Sextant Holding Ltd v NZ Railways Corporation

High Court Wellington
22 April, 14 May 1992
Neazor J

Arbitration – Rental review – Lease of forecourt of service station – Profitability of present use of site – Highest and best use of the land – Error of law

A five yearly rental review was provided in a lease of a forecourt of a service station and on failure of acceptance by the lessee of the rent valued, provision was made for arbitration by two arbitrators and an umpire. The rent originally reserved was $5200 pa. The umpire determined that for the second period of five years, the rent should be $80 000 pa. In the award, the umpire distinguished the case of *Mahoney v Giltrap Holdings Ltd*, concluding that the actual profitability of the present use of the site was of little or no relevance in determining the fair annual rent of the land. The valuation evidence indicated that the valuer's approach was to assess the freehold value of the land and to apply an interest rate to that valuation to produce the rental valuation. The lessor's valuer made a valuation on the basis of the ability of the land to be amalgamated with the adjoining land in the same block. Such amalgamation was regarded as the highest and best use for the land.

The lessee argued that four errors of law had been made in the award, namely first that the review provisions required a subjective approach whereas the umpire had applied only objective criteria, secondly that the umpire held that the case law determined the valuation approach rather than the intention of the parties in the circumstances, thirdly that the construction of a provision of the lease was incorrect and fourthly by distinguishing *Mahoney's* case. On the third point, the umpire had decided that the actual profitability of the present use of the site was of little or no relevance in determining the fair annual rent.

Held, 1 None of the errors of law which the lessee had contended existed were apparent in the award. The umpire was entitled to treat the matters of economics of the operation and use of the land as he did. His references to highest and best use were to matters of valuation formulae or approach in the assessment of the value of the land and were entirely within his competence and jurisdiction. Having considered those matters, the umpire assessed the rental having regard to what a prudent lessee would consider he should take into account in respect of the rent which was the proper approach.

2 The economics of a particular activity are not brought into account by the prudent lessee test, nor are considerations arising from the lessee's business on adjoining but separate premises.

3 There was no reference to agreement in the lease, nor was the use of the land confined by the lease to the business of a service station. The rent was to be the fair annual rent of the land fixed by valuation. The effect to be given to a clause of the type in issue is that result which will provide fairness to the lessor but will give particular regard to those factors which would affect the mind of a prudent lessee, calling for regard to be given to the value of the land, where the premises are, the size, restrictions on use and the provisions of the lease.

4 The element of fairness is not to be looked at only from the point of view of the lessee, but also of the lessor and what will be fair to him will be tested against what he could receive on a purely market approach of hypothetical willing parties.

Cases mentioned
Barr v Bowden [1981] 1 All ER 1070
re Brechin and Drapery Importing Co Ltd [1928] NZLR 241
Devonport Borough Council v Robbins [1979]1 NZLR 1

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

Drapery & General Importing Co Ltd v Wellington City Council (1912) 31 NZLR 598
Feltex International Ltd v JBL Consolidated Ltd [1988] 1 NZLR 668
Jefferies v RC Dimock Ltd [1987]1 NZLR 419
Lear v Blizzard [1983] 3 All ER 662
Re Lunds Lease [1926] NZLR 541
Mahoney v RC Dimock Ltd [1990] 3 NZLR 14
Mahoney v Giltrap Holdings Ltd [1990] 3 NZLR 114
Ponsford v HMS Aerosols Ltd [1979] AC 63
Thomas Bates & Son v Wyndhams Lingerie Ltd [1981] 1 All ER 1077
Wellington City Council v National Bank of NZ Properties Ltd [1970] NZLR 660
Wellington City Corporation v Wilson [1936] NZLR s 110

Neazor J: In this proceeding the plaintiff lessee seeks an order setting aside an award made by the umpire in an arbitration relating to rent under a lease, or an order remitting the dispute back to the umpire for rehearing. The grounds of the application are that the umpire technically misconducted himself in making four errors of law in his award.

