Lear and another v Blizzard [1983] 3 All ER 662

QUEEN'S BENCH DIVISION

TUDOR EVANS J

10, 13, 14, 15 JUNE, 6 JULY 1983

Landlord and tenant - Rent - Review - Renewal of lease - New rent payable to be rent agreed between parties or fixed by arbitrator in default of agreement - Whether rent to be fair rent as between parties or market rent - Whether improvements made by tenant's predecessor in title to be taken into account - Whether premium to be added to take account of anticipated inflation.

In 1961 L's predecessors in title granted C Ltd a 21-year lease of premises at a rent of £ 350 per annum. By cl 2 of the lease C Ltd covenanted that they would not make any additions to the premises without the landlords' consent and that they would use the premises only for the purpose of a petrol filling station. By cl 3(2) the landlords covenanted that, at the request of the tenant, they would renew the lease for a further term of 21 years from the date of the expiration of the original term 'at a rent to be agreed between the parties ... or in default of agreement at a rent to be determined by a single arbitrator'. In 1967 C Ltd, in breach of cl 2, improved the premises by building a tune-up bay, a car port and a car wash area, and enlarged their business to include vehicle maintenance work. In 1970 the landlords consented to the improvements and C Ltd agreed to pay an additional rent of £ 150 per annum in return for the lease being varied to cover not only the petrol filling station business but also the vehicle maintenance work. In 1974 C Ltd assigned the lease, as varied, to E Ltd, and in 1981 E Ltd assigned it to B for £ 12,500. In 1982 B asked L, in whom the freehold reversion had vested, to renew the lease in accordance with cl 3(2). The parties failed to agree on the new rent, and the matter was referred to a single arbitrator. L submitted (i) that, by virtue of cl 3(2), the new rent should be what the arbitrator determined would be a reasonable rent for the premises, as improved, on the open market, and (ii) that, no provision having been made in the lease for a rent review, the arbitrator should add a percentage or

premium to take account of anticipated inflation during the currency of the new term. B contended (i) that, in determining the new rent, the arbitrator should apply a subjective test and determine what would be a fair rent as between L and B, (ii) that the 1967 improvements should be disregarded in calculating the amount of the new rent and (iii) that it would be wrong for the arbitrator to add a premium because if he did do so he would in effect be making provision for a rent review. The arbitrator being unable to reconcile their submissions, the matter was referred to the High Court.

Held - (1) Since cl 3(2) of the lease provided for renewal of the lease at a rent 'to be agreed between the parties', it followed that on the true construction of the lease the arbitrator was to determine, subjectively, what would be a fair rent for L and B to agree in all the circumstances, taking into account all the considerations which would have affected the minds of the parties if they had been negotiating the rent themselves (see p 668 *b c j*, p 669 *e f*, p 670 *j* to p 671 *b* and p 672 *e f*, post); *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077 applied; *Foley v Classique Coaches Ltd* [1934] All ER Rep 88 and *Beer v Bowden* [1981] 1 All ER 1070 considered; *Ponsford v HMS Aerosols Ltd* [1978] 2 All ER 837 distinguished.

(2) It was for B to show that by way of assignment he had paid wholly for or contributed towards the 1967 improvements to the premises, and accordingly they were to be disregarded only to the extent that he satisfied the arbitrator that he had contributed in money or money's worth to their value (see p 669 *f*, p 670 *f* to *h* and p 672 *f*, post); *Cuff v J & F Stone Property Co Ltd* [1978] 2 All ER 833, *Ponsford v HMS Aerosols Ltd* [1978] 2 All ER 837 and *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077 considered.

(3) Since the arbitrator had no power to introduce any variations between the original lease and the new lease, it followed that he had no power to add a premium to take account of anticipated inflation during the currency of the new term (see p 672 *c d f*, post); *National Westminster Bank Ltd v BSC Footwear Ltd* (1980) 42 P & CR 90 followed.

Notes

For rent review clauses and their effect, see 27 *Halsbury's Laws* (4th edn) paras 215, 217.

Cases referred to in judgment

Bates (Thomas) & Son Ltd v Wyndham's (Lingerie) Ltd [1981] 1 All ER 1077, [1981] 1 WLR 505, CA.

Beer v Bowden [1981] 1 All ER 1070, [1981] 1 WLR 522, CA.

Cuff v J & F Stone Property Co Ltd [1978] 2 All ER 833, [1979] AC 87, [1978] 3 WLR 256.

