which is specific question of law, the exception from curial review of answers to questions of law will apply to the answer to that question. Finally, in determining what questions were required to be decided by the arbitrator and the scope of those questions, it is necessary to consider the submission as a whole in its factual matrix and thus consistently with ordinary principles of interpretation of documents the apparent breadth of a generally expressed question may be cut down by other provisions of the submission.

This in my opinion is the position in this case. The factual matrix to the reference to Mr Fox is sufficiently expressed in the recitals to the Deed of 9 May 1990. They record that the rent payable in relation to the lease was to be reviewed as at 11 June 1984 and 11 June 1987; that that required a determination of the market value of the premises specified in the lease; that Tower and GUS each appointed valuers as arbitrators; that the valuers had reached a measure of agreement as to establishing the market value of the premises but had failed to resolve outstanding issues "the extent of the agreement and the extent of the outstanding issues being specified in the schedule hereto"; and that the parties, rather than continue with the arbitration procedure contemplated by the lease and the variation, had agreed to refer to the arbitration of Mr J R Fox of Christchurch barrister and solicitor the determination of the market value of the premises as at 11 June 1984 and 11 June 1987.

In short, rather than continue the rent fixing process under the original arbitration reference the parties decided to start a fresh arbitration before a lawyer appointed for that purpose. The fresh arbitration was to be on a limited basis and to take account of the matters on which agreement had been reached by the valuers. The arbitrator was asked in terms of clause 1 to determine the market value of the land described in the first schedule to the lease and all buildings and improvements excluding alterations, fixtures or fittings paid for and owned by the lessee, first as at 11 June 1984 and second as at 11 June 1987. Although the question is expressed as a question of mixed law and fact clause 1 goes on to make it clear that it is not a general reference at all. It stipulates that the question for each review period is "to be determined in accordance with the agreement reached between the valuers as specified in the schedule hereto".

On analysis of the schedule it is apparent that for each review period specifically limited questions were asked of the arbitrator. Thus in relation to the 1984 review para 1 records the agreement that subject to the outstanding issues specified in paras 3 and 6 the market value of the premises is $5,959,780 and the contractual rent to be fixed on review is $562,007. In terms of para 3 the arbitrator is to consider the contention for GUS that the assessment of market value should allow for the existence of a head tenant's margin. It is common ground that that is a matter of construction of the reference and of the lease and so is a question of law. If the contention is right then subject to para 6 the base figures in para 1 apply. If rejected, and again subject also to para 6, the market value of the premises is reduced to $5,542,238 and the contractual rental to $522,633 (para 4). In short the first question for consideration by the arbitrator is a specific question of law.

The second question or rather series of possible questions, arises under para 6. At the first step the arbitrator is asked to consider the proposition advanced for GUS that the premises should be valued on the basis that they are vacant and not subject to any leases. While any assumptions as to vacant possession if considered alone would be matters of fact, the important question of no leases to which it is incidental is clearly a question of construction and so a specific question of law. If that composite sub question is answered against GUS nothing further is required of the arbitrator. If answered in its favour then two further questions arise for consideration. One is whether there should be an allowance for initial vacancy, leasing commissions, and advertising and promotional costs. The other is the consequential effect in money terms on what would otherwise be the market value of the premises.

In his award the arbitrator answered the para 3 question in favour of GUS and on his approach to those questions could see no room for any further adjustment under para 6. In effect his answer at the first step under para 6 was against the proposition advanced by GUS and the further sub-questions did not require any answer. It follows in my view that the crucial questions addressed to and answered by the arbitrator are specific questions of law and are not subject to curial review for any error of law on the face of the award.

In his submissions Mr Camp argued that looked at realistically the reference to Mr Fox was no more than the continuation of the rent fixing process in the course of which the parties through their valuers reached agreement on various factual matters. He emphasised the breadth of the questions posed in clause 1 and submitted that rather than have those questions determined by an umpire appointed by the original arbitrators, the machinery of the deed of submission was availed of so as to allow Mr Fox to take the matter up at that point without having to start afresh, and to allow the former arbitrators to give evidence before him. No doubt there were sound commercial reasons why the parties adopted the course they took. However, it is what that did that counts. The ascertainment of the questions required by the parties to be answered by Mr Fox and actually answered by him must turn on the deed of submission into which they actually entered rather than on consideration of an alternative means for resolution of the difficulties they found themselves in when the original arbitrators could not reach final agreement which they could have followed but chose not to do. For the reasons given I am satisfied that in their Deed of 9 May 1990 the parties submitted specific questions of law for decision by the arbitrator and his answers to those questions are not reviewable for error of law on the face of the award.

In the result it is not necessary to consider the second question concerning the interpretation of the submission and the lease. However in case it is of assistance in further rent reviews I add two comments. The first is that as part of the factual matrix the actual occupancy level of the mall shops as at the review date must be evidence of the market demand and supply, and thus that the land had that letting potential even though the particular contractual rights are not relevant to an enquiry in terms of clause 1 as to the market value of the freehold land, buildings and improvements specified in that clause.

Second, market value calls for an enquiry as to the value at which a willing but not anxious vendor would sell the property and a willing but not anxious purchaser would buy. As has been emphasised in numerous cases, this is essentially a practical question not to be overlaid by philosophical or legal niceties. Various methods or approaches which may be conventionally used or taken by experts in arriving at that value are in the factual area and are to be assessed on the facts in the ordinary way. As Turner and McCarthy JJ emphasised in *Hatrick v CIR* [1963] NZLR 641, 661, the method of approach must not be elevated to become the test itself; it is only an aid to ascertain the market value. Each method of approach and whether more than one should be employed, depends in each case on the circumstances. That warning is in point where, as here, there were attempts to elevate factual considerations into legal doctrine.

There are two other aspects of particular relevance in valuation cases. One is that property is valued not merely by reference to the use to which it is being put at the time at which its value has to be determined, but also by reference to the uses to which it is reasonably capable of being put in the future and to the various means by which its income earning potential may be realised. Thus questions of head leases, multi tenancies and professional management arrangements may all arise for consideration in the factual area. The other is that the hypothetical sale involves a hypothetical seller not the owner as seller and because the whole world is hypothetically there making hypothetical bids (*IRC v Crossman* [1937] AC 26, 69) the lessee under a rent review is there as a hypothetical purchaser, but again its actual and potential use of the property is a factor for consideration in the factual area.