Mahoney v RC Dimock Ltd - [1990] 3 NZLR 114

High Court (Commercial List) Auckland
7, 14 December 1989
Eichelbaum CJ

Property law -- Lease -- Rent review -- Rent payable on review was to be such amount as was agreed upon by the parties or fixed by arbitrator if they could not agree -- Arbitrator fixed rent on open market basis with deduction for tenant's improvements -- Tenant argued that lack of profitability of business carried on in premises should be taken into account -- Whether profitability or otherwise of business of tenant should be taken into account.

Modick R D Ltd (formerly RC Dimock Ltd) was the landlord and Giltrap Group Holdings Ltd the tenant under an agreement to lease commercial premises for a term of 21 years commencing on 28 May 1982. The rental was to be reviewed every three years, the review clause providing that "The rental fixed at each review shall be such rental as is agreed upon by the landlord and the tenant and if they cannot agree to be determined by arbitration in the manner herein provided but not in any case to be a rental less than the rental chargeable immediately prior to such review." In Jeffries v RC Dimock Ltd [1987] 1 NZLR 419 the Court held in relation to the first rental review that the review clause required a subjective assessment by the arbitrator which would take into account all the considerations that would have affected the minds of the parties if they had been negotiating the rental themselves. Accordingly a deduction was made for improvements effected by the tenant.

On the second review the valuers agreed on a market rental of $343,700 per annum which after adjustment for tenant's improvements resulted in a figure of $308,500 per annum, the figures being reached by comparison with other known lease rentals. Evidence was given that the tenant had shown a net operating loss for the year ended 31 March 1988 of some $800,000 and an unaudited loss for the succeeding nine months of over $1.6 million. The tenant argued that the arbitrator was required to take into account the profitability of the particular aspect of its business which the tenant chose to operate on the demised premises, while the landlord argued that the only appropriate adjustment to the rental fixed on a market basis was that required for the tenant's improvements. The arbitrator, PJ Mahoney, accepted the landlord's contentions and fixed the rental at $308,500 per annum. In stating a case pursuant to s 11 of the Arbitration Amendment Act 1938 the arbitrator asked determination of several questions, the principal question being whether in fixing the rental on review he must have regard to the profitability or otherwise of the actual business conducted on the leased premises.

Held:

1 The rent review clause in the lease required a subjective approach in fixing the rent on review. The arbitrator should therefore have approached the arbitration by determining what would be a reasonable rent for the parties to agree to in all the circumstances taking into account all considerations existing at the review date pertinent to the demised premises and the relationship of landlord and tenant which would have affected the minds of reasonable persons in their position had they

been negotiating the rent themselves. The profitability or otherwise of the business which the tenant proposed to conduct on the premises could not be automatically and in all respects excluded. Excluded as a consideration, however, was the tenant's ability to pay, or the landlord's need to receive some minimum figure to survive. Ability to pay (or survive) was to be assumed. The financial situation of the business of the tenant was relevant only in respect of the particular business carried on at the premises in question (see p 118 line 50, p 112 line 3).

2 The arbitrator had determined the rent on an open market basis, and then deducted an allowance for tenant's improvements. His award did not therefore fix the rental on the appropriate principles, and it was remitted to the arbitrator for reconsideration (see p 123 line 21).

Cases mentioned in judgment

Barton (W J) Ltd v Long Acre Securities Ltd [1982] 1 WLR 398; [1982] 1 All ER 465 (CA).

Basingstoke and Deane Borough Council v Host Group Ltd [1988] 1 WLR 348; [1988] 1 All ER 824; (1987) 284 EG 1587 (CA).

Drapery & General Importing Company of New Zealand Ltd v Mayor, etc, of **Wellington** (1912) 31 NZLR 598 (CA).

Email Ltd v Robert Bray (Langwarrin) Pty Ltd [1984] VR 16 (Vic: SC (Full Ct)).

Feltex International Ltd v JBL Consolidated Ltd [1988] 1 NZLR 668.

Harewood Hotels Ltd v Harris [1958] 1 WLR 108; [1958] 1 All ER 104 (CA).