Foley v Classique Coaches Ltd [1934] 2 KB 1, [1934] All ER Rep 88, CA.

National Westminster Bank Ltd v BSC Footwear Ltd (1980) 42 P & CR 90, CA.

Ponsford v HMS Aerosols Ltd [1978] 2 All ER 837, [1979] AC 63, [1978] 3 WLR 241, HL.

Motion

Basil Montagu Lear and Lindsay Ann Smith (the landlords) and Oliver Harry James Blizzard (the tenant) failed to agree on the rent payable under an option clause, cl 3(2), in a lease dated 23 December 1961. In accordance with cl 3(2), the matter was referred to a single arbitrator. As he was unable to reconcile the submissions made to him by the parties, the landlords, at his request, applied to the court for the determination of the following questions: (a) whether the rent to be determined by the single arbitrator should be assessed as an open market rent or as a fair rent; (b) if a fair rent was to be assessed, whether that meant that the rent was to be a rent which would be a fair rent for the particular landlord and the particular tenant to have agreed on had

they both been willing negotiators anxious to reach agreement, and whether, in deciding what the particular landlord and the particular tenant would have agreed, account could be taken of all considerations which might affect the mind of either party to such negotiations; (c) whether the tenant's improvements were to be taken into account or to be disregarded; (d) whether, having regard to the fact that a 21-year lease without further rent reviews during the currency of the term was provided for by cl 3(2) of the lease, a premium to

take into account anticipated inflation during the currency of the term should be built into the new rent and, if so, whether it should be assessed at the level of the premium applicable in 1961 which should then be converted into a premium and applied to the current rental value or whether the percentage should be assessed by reference to the current market conditions at the date of renewal. The facts are set out in the judgment.

John Grace for the landlords.

Malcolm D Warner for the tenant.

Cur adv vult

6 July 1983. The following judgment was delivered.

TUDOR EVANS J.

This is an application under s 2(1) of the Arbitration Act 1979 to determine questions of law which have arisen during the course of an arbitration between the applicants and the respondent, who are respectively the landlords and the tenant of a petrol service station in Gloucester. The parties were unable to agree the rent payable under an option to renew a lease of the premises. The dispute was referred to arbitration under cl 3(2) of the lease. At the conclusion of the evidence, the arbitrator was unable to reconcile the submissions made to him. These proceedings were brought at his instigation. I am asked to determine the true construction of the rent formula within cl 3(2) and the basis on which the arbitrator should assess the rent. Four questions have been drafted by or on behalf of the arbitrator to which I shall refer later.

On 23 December 1961 predecessors in title of the landlords granted a 21-year lease of the premises to the Cleveland Petroleum Co Ltd (Cleveland) at a rent of £ 350 a year. I need refer only to three clauses in the lease. By cl 2(6), the then tenants covenanted not to erect or permit or suffer to be erected any other building on or alterations or additions to the demised premises, without previous consent in writing of the landlords, such consent not to be unreasonably withheld. By cl 2(9) the tenants covenanted not to carry on or to permit or suffer to be carried on in or on the demised premises any trade or business other than that of a petrol filling station and the sale of accessories appertaining to motor vehicles. The option to renew is contained in cl 3(2) of the lease, the material language of which provides:

'The Landlords hereby covenant with the Tenant ...

(2) THAT the Landlords will on the written request of the Tenant made six months before the expiration of the term hereby granted ... grant to the Tenant a Lease of the demised premises for the further term of twenty-one years from the expiration of the said term at a rent to be agreed between the parties hereto or in default of agreement at a rent to be determined by a single arbitrator ... '

In 1967, and in breach of covenant, Cleveland carried out improvements to the premises by building a tune-up bay, a car port and a car wash area and they enlarged the business by carrying on vehicle maintenance work. On 12 January 1970 the lease was varied by a deed of variation. Cleveland were thereby released from cl 2(9) of the lease and the existing use of the premises was extended to cover not only the original business but the carrying on of vehicle and repair work. The landlords granted a licence and consent to the improvements. The deed provided for the payment of an additional rent of £ 150 a year in consideration of the variations of the lease.

In August 1974 Cleveland assigned the lease to the Esso Petroleum Co Ltd. On 13 July 1981 Esso assigned the lease, as varied, to the respondent tenant at a price of £ 12,500. The original term of 21 years expired on 31 July 1982.