The defendant lessor denies that there have been errors and alternatively says that if the umpire did make an error of law, it was of no significance in the result of the award.

The leased premises are 160 m^2 of land in central Wellington which is used as the forecourt of a service station. The buildings associated with the service station are on a separate title. The bulk of the land in the same city block is on a third title. The purpose for which the land was leased is described in the document as "commercial" and the use of the land is limited to such a purpose. The term of the lease was for twenty years with provision for five yearly rent reviews.

The provision as to rental reviews are these:

> "17. WITHIN six calendar months previous to the expiry of the first second and third periods of five (5) years of the within term or so soon thereafter as may be the Lessor shall cause a valuation to be made by a person whom the Lessor reasonably believes to be competent to make the valuation of the fair annual rent of the land hereby demised so that the rent so valued shall be uniform throughout the period of five (5) years next following the first second or third period of five (5) years PROVIDED THAT such rentals shall not be less than the rental payable for the first five (5) years of the within term.
>
> 20. IN making the valuations referred to in Clauses 17 and 19 hereof no account shall be taken of the value of any buildings or improvements then on the said land."

Failing acceptance by the lessee of the rent so valued, provision is made for arbitration by two arbitrators and an umpire. The umpire's duty, if the matter goes so far, is:

> "27. THE duty of the umpire on reference to him of any question shall be to consider the respective valuations of the two arbitrators in the matters in which their valuations do not agree and then to make an independent and substantive valuation and the last mentioned valuation shall be the decision of the umpire but in giving his decision on any question so referred to him the umpire shall in every case be bound to make a valuation not exceeding the higher and not less than the lower of the valuations made by the arbitrators respectively."

The rent originally reserved in the lease was $5,200 per annum. The umpire determined that for the second period of five years it should be $80,000 per annum.

In his award the umpire determined that the terms of the lease required the fair annual rent of the land for five years to be determined, and that as a matter of law valuers must proceed on the basis that there are no buildings or improvements on the land. In this case, there is express provision in clause 20 of the lease that in making the valuations referred to in clauses 17 and 19 "no account shall be taken of the value of any buildings or improvements then on the said land".

Reference was then made to *Wellington City Corporation v Wilson* [1936] NZLR s 110, 113 and *Wellington City v National Bank of New Zealand Properties Ltd* [1970] NZLR 660 for the proposition that the valuer's approach should be to ascertain what a prudent lessee would offer to the landlord.

The award then said that it had been submitted that the circumstances were similar to those dealt with in the decision of Eichelbaum CJ in what is reported as *Mahoney v Giltrap Group Holdings* [1990] 3 NZLR 114. The award stated:

> "Having read that decision I believe that case was quite different from the one in question here. That judgment related to a rental for land and buildings whereas here a fair annual rental is required to be valued on the basis that there are not buildings or improvements on the land and the purpose/use of the land under the lease document is commercial.
>
> Use of the land is restricted in the main by town planning considerations, and not to the present use of the land which is as part of a service station site.
>
> I have concluded here that the actual profitability as related to the present use of the site is of little or no relevance here in determining the fair annual rent of the land disregarding the buildings or improvements thereon."

The award then proceeded to set out the valuation evidence presented to the umpire. That indicated that the valuers' approach was to assess the freehold value of the land and to apply an interest rate to that value to produce the rental valuation. The lessor's valuer made his valuation on the basis of the ability of the land to be amalgamated with adjoining land in the same city block. Such amalgamation was regarded as the highest and best use for the land. [In fact the land in the block is in three titles, that on which the forecourt is, that on which the buildings of the service station are and, adjoining the latter, the bulk of the block].

In discussing the lessee's valuer's valuation the umpire said:

> "Having decided as umpire that this land is to be valued as vacant, disregarding both the economics and the existence of the present buildings and other improvements, that eliminates the need to traverse quite an amount of Mr Finnis's submissions".