Jefferies v RC Dimock Ltd [1987] 1 NZLR 419.

Lear v Blizzard [1983] 3 All ER 662.

Ponsford v HMS Aerosols Ltd [1979] AC 63; [1978] 2 All ER 837 (HL).

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

Wellington City Council v National Bank of New Zealand Properties Ltd [1970] NZLR 660 (SC & CA).

Case stated

This was an award stated in the form of a special case pursuant to s 11(1)(b) of the Arbitration Amendment Act 1938.

R J Craddock QC and R P Deeble for the first respondent (Modick R C Ltd, formerly R C Dimock Ltd).

M P Reed and Glenese Adams for the second respondent (Giltrap Group Holdings Ltd).

There was no appearance for the applicant (the arbitrator, P J Mahoney).

Cur adv vult

EICHELBAUM CJ.

The first respondent is the lessor and the second respondent the lessee under an agreement to lease for a term of 21 years commencing 28 May 1982, relating to premises at 103 Great North Road, Auckland. As to rental, after providing that for the first three years the rental was to be as stated in the lease, cl 3.13 continued as follows:

"The rental hereunder shall be reviewed on the third anniversary of the commencement of the term and at every subsequent third anniversary thereof. The rental fixed at each review shall be such rental as is agreed upon by the landlord and the tenant and if they cannot agree to be determined by arbitration in the manner herein provided but not in any case to be a rental less than the rental chargeable immediately prior to such review. During the fourth, fifth and sixth years of the term hereof, the rental payable each month shall be reduced by any amount calculated on the formula

a

-- x c where

b

"(a) Is the amount to be refunded by the landlord to the tenant in accordance with cl 1.17 hereof reduced by the amount actually paid in terms of that clause as at the rent day concerned.

"(b) Is the total value of the demised premises fixed by the valuation on which the rental for the three years commencing on 20 April 1985 is established.

"(c) Is the rental for the demised premises as established by the foregoing valuation."

The explanation of the latter portion of this provision is that cl 1.17 provided that the tenant was to proceed forthwith with the partial demolition and reconstruction of the building forming part of the demised premises, according to certain plans identified by the parties. The completed structure, including partitioning fencing and electrical fittings, but not carpets and drapes, was to be the property of the landlord. The landlord agreed to refund to the tenant the cost of such work, not exceeding $200,000. In the event, the tenant's expenditure amounted to $479,222. That factor led to proceedings in this Court when on the occasion of the first rent review, the issue arose whether in fixing the rental for the renewed term the arbitrator should take into account the fact that (a) the tenant had spent $279,222 on improvements for which it was to receive no reimbursement, and (b) accordingly the tenant had paid for major improvements to the landlord's land, on which in effect it would be paying rent. The matter came before this Court on a case stated, Barker J's judgment being reported as Jefferies v RC Dimock Ltd [1987] 1 NZLR 419. Barker J referred to a line of cases where a distinction had been drawn between clauses, on the one hand, which had the effect of requiring a assessment on the footing of a reasonable rent assessed on an objective basis, without reference to a particular tenant or a particular landlord, or to the history of how the premises came to be built or paid for; and on the other hand, provisions requiring the ascertainment of a rent reasonable as between the particular parties. Cases of the latter type, of which Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd [1981] 1 All ER 1077 and Lear v Blizzard [1983] 3 All ER 662 are examples, required the arbitrator to determine, subjectively, what would be a fair rent for the parties 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. Barker J, holding that the clause in the present case was indistinguishable in any material way from the clauses under consideration in the two cases just cited, held that the submissions for the tenant must prevail. It followed that the proper approach was the "subjective" one and that therefore the elements set out earlier relating to the improvements were ones the parties would properly have had in mind in negotiating their agreement, and to which regard should have been had by the arbitrator.

Having stated the outcome of the earlier litigation in broad terms, it is now desirable that I record more specifically the reasoning on which it was founded. In Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd Buckley LJ said at p 1087:

". . . the question arises: by what measure is an arbitrator to fix the rent if the parties do not agree? 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 [1978] 2 All ER 837, [1979] AC 63. 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 on 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 . . ."