I am asked to construe cl 3(2) of the lease. The four questions as drafted by or on behalf of the arbitrator are these:

'(a) Whether the rent to be determined by the single Arbitrator should be assessed as an open market rent or whether it should be assessed as a fair rent, and (b) If a fair

rent was to be assessed, whether that meant that the rent was to be a rent which would be a fair rent for this particular landlord and this particular tenant to have agreed upon had they both been willing negotiators anxious to reach agreement. In deciding what this particular landlord and this particular tenant would have agreed to, account can be taken of all considerations which might affect the mind of either party to such negotiations.'

Counsel for each party agree that the last sentence in (b) is incorrectly drafted and that the question I have to decide is 'whether, in deciding what this particular landlord and this particular tenant would have agreed, account can be taken of all considerations which might affect the mind of either party to such negotiations'. Counsel for the landlords submits that the test to be applied is objective and that the arbitrator has to determine what would be a reasonable rent for the demised premises, together with the improvements, on the open market. Counsel for the tenant contends that the proper test, on a true construction of cl 3(2) of the lease, is subjective and that the rent is to be a fair rent for these particular landlords and this particular tenant.

The third question, as drafted, is:

'(c) As to how the tenant's improvements should be taken into account or disregarded, as the case may be.'

Counsel also agree that the question as drafted does not accurately set out the question which has to be answered. The question, correctly stated, is 'whether the tenant's improvements are to be taken into account or to be disregarded'. The improvements are, of course, those carried out by Cleveland in 1967. Counsel have agreed that there are three possible answers to question (c) which they have drafted: (i) that the improvements are to be wholly disregarded by the arbitrator

when determining the rent on renewal. Counsel for the tenant submits that, once it has been decided that cl 3(2) is to be construed on a subjective basis, the improvements must be disregarded when determining the rent. He contends that the £ 12,500 paid by the tenant to Esso in July 1981 covered the cost of the improvements and that it would be wholly unreasonable and unfair to require him to pay for them again in the form of rent for the further 21 years; (ii) alternatively, the improvements are to be either wholly or partly disregarded if the arbitrator is satisfied by the tenant that he has contributed in money or money's worth to the value of the improvements; (iii) that the improvements are to be taken into account in full.

The fourth question, as drafted, is:

> '(d) Whether, having regard to the fact that a 21 year lease without further rent reviews during the currency of the term was provided for by clause 3(2) of the lease, a premium to take into account anticipated inflation during the currency of the term should be built into the new rent and, if so, whether it should be assessed at the level of the premium applicable in 1961 which should then be converted into a premium and applied to the current rental value or whether the percentage should be assessed by reference to the current market conditions at the date of renewal.'

Counsel for the landlords submits that the word 'reasonable' should be implied into the language of cl 3(2) so that the clause should be construed in an objective sense requiring a reasonable rent to be assessed on an open market basis for the premises as improved. It is submitted that the word 'reasonable' should be implied in order to exclude from the arbitrator's consideration any freak rent which may be offered on the open market. For the implication of the word 'reasonable', counsel for the landlords relies on *Foley v Classique Coaches Ltd* [1934] 2 KB 1, [1934] All ER Rep 88. In that case, by two separate contemporaneous agreements, the plaintiff sold land to the defendants, who carried on a motor business, on terms that the defendants would buy all petrol from the plaintiff. After the petrol agreement had been performed for some time, the defendants repudiated it. The plaintiff sought a declaration that the petrol agreement was binding, an injunction to restrain the defendants from purchasing petrol elsewhere and damages. The defendants contended that the agreement was not binding since there was no agreement as to price.

It was held at first instance and in the Court of Appeal that the parties intended to make a binding agreement and considered that they had done so and that a term should therefore be implied that the petrol would be supplied at a reasonable price in order to give effect to what the parties intended. Counsel for the landlords submits that the same principle should be applied in the case of a lease. He relies on the decision of the Court of Appeal in *Beer v Bowden* [1981] 1 All ER 1070, [1981] 1 WLR 522. A landlord and a tenant were unable to agree what rent should be paid under a review clause. There was no provision for arbitration in default of agreement. Applying the principle in *Foley v Classique Coaches Ltd* the court implied a term in the lease that, in the absence of agreement, the rent should be a fair rent.