Having discussed how the original rental was arrived at the umpire said:

> "Be that as it may what we are concerned with here is the fair annual rental within the market as it existed on 1 January 1990.
>
> It is a fact that this land area is relatively small at 160m^2, its highest and best use value lies in amalgamation with the adjoining land and when considered with the adjoining land provides a desirable frontage and harbour views, which although not necessary in the development of the adjoining land is certainly desirable, and as part of the adjoining land must have a value in the region of the overall psm value for that adjoining land.
>
> The question here then is would a prospective purchaser of the Dalgety site pay this level for the 160m^2 of land as a separate entity for future amalgamation which is desirable but not essential.
>
> It has been shown to me at this hearing that not only is the prospective owner of the Dalgety land interested in acquiring this site but also at one time had a conditional contract with the Lessor over it. . . ."

Consideration was then given to demand for development of the site. The umpire reached the conclusion that there would possibly be demand during the second five years period, that the prudent lessee would have seen market land values increase and decline between 1987 and 1990 and differences in other ground rentals. He then made his award which was approximately 72% of the lessor's valuer's valuation.

The lessee contends that in his award the umpire made four errors of law:

(a) on a true construction of the lease the review provisions required a subjective approach encompassing the circumstances of the actual lessee whereas the umpire applied only objective criteria;

(b) holding that case law determined the valuation approach rather than the intention of the parties to the lease expressed in the rent review clause in the context of the said lease and the matrix of material surrounding circumstances;

(c) holding that the provision in clause 20 of the lease

"in making the valuations referred to in clauses 17 and 19 hereof no account , shall be taken of the value of any buildings or improvements then on the said land"
meant that the buildings on the land and the use to which it was put should be disregarded from the valuation process;

(d) holding that the decision in *Giltrap Group Holdings Limited* (unreported Eichelbaum CJ, 14 December 1989, Auckland, CL 68/89) was inapplicable.

These allegations are put into context by the lessee's proposition in argument that the general approach of the award is wrong in that, whilst not expressly saying so, it proceeds on a basis that ground rental valuation cases mean not only disregarding the value of buildings and improvements but require establishing the highest and best use of the site without regard to the party's circumstances when regard for those is in fact called for by the subjective rent review clause.

Central to all of the issues is what regard, if any must be had under the review clause in this lease to the circumstances of the actual lessee, the relevant circumstance in this case being the use to which the lessee puts the land.

Reliance was placed on the decisions in *Mahoney v R C Dimock Ltd* [1990] 3 NZLR 14, *Jefferies v R C Dimock Ltd* [1987] 1 NZLR 419 and *Feltex International Ltd v JBL Consolidated Ltd* [1988] 1 NZLR 668.

The review clause in *Mahoney v R C Dimock Ltd* was in terms that:

"the rental fixed at each review shall be such rental as is agreed upon by the landlord and 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".

Barker J in *Jefferies v R C Dimock Ltd* (which related to the same lease), after consideration of *Thomas Bates & Son v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, *Lear v Blizzard* [1983] 3 All ER 662 and *Ponsford v HMS Aerosols Ltd* [1979] AC 63, had concluded that a clause so worded required an assessment by the arbitrator of considerations which would have affected the minds of the parties if they had been negotiating for the rent themselves. That that was the proper approach in respect of that lease was accepted in *Mahoney v R C Dimock Ltd* [1990] 3 NZLR 114 by Eichelbaum CJ and it was accordingly the approach rejected by the umpire in this case.

In the English cases referred to, a clause worded to produce that result had been contrasted with a clause differently worded which required the valuer to value the land without regard to considerations personal to the parties, including their activity on the land.