Later Buckley LJ noted that by the conclusion of the argument, counsel were at one as to the right approach. He continued at p 1088:

> ". . . I myself am satisfied that the market rent would not provide a proper standard to adopt in the present case. In my judgment, in default of agreement between the parties, the arbitrator would have to assess what rent it would have been 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." (Emphasis added.)

In Lear v Blizzard Tudor Evans J followed this authority, saying at p 668:

> ". . . 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."

On the occasion of the second rental review, issues arising between the parties have again brought them to this Court, by way of an award stated in the form of a special case pursuant to s 11 of the Arbitration Amendment Act 1938. At the hearing of the arbitration evidence was given by valuers on each side. They had agreed on a market rental assessment for the leased premises at $353,700 per annum, and after adjusting the same for the tenant's improvements in accordance with the decision of Barker J, reached an agreed rental figure of $308,500 (exclusive of GST) for the rent review period commencing 28 May 1988. According to the case, the valuers informed the arbitrator that the rental figure just quoted did not have regard to the particular business operations on the premises, but rather to the premises, that is the land and buildings, by comparison with other known lease rentals. Evidence was also given by Mr Gibb, the Group general manager of the second respondent. He deposed that Giltrap Motor Group Ltd had shown a net operating loss for the financial year ending March 1988 of some $800,000, and unaudited loss for the succeeding nine months of over $1.6 million.

I should say more about the nature of the tenant's business. By way of an agreed statement for the Bar I was informed that the lessee was involved in every aspect of the motor industry except manufacture. Initially it had operated a General Motors franchise in the premises, but at the relevant time it was carrying on its Nissan franchise there. The Nissan franchise was operated through a subsidiary, Giltrap Motor Group Ltd. (The parties did not seem to place any significance on the different entities involved.) Counsel were unable to agree whether the entire business of Giltrap Motor Group Ltd was carried on at the premises. The evidence was that for purposes of their own use as a franchise dealership the premises included facilities for retailing, warehousing and administration. I infer that the improvements effected, mentioned earlier, were specifically designed to make the premises suitable for a franchise dealership. Possibly they would be suitable for other forms of business as they stand but I think that must be speculative. However,

no doubt they could be made usable for such with the expenditure of money. Whether they could be so used would be subject to the landlord's permission, and might also require planning approval; I do not believe the evidence contains any information on the last mentioned topic.

The case recorded the lessee's contention that the wording of the rent review clause required a subjective approach in assessing the rental, and that under such an approach the profitability of the only type of business that could be carried on in the premises as of right must be taken into account. On the basis of the financial evidence, the lessee contended there should be no increase in rental; from the wording of the clause, it will have been seen that a ratchet provision prevents any decrease. On the other hand, as noted in the case it was the lessor's contention that the valuers had agreed on a market rental which took into account restriction on user, that evidence as to the profitability or otherwise of the business carried on in the leased premises was irrelevant, that the only appropriate adjustment to the rental fixed on a market basis was that required by the judgment of Barker J, namely to recognise the lessee's expenditure on improvements, and that the rental figure agreed by the valuers of $308,500, which reflected this adjustment, should thus be the rental for the review period. The arbitrator accepted the lessor's contentions and fixed the rental at $308,500 exclusive of GST. He stated that in the event that his award was found to be erroneous as a matter of law and that the financial circumstances of the lessee and/or the proprietor of the business on the leased premises were relevant, on the evidence before him he was unable to make an alternative award on that basis and accordingly requested that the matter be remitted to him for a further hearing. The questions for the Court posed by the arbitrator in the case were as follows:

(i) In fixing the rental on a rent review under the lease between the first and second respondent must any regard be had to the profitability or otherwise of the actual business conducted on the leased premises?

(ii) If so, to what extent?

(iii) Is the financial situation of the actual lessee relevant?

(iv) If so, to what extent?

(v) Does the award correctly state the rental to be paid for the leased premises for the period 28 May 1988 to 27 May 1991?