Provided the clause is to be construed objectively on the basis of an open market rent, I agree that a term should be implied as counsel for the landlords contends. But the question is whether cl 3(2) is to be construed on a subjective or objective basis. In support of the latter construction, counsel for the landlords relies strongly on the decision in the House of Lords in *Ponsford v HMS Aerosols Ltd* [1978] 2 All ER 837, [1979] AC 63. In that case the landlords' predecessors had granted a 21-year lease to tenants at a rent of £ 9,000 a year for the first seven years. The rent for the second and third period of seven years was the subject of a review clause expressing the rent to be £ 9,000 a year 'or such sum whichever shall be higher as shall be assessed as a reasonable rent for the demised premises for the appropriate period'. The lease provided that the reasonable rent for the second and third periods should be agreed between the parties but that, if they failed to do so, it should be assessed by an independent surveyor appointed by them. In 1969 the premises were burnt down. They were rebuilt by the landlords, but the new building incorporated substantial improvements paid for by the tenants at a cost of £ 31,780. When the rent came to be reviewed for the second period of seven years, the tenants contended that the rent should be a reasonable rent without taking into account the improvements for which they had already paid. In proceedings to determine the meaning of the rent review clause, it was argued that if the tenants' improvements were included they would in effect be paying twice over. It was contended that the surveyor should assess what was a reasonable rent for the tenants to pay and not what was a reasonable rent for the demised premises as they stood. The House of Lords, by a majority, rejected the argument. It was held that, on a true construction of the

relevant clause, the surveyor's task was simply to assess what was a reasonable rent for the demised premises on the open market. Speaking of the surveyor's task, Viscount Dilhorne said ([1978] 2 All ER 837 at 842, [1979] AC 63 at 76-77):

> 'Surely it is to assess what rent the demised premises would command if let on the terms of the lease and for the period the assessed rent is to cover at the time the assessment falls to be made ... In assessing it, the surveyor will be assessing the reasonable rent that others, not just the sitting tenant, would be prepared to pay for the use and occupation of the premises. He will not consider the tenant's position separately.'

Lord Fraser said ([1978] 2 All ER 837 at 847, [1979] AC 63 at 83):

> 'It is true that the words "for the demised premises" do not add anything new, because there is no doubt about the identity of the premises for which the rent is payable, but in my opinion the words are of importance because they emphasise that the assessment is to be made by reference to the premises and not by reference to wider considerations or to what would be reasonable between these particular landlords and tenants.'

Lord Keith, the third member of the majority, said ([1978] 2 All ER 837 at 849-850, [1979] AC 63 at 85-86):

> 'At first impression the words "reasonable rent for the demised premises" suggest that what has to be ascertained is simply the rent that is reasonable for the premises

> as such in their actual state, the situation being viewed entirely objectively. "The demised premises" must mean the demised premises as improved ... In my opinion the words "a reasonable rent for the demised premises" simply mean "the rent at which the demised premises might reasonably be expected to let".'

It is contended on behalf of the landlords that the words in cl 3(2) 'a lease of the demised premises ... at a rent to be agreed between the parties hereto' are the same, in effect, as the language in the review clause in that case. But it seems to me that there are material differences between the language of the two clauses. The clause in *Ponsford v HMS Aerosols Ltd* did not contain any reference to an agreement between the parties.

The importance of this distinction was emphasised in *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505, on which the tenant relies. That case contained many points which are not relevant in the present case but the essential facts were these. Landlords let premises to predecessors of the tenants for seven years with an option for a further lease 'of the demised premises ... at a rent to be agreed between the lessor and lessee'. There was provision for an arbitrator to fix the rent in default of agreement. In 1963 the option was exercised and a further lease was granted with an option in terms identical with the original lease. In 1970, when the tenant exercised the option, the landlords sought to introduce a review clause. A new lease was executed for 14 years with a review at the fifth and tenth years. By a mistake, the lease contained no provision for arbitration in default of agreement of the rent on review. The material language of the clause provided:

> 'Yielding and Paying therefor during the first Five Years of the said term unto the lessor the rent of Two Thousand Three Hundred and Fifty Pounds and for the next period of five years of the said term and the final period of four years of the said term such rents as shall have been agreed between the Lessor and the Lessee ... '