Ponsford v HMS Aerosols Ltd was in the latter category. There the words of the review clause were that the rent would be such sum as would be assessed as "a reasonable rent for the demised premises". A clause so worded was held to indicate the intention that the rent was that which was reasonable for the demised premises, not that which would be reasonable for the tenant to pay. The context in which the decision was made was that during the term preceding that in which the review would be applicable the premises had been damaged and reinstated at the cost of the lessee. The question was whether the rent should be assessed on the value of the premises or whether the circumstance that the lessee had paid for restoration would require a diminution of rent for that lessee if the rent was to be reasonable.

The key to the distinction made in the English cases is whether the rent was expressed to be one "agreed between the parties", which would bring in all the issues material to either party, or a rent "for the premises", which directed attention to the premises and not to the views or activities of the parties – see, for examples, per Buckley LJ in *Thomas Bates & Son v Wyndham's (Lingerie) Ltd* at 1087 and per Tudor Evans J in *Lear v Blizzard* at p 668. The clause in this case is, looked at in light of the English cases, significantly different from that under consideration in *Mahoney v R C Dimock Ltd.*

The conclusion that the clause in this case may be required to be looked at differently from that in *Mahoney v Dimock* is, in my view, reinforced by the judgments of the Court of Appeal in that case (sub nom *Modick R C Ltd v Mahoney and Giltrap Group Holdings Ltd* CA 12190, judgment 24 June 1991). Cooke P differentiated between the two:

> "Although the expressions 'objective' and 'subjective' have occasionally been used in contrasting two kinds of rent review clause (see for example *Ponsford v HMS Aerosols Ltd* [1979] AC 63, 85 per Lord Keith; *Lear v Blizzard* [1983] 2 All ER 662, 668 per Tudor Evans J) I think with respect that they are not truly helpful. The wider approach, whereby the arbitrator has the task of determining what reasonable parties would have agreed, itself poses an objective test of reasonableness. The real question in such cases as *Ponsford* has been whether the review clause is worded in such a way that, even if reasonable parties would have agreed on a deduction to reflect tenant's improvements, the arbitrator cannot take that into account. In *Ponsford* the majority of the House of Lords attributed that inhibiting effect to a clause requiring an assessment of 'a reasonable rent for the demised premises'. They held that a reasonable rent was the market rent."

So did Hardie Boys J:

> "A number of cases decided in England in recent years have demonstrated the various drafting techniques employed in statutes as well as leases to fulfil the original purpose of rent reviews. These are of two general kinds. One calls for the assessment of a market rent, what the hypothetical willing lessee would pay to the hypothetical willing lessor for the particular premises. An example is *W J Barton Ltd v Long Acre Securities Ltd* [1982] 1 All ER 465. The other, of which the present case affords an example, directs attention to what the particular parties, acting reasonably, would agree as the proper sum in the current circumstances. Such a case is *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077. Describing the former as an objective approach and the latter as subjective confuses rather than clarifies, for the second is objective too. To the extent that there is any difference between them, it is in the considerations that may be relevant to the determination that is to be made. It may well be that there is, or ought to be, no difference in result between the two approaches. For it is clear that neither party is to be advantaged or disadvantaged by the fact that the review occurs during the term of the lease: it proceeds on the basis that a new lease is being negotiated at that time. And reasonable parties would expect to pay and receive the going rate."

In *Ponsford v HMS Aerosols Ltd* [1979] AC 63, the House divided three to two on the construction of the clause. Of the majority, Viscount Dilhorne, having noted that the purpose of the review clause was to protect against inflation and to secure that in real terms over a period the rent payable does not fall below that initially agreed on, asked what has the surveyor to do? and answered:

> "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. The rent may depend to some extent on local factors such as deterioration of the neighbourhood. 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. "

Thus the approach required by such a clause is the open market rental, but qualified as "reasonable": not what would be a reasonable rent for the lessees to pay, but what is a reasonable rent for the premises.

Lord Fraser of Tullybelton put it in this way (p 83):

> ". . . the effect would be the same whoever the landlord or the tenant might be. 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 this particular landlord and tenant."