In the concluding stages of the argument before me, it became apparent that Mr Reed, who had not been engaged in the matter until recently, sought to argue that even if questions (i) and (iii) were decided against him, under question (v) the award was incorrect in other respects. I agree however with Mr Craddock's contention that this course is not open. The allegations in question are that the arbitrator failed to take into account the terms of the lease, in particular the restriction on user, and that in relying on the evidence of rentals of so-called comparable premises, he did not have regard to the differences in the review clauses of those premises and (in one particular instance, the John W Andrews premises) the differences as to the nature and success of the business being carried on at them. In my opinion all these points were submerged in the agreed figure submitted in evidence by the valuers, and the arbitrator must have been satisfied that such a figure sufficiently took into account the points in issue. From the formal statement of issues filed in these proceedings it is evident that that was also the view of counsel then acting.

I should record that the first respondent did not seek to re-litigate any of the matters decided by Barker J. Clearly, to some extent at least it would be precluded from doing so. It is not necessary to attempt to define the precise ambit of the decision which is binding on the parties since it was not challenged that the review clause should properly be regarded as requiring a "subjective" approach. The question is whether the matters which the lessee wishes to have taken into account are properly within the ambit of that approach. In substance, the issue is whether

the arbitrator was required to take into account the profitability of the particular aspect of its business which the lessee chose to operate on the demised premises.

I commence by referring to a number of the decisions cited by Mr Reed in his comprehensive submissions. As to the general approach to a rent review I cannot do better than quote from Basingstoke and Deane Borough Council v Host Group Ltd [1988] 1 WLR 348. Delivering the judgment of the Court of Appeal Nicholls LJ said at p 353:

> "The question raised on this appeal is one of construction of a rent review clause in a lease. In answering that question it is axiomatic that what the court is seeking to identify and declare is the intention of the parties to the lease expressed in that clause. Thus, like all points of construction, the meaning of this rent review clause depends upon the particular language used interpreted having regard to the context provided by the whole document and the matrix of the material surrounding circumstances. We recognise, therefore, that the particular language used will always be of paramount importance. Nonetheless it is proper and only sensible, when constructing a rent review clause, to have in mind what normally is the commercial purpose of such a clause.
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> "That purpose has been referred to in several recent cases, and is not in doubt. Sir Nicholas Browne-Wilkinson V-C expressed it in these terms in British Gas Corporation v Universities Superannuation Scheme Ltd [1986] 1 WLR 398, 401:
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> > "'There is really no dispute that the general purpose of a provision for rent review is to enable the landlord to obtain from time to time the market rental which the premises would command if let on the same terms on the open market at the review dates. The purpose is to reflect the changes in the value of money and real increases in the value of the property during a long term.'
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> "To the same effect Dillon LJ said in Equity & Law Life Assurance Society Plc v Bodfield Ltd [1987] 1 EGLR 124, 125:
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> > "'There is no doubt that the general object of a rent review clause, which provides that the rent cannot be reduced on a review, is to provide the landlord with some measure of relief where, by increases in property values or falls in the real value of money in an inflationary period, a fixed rent has become out of date and unduly favourable to the tenant. The exact measure of relief depends on the true construction of the particular rent review clause.'"

In Email Ltd v Robert Bray (Langwarrin) Pty Ltd [1984] VR 16 the Supreme Court of Victoria (Full Court) had before it a review clause providing that in default of agreement, the rental was to be as determined as a reasonable rental by a valuer appointed by the parties. The premises contained a building constructed to the tenant's specifications, including special and unusual features; and it could be inferred that the parties recognised that the premises would be difficult to let on the open market, because the demand for it would be limited, although it had special value to the tenant. The Court held that the expression "reasonable rental" was of a different character from "market rental", and in the context meant a rental reasonable in the light of all the relevant circumstances. The Court declined however to circumscribe or delineate the circumstances to which the valuer might have regard. The case is of interest in pointing up a rare example, so far as reported decisions go, of a factor (other than tenant's improvements) relevant to a "subjective" assessment which would not be permissible if the rental had to be fixed on an open market basis, namely where the landlord had constructed a specialised building for the tenant.