In proceedings for rectification, the court ordered that language should be inserted into the clause providing for an arbitrator to determine the rent in default of agreement. On appeal, one of the questions which arose was: on the lease as rectified, by what measure was the arbitrator to fix the rent if the parties failed to agree? Buckley LJ, having referred to the language of the review clause in *Ponsford v HMS Aerosols Ltd*, said ([1981] 1 All ER 1077 at 1088, [1981] 1 WLR 505 at 518):

> 'That form of clause, as it seems to me, focuses attention on what is there described as "a reasonable rent for the demised premises" for the appropriate period, and that expression is first used without any reference to agreement between the parties to the lease at all. It then goes on to provide that such assessment (that is to say, the fixing of the amount of the rent to be charged) shall be either agreed or, in default of agreement, arrived at by valuation by an independent surveyor. That form of wording, in my judgment, certainly affected the views of the majority of the House of Lords in that case.'

Buckley LJ then referred to passages in the majority opinions and continued ([1981] 1 All ER 1077 at 1088, [1981] 1 WLR 505 at 518-519):

> 'But it appears to me that the terms of the clause there under consideration were noticeably different in important respects from the clause which we have, which refers to nothing other than such rent as the parties shall have agreed ... In my judgment, in default of agreement between the parties, the arbitrator would have to assess what rent it would be reasonable for these landlords and these tenants to have agreed under this lease having regard to all the circumstances relevant to any negotiations between them of a new rent from the review date.'

Eveleigh LJ expressed the same opinion ([1981] 1 All 1077 at 1090, [1981] 1 WLR 505 at 521):

> 'I should just add that I, too, regard this case as different from *Ponsford v HMS*

> *Aerosols Ltd*. There the reference was specifically to the demised premises and that is an important difference.'

Counsel for the tenant points out that the option in *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd*, with immaterial differences, is indistinguishable from the language of the option clause in the present case. But it was the review clause which fell to be construed in that case. Even so, I can find no material difference in the language and its effect. The option clause is radically different from the clause which had to be construed in *Ponsford v HMS Aerosols Ltd*. It seems to me that in the present case the emphasis in the clause is on what is to be agreed between the parties, and the arbitrator is required to determine what it would be reasonable for these landlords and this tenant to agree in all the circumstances of the case. I think that it was the intention of the parties to the lease that, in default of agreement between them, the arbitrator should determine a rent which it would have been reasonable for these landlords and this tenant to agree and to take into account all the considerations which would affect the minds of the parties. In other words, the test to be applied is subjective and not objective. Counsel for the landlords accepted that the decision in *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* was against his submission but he contends that the decision was based on a concession by counsel for the landlords in that case and that the construction put on the clause was in default of argument to the contrary. That is not accurate. It is true that counsel for the landlords in that case ultimately conceded, in effect, that a subjective construction was the proper construction but the Court of Appeal examined whether the concession was well founded. Buckley LJ said ([1981] 1 All ER 1077 at 1087, [1981] 1 WLR 505 at 517-518):

'Counsel for the landlords initially contended that the arbitrator so-called would act not as an arbitrator but as a valuer. He based that argument on the use of the words "shall have agreed" and the word "fixed" in the review clause. On that basis he submitted that the rent should be the market rent for the property, on the authority of a decision of the House of Lords in *Ponsford v HMS Aerosols Ltd*. Subsequently he conceded that the clause must be read as an agreement to arbitrate and not as an agreement to abide by a valuation. On that footing he agreed that, on the true construction of the clause, the rent should be such as it would have been reasonable for this landlord and this tenant to have agreed under the lease. It would consequently be proper for the arbitrator to take into account all considerations which would affect the mind of either party in connection with the negotiation of such a rent, as, for example, past expenditure by the tenant in improvements. In my judgment, counsel for the landlords was right to make that concession and to have accepted that the present case falls within the reasoning of the minority of the House of Lords in *Ponsford v HMS Aerosols Ltd* and not within the reasoning of the majority in that case.'

Buckley LJ then proceeded to give the reasons why he considered the concession to have been properly made in the passage in his judgment to which I have referred.