Lord Keith of Kinkel (p 86) considered that whether the surveyor was required to assess a "market rent" for the premises or a "reasonable rent" his approach would be the same:

> "I consider that in either case the surveyor would have regard to the condition of the premises, the terms and provisions of the lease, and the general level of rent for comparable premises in the same locality or in similar localities, and I would not expect any difference in the resulting

assessment.

. . . 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'. . . . The fact that the assessed rent leads to an unreasonable result as between the particular tenant and the particular landlord does not mean that it is not a reasonable rent for the premises."

In *Feltex v JBL Consolidated* [1988] 1 NZLR 668 Henry J was concerned with an award in respect of a lease which provided in these terms for a rent review:

"2. At the expiration of each five (5) year period during this Lease or any renewal or extension thereof the annual rental payable hereunder shall be reviewed and fixed for the five (5) year period following each such date of review by agreement between the parties or failing agreement shall be fixed by arbitration pursuant to the provisions of the Arbitration Act 1908 and its amendments but in any event shall not be less than the annual rental payable for the five year period immediately preceding each such date of review."

Henry J held that the word "fair" should be implied so that the lessee was to pay the fair annual rent and that in New Zealand, following *Drapery & General Importing Co of NZ Ltd v Mayor of Wellington* (1912) 31 NZLR 598, *Devonport Borough v Robbins* [1979] 1 NZLR 1 and *Barr v Bowden* [1981] 1 All ER 1070, those words required inquiry as to what a prudent lessee would pay for the premises having regard to the terms and conditions of the lease.

Henry J equated the test propounded in the New Zealand cases with those applied in *Lear v Blizzard* [1983] 3 All ER 662 and *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077. There is no difficulty with that equation in that case because the clause in the lease provided for the rent to be reviewed and fixed by agreement between the parties, which on the English cases would make relevant those considerations which would affect the kind of the lessee, as well as those affecting the lessor.

In the present case, however, there is no reference to agreement in the lease, nor is the use of the land confined by the lease to the business of a service station. The rent is to be the fair annual rent of the land fixed by valuation. In my view, Mr Camp's submission that the approach in *Mahoney v Dimock* and the two English cases last mentioned was the proper one to apply to this lease cannot be sustained. The clause in this case is different in the significant aspect from the clause in those cases.

If, so far as the English cases go, the approach in *Ponsford v HMS Aerosols Ltd* is the proper one in such a case, there is still a question as to how that sits with the prudent lessee test indicated by the New Zealand cases to be the proper approach where the words used are "valuation of the fair annual rent of the land"? If there is a difference, in my view the construction must follow the New Zealand view, because the words have acquired a well settled meaning in New Zealand conveyancing.

The prudent lessee test was stated in very basic terms in *DIC v Mayor of Wellington*, which is its source. The lease required assessment of "the fair annual ground rent of the said land only, without any buildings or improvements". Stout CJ for the Court said:

". . . the true basis on which the valuers must proceed is that there are no buildings or improvements on the land. They must ascertain what a prudent lessee would give for the ground-rent of the land for the term, and on the conditions as to renewal and other terms etc, mentioned in the lease. They must put out of consideration the fact – if it be a fact – that there are buildings and improvements on the land."

The Courts in later cases have regarded it as inappropriate to expand on that statement beyond the view endorsed in the decision in *Wellington City Council v National Bank of New Zealand Properties Limited* at 671/2 by North P:

"In my opinion, what the umpire was saying was this; the principle laid down in the *DIC* case required him to ascertain what a prudent lessee would give as a ground-rent of the land for the new term of 21 years. This being so he was obliged to consider what factors would be taken into account by a prudent lessee. In short he was only concerned with matters which would affect the mind and ultimately the judgment of the prudent lessee in making his offer to the landlord.