In Feltex International Ltd v JBL Consolidated Ltd [1988] 1 NZLR 668 there was a 30 year lease with rent reviews every fifth year. On review the rental was to be fixed by agreement or failing agreement by arbitration, subject to a ratchet clause. Henry J, approaching the matter on the basis that some implication was

necessary to give business efficacy, decided that the "annual rental" to be fixed on review must be regarded as the fair annual rental. That in turn, in the Judge's view, brought in the test of the "prudent lessee", laid down in Drapery & General Importing Company of New Zealand Ltd v Mayor etc of **Wellington** (1912) 31 NZLR 598; what the prudent lessee would give for the ground-rent of the land for the term, and on the conditions as to renewal and other terms contained in the lease. For present purposes the importance of the case is that it reinforces the distinction between a "reasonable rent" (the Judge equated "fair" with "reasonable") on the one hand, and a market rent on the other; the latter, Henry J remarked at p 671, being capable of excluding subjective factors which could influence the determination of what is fair between two particular parties.

The **DIC** case and more recent decisions in which it has been followed and amplified (eg **Wellington** City Council v National Bank of New Zealand Properties Ltd [1970] NZLR 660, also cited in argument) were of course concerned with perpetually renewable leases with long-term review periods, the rental being assessed on the basis of unimproved land. The review of the rent was inseparable from the tenant's right of renewal; although (as Mr Craddock correctly pointed out) the decision as to renewal would precede the fixation of the new rent. For myself I should prefer to reserve the question of the extent to which the principles there applied can helpfully be carried over to the present situation. The "prudent lessee" approach, which specifically excludes any consideration other than those present to the mind of the lessee (see eg the National Bank case, per Sir Alfred North P at p 671) does not seem to sit readily with one requiring considerations of all factors relevant to a fair agreement between the particular parties.

In WJ Barton Ltd v Long Acre Securities Ltd [1982] 1 WLR 398 the Court was concerned with a statutory tenancy in respect of which s 34 of the Landlord and Tenants Act 1954 provided:

> "The rent payable under a tenancy granted by order of the court under this Part of this Act shall be such . . . as, in default of . . . agreement, may be determined by the court to be that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor, there being disregarded -- (a) any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding, (b) any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him of by a predecessor of his in that business) . . ."

The issue for decision was whether the tenant should make discovery of its accounts relating to the business it had carried on in the premises for the past three years, and also accounts relating to the business tenant carried on in other premises about seven miles distant. It was held that in determining the open market rental under the Act, the best evidence was that of the rental of comparable premises; that the tenant's business accounts might be relevant when evidence of such comparable premises was not available, or the premises were peculiarly adapted for a particular purpose; and that there was no general proposition of law that the tenant's accounts were always relevant. Oliver LJ, who delivered the judgment of the Court (Lawton, Brightwell and Oliver LJJ) at p 401 posed the question:

". . . of what relevance to such an inquiry are the tenant's trading results? The court is not concerned with the tenant's ability to pay rent but with the rent which a willing lessor could command for these premises in the hypothetical open market and there is a perfectly well recognised way of arriving at that by reference to the rents payable for similar premises in the vicinity."

Later, at p 402, in dealing with a passage in the judgment at first instance to the effect that the tenant's trading accounts were always relevant, he said:

"We confess that, for our part, we are entirely unable to follow this in the case of a property such as this where there are, as it is conceded that there are, plenty of comparable premises in the vicinity from which the open market value of premises of this type can be deduced. No doubt evidence of the tenant's trading would indicate whether his business had been successful or unsuccessful and so might be a pointer to the rent which this particular individual tenant might be prepared to pay in order to spare himself the disruption of moving to other similar premises in the area, but that has nothing to do with the open market rent which the court is directed by the Act to ascertain."