Counsel for the landlords here made three further submissions with respect to the *Thomas Bates* case. Firstly, he pointed out that the clause in that case provided for 'such rents as shall have been agreed', which he contends is significantly different from 'a rent to be agreed', the words used in the present case. The former language is said to lay greater emphasis, as I understood the argument, on the word 'agreement' and that therefore the arbitrator was required to fix a rent such as these particular landlords and tenant would have agreed. But I do not follow why this should be so. Both clauses emphasise the fact of agreement between the parties. It seems to me that the arbitrator in the present case is to assess the rent which it would be reasonable for the parties to agree. Secondly, counsel for the landlords submitted that a clause, similar in language to the clause in the present case, had been construed in an objective sense in *Beer v Bowden* [1981] 1 All ER 1070, [1981] 1 WLR 522 and that, since the decision in that case conflicts with the decision in *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd*, I am free and I

have to choose which to follow. In *Beer v Bowden* the material clause provided, in language part of which was very similar to that in the present case, for a rent review of--

'such rent as shall thereupon be agreed between the Landlords and the Tenant but no account shall be taken of any improvement carried out by the Tenant in computing the amount of increase, if any ... '

The parties failed to agree a new rent. On the landlord's originating application, it was ordered that the tenant was to pay as rent 'what the ... premises are reasonably worth', which was taken in the Court of Appeal as meaning a fair rental value for the premises on the open market. The argument of the tenant before the Court of Appeal, on the basis that the court had to imply some term as to what the rent should be, was that it could only be either a fair market rent or the rent originally reserved in the lease (see [1981] 1 All ER 1070 at 1073, [1981] 1 WLR 522 at 525 per Goff LJ). The court implied the former term. As far as I can see, it was never argued that a subjective test should be applied in deciding what the rent should be, whereas in the *Thomas Bates* case the point was central to the whole case. In these circumstances, I do not think that it can be properly said that there is a conflict between the two cases, but if I am wrong I should follow the decision in the *Thomas Bates* case where the question whether the clause should be construed in an objective or subjective sense was directly considered and the relevant authorities were referred to. Thirdly, counsel for the landlords submitted that the clause in the present case contains the words 'the demised premises', indicating that the rent is to be determined in relation to their actual state at the time of assessment by the arbitrator, whereas those words were absent from the review clause in the *Thomas Bates* case. It is quite true that the clause in the latter case did not expressly contain the words, but for what was the new rent to be paid if it was not for the demised premises? I think that the presence of the words in the clause in the present case are superfluous to the question of the construction of the meaning of the words 'at a rent to be agreed between the parties'. It seems to me that they do not add anything to the meaning of the clause.

I therefore construe the option clause in the present case in a subjective sense and I must now consider the question of the improvements. Since the rent to be assessed by the arbitrator is to be a rent for these particular landlords and this particular tenant, taking into account all considerations which would affect the mind of either party, it must follow that he should consider as one of those considerations the question of past expenditure on the improvements. This was the approach of Buckley LJ in the *Thomas Bates* case [1981] 1 All ER 1077 at 1087, [1981] 1 WLR 505 at 517. But they were not carried out by the present tenant but by a predecessor many years before. Does it make any difference in principle that the tenant did not himself carry out the improvements but took the premises by assignment? Counsel for the landlords submits that it does. On the assumption that the present tenant paid for the improvements, either wholly or in part, counsel for the landlords contends that such payment is irrelevant: it is res inter alios acta. But, as counsel for the tenant pointed out, when the tenant took the premises by assignment, he stepped into the shoes of the previous tenant and is entitled to say, if it be the fact, that he paid for the improvements then, and to argue either that they should be wholly disregarded when determining the rent or that the rent should be affected by a partial payment made for the improvements. Counsel for the landlords relies on the general law that improvements become part of the demised premises for the benefit of the landlord and he submits that it must follow that the tenant should pay for them in the new rent. He contends that if they were to be disregarded it would have been so stated in the deed of variation. He has referred to passages in the speeches of Viscount Dilhorne and Lord Fraser in *Ponsford v HMS Aerosols Ltd* [1978] 2 All ER 837 at 841, 848, [1979] AC 63 at 76, 84. Viscount Dilhorne said:

> 'Landlords and tenants are usually advised by lawyers on the terms of leases. If the parties to this lease had agreed that the effect of the improvements was to be disregarded in assessing the rent, I expect it would have been.'

Lord Fraser said:

> 'If the parties intended that the general law was to be varied by special provisions in favour of the tenants, the time to make such provisions would have been when the licence for improvements was granted by the landlords, but that was not done.'