It is clear then that evidence of the success or otherwise of the tenant's business in the premises will be excluded for purposes of the assessment of an open market rental, at any rate in the ordinary case where evidence of comparable rents is available. Nor does the suggestion that financial evidence could be a pointer to the rent which a particular tenant might be prepared to pay to spare himself the disruption of moving help the tenant here, because in this case the review is unconnected with any question of renewal. The tenant is saddled with the lease for the next review period. Nevertheless this passage in the judgment contains at least a hint that considerations relating to profitability could be relevant in a case where the subjective approach was appropriate.

In the judgment in WJ Barton Ltd v Long Acre Securities Ltd, there was a discussion of another decision of the Court of Appeal, Harewood Hotels Ltd v Harris [1958] 1 WLR 108. It concerned what was described as rather unusual hotel premises, and again one issue (indeed the principal issue) was the admissibility of evidence concerning the tenant's trading. At p 115 Romer LJ said this:

"But I cannot find anything in the language of [s 34(a) and (b) of the 1954 Act] which renders it irrelevant to look at such material as the accounts of this company as part of the material on which the judge must make up his mind as to what rent might reasonably be expected to be obtained for the premises in the open market. I should have thought that one of the first things that anybody who was going to set up a hotel business in this type of premises in this locality would want to know would be what prospects he had of making a good thing out of it, and, therefore, what rent he would be prepared to pay for the premises -- if, indeed he decided to take a tenancy of the premises at all. I cannot see any ground, either on common sense or the language of the section, upon which that consideration should be relegated to the realm of the irrelevant. I do not think that the judge would be entitled to look at the accounts for the purpose of seeing what the company could afford to pay. Mr King-Hamilton suggested that that really was what the judge did in the present case -- that he looked to see what profit they made in one year and what loss they made in another year, and so on, and said that this company, having regard to those figures, ought not be be expected to pay more than a particular rent. I should be disposed to agree that that was wrong, if the judge did it; but I do not think that he did it at all. He came to the conclusion that this hotel was being run efficiently; he came to the conclusion -- and indeed it was agreed on all hands -- that the premises could only be used as an hotel, and then, for the purpose which I have mentioned of seeing what a new person, an outsider, would pay as rent for these premises, he looked into the question of what kind of prospects, having regard to the law of supply and demand, this hotel would have."

So Romer LJ was saying that the question of how profitably a business of a particular kind might be conducted in the premises could be relevant even where the issue concerned an open market rental. If it is legitimate to have regard to evidence of this nature for such purposes in the case of an open market assessment,

then it follows that it must equally be relevant in a case where the subjective approach is appropriate.

It is now necessary to clear away matters not in contention, and to endeavour to refine the actual issue. The lessee does not contend that the evidence of the financial situation of the lessee is relevant, other than in respect to the viability of the business of the tenant carried on at the particular site, or what the tenant considers it worth to continue to conduct the business which it is presently conducting from those particular premises. The emphasis is on the particular business, carried on at the premises in question. Thus the issue does not concern any question of the state of the country's economy as a whole. Nor does it relate to any downturn in the motor industry in general. These considerations would neces-

sarily be in the mind of any parties negotiating a review of rent, and would properly be taken into account in assessing the rental on an open market or objective basis. The same applies to any suggestion of a localised state of business depression. Likewise, if the tenant wished to suggest that the particular location had become less attractive, for example by reason of a street closure, or the institution of a one way traffic system. Needless to say evidence pointing to opposite trends in any of the respects mentioned would equally be relevant.

The financial standing of the respective parties, in the broad sense, must however be irrelevant. At this stage, limitations to what is encompassed by the "subjective" approach begin to become apparent. The fact that either the landlord or the tenant is a wealthy person may affect his attitude in negotiations, or that of the opposite party, but one would think it self evident that on any basis it should not be permitted to affect the outcome, whatever the appropriate basis of approach. It is however helpful to examine why, conceptually, that is so. I suggest two reasons (without excluding the possibility of others). Notwithstanding that the approach is described as subjective the factors which may permissibly be taken into account are limited to those which a reasonable person would regard as bearing on the rental of the subject premises as between the particular parties. That excludes the tenant's ability to pay, or the landlord's need to receive some minimum figure to survive. In my opinion, ability to pay (or survive) is assumed. In negotiations the tenant might be tempted to say that a wealthy landlord did not need to extract the last cent but (considerations of economic duress apart) the reasonable tenant would recognise the right of such a landlord to drive as hard a bargain as anyone else.

This theme I think derives some support from remarks by the minority in Ponsford v HMS Aerosols Ltd [1979] AC 63 a decision referred to in the extracts from Thomas Bates & So Ltd v Wyndham's (Lingerie) Ltd quoted earlier. I refer to the speech of Lord Wilberforce at p 74 and particularly to Lord Salmond's at p 80:

> "I agree entirely with Roskill LJ that the reviewed rent must be reasonable as between the parties to the lease -- a reasonable rent for the lessors to accept and for the lessees to pay, having regard to all the relevant circumstances of the case existing at the date of the rent review."

In that case the review clause explicitly referred to a reasonable rent, but the same concept, in my opinion, is implicit in the subjective approach appropriate here. It is not subjective in the sense of permitting the infiltration of fanciful considerations, or ones idiosyncratic to the personalities of the respective parties, but only allows regard to be had to those having a basis of fact, and of a nature that would be perceived as relevant by a reasonable landlord or tenant.

The second limitation may be regarded as subsumed in the first, and indeed as one which goes without saying; but should be spelled out nevertheless. It is that the factors which may be taken into account are limited to those having a connection with the demised premises, or (although generally this will be no different or wider) the relationship of landlord and tenant.

In the end, the assessment of the relevance of particular circumstances, and the weight to be given to them in the instant case, is for the arbitrator. I conclude however that on a review where the subjective approach is appropriate, one cannot automatically and in all respects exclude regard to the profitability or otherwise of the business which the tenant proposed to conduct on the premises during the currency of the period for which the rental is being fixed. It would be difficult to say more without trespassing on the arbitrator's territory: see the Email case at p 21.

I can now answer questions in the case as follows:

(i) The arbitrator should have approached the arbitration by determining what would be a reasonable rent for the parties to agree to in all the circumstances, taking into account all considerations existing at the review date pertinent to the demised premises and the relationship of landlord and tenant, that would have affected the minds of reasonable persons in their position had they been negotiating the rent themselves.

(ii) To the extent that the arbitrator considers appropriate, having regard to the answer under (i) and the evidence before him.

(iii) As under (i).

(iv) As under (ii).

Question (v) asked whether the award correctly stated the rental for the review period. It is evident that the arbitrator did not approach the fixation of the rent on the basis set out in this judgment. He first determined the rent on an open market basis, then deducted an allowance for the tenant's improvements. In the circumstances I have to answer question (v) by saying that the award did not fix the rental on the appropriate principles. However, that is not to say that the arithmetical answer was wrong. Nor of course am I saying that it was right. The result is entirely a matter for the arbitrator, to whom I now remit the award for reconsideration.

I make two comments in conclusion. It may be surprising to many landlords and tenants to learn that the financial accounts of the business carried on by the tenants in the demised premises are of any relevance. That it must be said is largely a function of the form of the present rental review clause, one that may well have been chosen deliberately in view of the building clause in the lease. I say "largely" because from the references to case law in this judgment it will be apparent that such financial evidence may be relevant even with an "objective" review. Secondly, counsel for the lessee accepted that sauce for the goose would have to be for the gander too. If the tenant's use of the premises appeared to be especially profitable, no doubt landlords would be interested in exploring the tenant's accounts.

As to costs, the second respondent having succeeded is entitled to costs against the first respondent which I fix in the sum of $3000 together with disbursements as approved by the Registrar. The first respondent must also pay the arbitrator's solicitor and client costs in relation to the proceedings, together with disbursements as approved by the Registrar, again on a solicitor and client basis. If the quantum of the arbitrator's costs cannot be agreed the question can be referred to me by memorandum.Questions answered accordingly.

Solicitors for the applicant: Kendall Sturm & Foote (Auckland).

Solicitors for the first respondent: Gaze Burt (Auckland).

Solicitors for the second respondent: McElroy Milne (Auckland).