It is quite true that the deed of variation is silent on the effect of the improvements on the question of rent. All that the deed provides is for a variation of the existing user in consideration of an additional rent of £ 150 a year and, by cl 3, it provides a licence by the landlords to the development of the land. But cl 3(2) of the lease means that, if a new rent fell to be assessed, it was to be assessed on the basis of taking into account all considerations, including any tenant's improvements, that is the new rent was to be assessed on a subjective basis. If this is the meaning of the clause, as I have held it to be, I do not see why, when the deed of variation was made in 1970, it was necessary for the then tenants to make a special provision for what was already provided in the lease. The present tenant has taken the benefit of cl 3(2) by assignment.

Counsel for the landlords also submitted that it is in practical terms impossible for the arbitrator to assess whether and, if so, to what extent the tenant contributed to the value of the improvements when he paid £ 12,500 in July 1981. He referred to the decision of Megarry J in *Cuff v J & F Stone Property Co Ltd* [1978] 2 All ER 833, [1979] AC 87. The clause which had to be construed was a rent review clause which provided for a rent of £ 2,400 a year 'or such sum as shall be assessed as a reasonable rent for the demised premises', with provision for assessment by an arbitrator in default of agreement. Counsel for the tenant in that case conceded that improvements which had been made by the tenant could not be wholly disregarded but he argued, in effect, that a discount could be made by the surveyor assessing the rent, inter alia, for the improvements which had been carried out by the tenant or someone on his behalf. Megarry J envisaged considerable practical difficulties for an arbitrator in performing such a task although he thought that the tenant's hand would have been strengthened if the formula used in the lease had admitted of a construction which allowed regard to the individual circumstances of the individual tenant (see [1978] 2 All ER 833 at 836, [1979] AC 87 at 90-91). Here it does. Moreover, the question of assessing the tenant's contribution was accepted by Buckley LJ in *Thomas Bates & Son v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505. Counsel for the landlords told me, and it

was not contended otherwise, that there is no evidence from the tenant to show that he contributed in any way by way of the assignment towards the cost of the improvements. The arbitrator, not having made his award, would have power to allow such evidence to be called even though he has heard or is in the course of hearing submissions. It is, of course, entirely a matter for him whether he exercises his discretion in this respect.

Counsel for the tenant submits that once it is established that the subjective approach is the correct method of construing cl 3(2) it must follow that the improvements are to be wholly disregarded when determining the rent. I do not accept that submission. It is for the tenant to show that by way of assignment he paid wholly or contributed partly towards the improvements. It is true that in *Ponsford v HMS Aerosols Ltd* [1978] 2 All ER 837 at 840, [1979] AC 63 at 75, Lord Wilberforce, in a minority speech, concluded that the tenant's improvements should be wholly disregarded but the amount of the improvements were precisely known in that case.

Finally, on this aspect of the case, counsel for the tenant submits that I should imply a term in cl 3(2) that the rent to be determined by the arbitrator is a 'fair' rent as between the parties. According to the argument, two factors are present in the option clause: the formula by which the rent is to be calculated and the machinery by which the formula is to be applied. According to counsel for the tenant, the formula is the 'fair' rent and the machinery is as agreed between the parties or determined by the arbitrator. I think that the correct approach is first to determine whether cl 3(2) is to be construed in an objective or subjective sense. It may be said that, once it is established that the latter construction is to prevail, it is not necessary to imply any term since the approach itself provides for

an assessment of rent which it would be reasonable for these landlords and this tenant to have agreed. But in case I were wrong in this, I should conclude that such a term should be implied. Counsel for the tenant submitted that in any event the arbitrator might take the open market rent as a datum and work up or down from that standard. In these circumstances, he submits that the word 'fair', if implied, will exclude the exceptional tenant when considering the datum of the market rent. If that is how the arbitrator approaches his task, I agree that a word must be implied to exclude a freak offer.

Finally, before I answer the four specific questions raised by or on behalf of the arbitrator, I must consider the argument of counsel for the landlords on inflation. He submits that the arbitrator should apply what he described as a premium or percentage uplift to take account of the fact that in the new lease for 21 years there is no provision for a rent review. The uplift is said to be necessary to protect the landlords from inflation over the period of the new lease. If, submits counsel for the landlords, the arbitrator concludes, on the basis of his experience and on looking at the market as it is at the moment, that an uplift is to be taken into account, he is entitled to do so when assessing the rent. He should look at the length of the new lease, allow for the fact of past inflation and, making the assumption that inflation will continue, add a percentage to provide for future inflation. Counsel submits that, even on the subjective construction of cl 3(2), the arbitrator will take the market value as his starting point and it is at this stage that he will make the necessary provision.

Counsel for the tenant contends that, if I accede to the landlords' argument, I shall in effect be permitting the arbitrator to build in a provision for a rent review into the lease. He submits that the landlords are seeking a guarantee of future inflation of an amount which, in the nature of events, can only be pure speculation. If his point fails, counsel for the tenant advances what is to me the rather surprising argument that the premium or uplift should be assessed at 1961 levels (the date of the original lease) and not the present level of inflation.

Counsel for the landlords relies on an article published in the journal of the Law Society ((1979) 76 LS Gaz 332). The author states at the beginning of the article that--

> 'The idea of charging premium rentals for properties let on leases with historically long periods between rent reviews has been put into practice by a few brave souls with amenable tenants in the past.'

The author then points out that most new leases make provision for rent reviews every five years or even every three years. But in the case of leases made in the 1950s or 1960s there was usually incorporated a 21-year period of rent reviews. To cope with such a long period without review, the method of adding a premium at the outset of the lease has been devised in order to protect the landlord against inflation and static rent. One case is referred to in the article which went to arbitration in which the arbitrator awarded a 20% premium over market rents. Two methods of achieving this end are suggested. The first is to use a formula which requires certain assumptions about the rate of growth in market rents over the years, but the author points out that it is almost impossible accurately to predict the extent to which rents will rise. The second method, which does not involve the use of actuarial methods, is by negotiation, and, failing agreement, arbitration.

The practice described in the article is dealing with the problem (related to that which arises here) of long periods between rent reviews. Counsel for the tenant referred me to the decision in the Court of Appeal in *National Westminster Bank Ltd v BSC Footwear Ltd* (1980) 42 P & CR 90. In that case, by a lease made in 1957, premises were let for 21 years. There was a provision for a renewal of the lease for a further 21 years 'at the then prevailing market rent' to be determined in default of agreement by a single arbitrator. There was no provision for a rent review. The question which came before the Court of Appeal was whether the arbitrator's power to determine the rent included a power to direct that the rent should be periodically reviewed. The Court of Appeal held that it did not. Templeman LJ said (at 92-93):

> 'In my judgment, the arbitrator has no power to introduce any variations between the original lease and the renewed lease. The arbitrator must determine the rent, and only the rent, and for this purpose he must determine the prevailing market rent ... The result of that declaration [by the judge at first instance] is to confer on the arbitrator a discretion to decline to determine the rent payable under the renewed lease for 21 years, but only to determine the rent for a period of three or five years, or some other period which he is free to choose, having heard indeterminate evidence and then he has power to direct that subsequent rent for subsequent parts of the term of 21 years shall be determined by such persons, at such intervals and by such machinery, as the arbitrator may think fit to draft and award. What is said is that, if the arbitrator fixes the rent at the beginning of 21 years for the whole period, then the landlord is in danger of not getting the fruits of inflation which he might otherwise get if there were rent review clauses. But what the landlords' predecessors in title gave away these landlords cannot now take back.'

These observations of Templeman LJ are in effect precisely the arguments advanced on behalf of the landlords in the present case. They are seeking to introduce the effect of a rent review clause into a lease which makes no such provision. It seems to me that the concluding observations of Templeman LJ about the impossibility of taking back what the predecessors in title have given away are apposite here. Moreover, I think that there is great force in the contention of counsel for the tenant that the whole process of making a calculation and building in a percentage for the effect of inflation on rents is entirely speculative both as to the continuation of inflation and as to the rates which might prevail from time to time.

Because of my conclusion on this issue, I do not find it necessary to consider or to express any view on the alternative argument advanced on behalf of the tenant that, if inflation is to be expressed in the rent, it should be at 1961 levels.

My answers to the four questions are these:

Questions (a) and (b): the rent to be determined by the arbitrator is a fair rent for these particular landlords and this particular tenant, account being taken of all considerations which would affect the mind of either party to such negotiations. Question (c): the improvements are either to be disregarded wholly or partly if the tenant satisfies the arbitrator by evidence that he has contributed in money or money's worth to the value of the improvements. Question (d): a premium is not to be added to take into account anticipated inflation during the currency of the new terms.

Order accordingly.

Solicitors: Stanleys & Simpson North agents for Treasures & Rivers Wyatt, Gloucester (for the applicants); Rowberry Morris, Gloucester (for the respondent).

K Mydeen Esq Barrister.