> I agree with the observation of Sir George Finlay: 'It is the motives which inspire the tenant which are material, . . .' In my opinion, this is the way the learned umpire looked at the matter for he agreed, by way of qualification, that if the landlord was seeking a rent based on too high an interest rate, then the prudent lessee would ask himself why he should be called upon to pay the rent sought by the landlord and would immediately turn his mind to the return that a landlord was obtaining from the land."

In *Re Lund's lease* [1926] NZLR 541 which related to the fixing of a "fair ground rent . . . exclusive of any buildings erections or improvements" Sim J remarked that the ground rent is a rent which, in the circumstances, is to be "fair" to both landlord and tenant and concluded that the proper approach was that of *DIC Ltd v Mayor of Wellington*, namely to ascertain what a prudent lessee would give as a ground rent for a lease for the specified term and subject to the specified conditions.

The clause in *In re Brechin and Drapery Importing Co Ltd* [1928] NZLR 241 (CA) required determination of "the fair and reasonable rent of the said premises calculated on the basis of the unimproved value of the said lands". The Court held that the requirement of the arbitrator was:

> ". . . to ascertain what a prudent lessee would give as a ground-rent for a lease of the land for the term of fourteen years without any buildings or improvements thereon, and subject to the obligations imposed on the lessee, including the obligation of remaining the tenant thereof for two further periods of fourteen years, and the obligation of leaving on the land any buildings and improvements erected by the lessee."

Smith J in *In re A lease, Wellington City Corporation to Wilson* [1936] NZLR s 110 had to fix the rental under a clause which the parties agreed imported the test in *DIC Ltd v Mayor of Wellington*, to ascertain what a prudent lessee would give for the ground rent of the land for the term, and on the conditions as to renewal and other terms etc mentioned in the lease. The first consideration Smith J discussed was who is the prudent lessee? and concluded that the proper course was to "judge the character of the prudent lessee in relation to this particular lot by inferring from the evidence what the parties expected that a lessee would do with this particular site".

In his conclusion as to how the rent should be assessed Smith J said the lessor "must not expect to get what a prudent lessor would consider he ought to get. It must take the ground rental which a reasonable but prudent lessee thinks it proper to give".

The effect to be given in New Zealand to a clause of the type in issue here in my view is that result which will provide fairness to the lessor, but will give particular regard to the factors which would affect the mind of a prudent lessee. The application of those considerations would appear to call for regard to be given to the value of the land, in the case of urban land to where the premises are, the size of them, any restrictions on their use and the provisions of the lease which give both a right and an obligation to occupy the premises for 15 years from the date at which the reviewed rent is to apply, with a right to obtain a renewal in perpetuity in 20 year terms.

The test for rent review within the term would in my view no doubt bring in as a factor that it is not then open to the tenant to accept or reject further occupancy of the premises, as would be the case at the end of the term when an offer for renewal for another term of 20 years would be in contemplation.

Mr Camp argued that the lease required the "subjective approach" exemplified by *Mahoney v Giltrap* taking account that the lessee had a short term lease of the land adjoining the demised premises with limitation of use to a service station, and of the lessee's personal economics; and that it was an error of law to take account of the "highest and best use" of the land related to possible development of the whole block which he said is "a straight and open market approach", and to leave out of consideration anything to do with the actual use of the site.

Mr Camp contended that the arbitrator's reference to a "fair annual rental within the market" contained an indication of error because the juxtaposition of "fair" and "market" was illogical. If the clause in the lease require the fixing of such a rent as the lessor and lessee agreed that might be so, but in my view it is not in relation to the clause in issue here. The element of fairness is not to be looked at **only** from the point of view of the lessee, but also of the lessor, and what will be fair to him

will presumably be tested against what he could receive on a purely market approach of hypothetical willing parties.

Mr Williams contended for the lessor that the terms of the lease do not require a subjective approach encompassing the circumstances of the actual lessee, but that in any event the umpire did adopt such an approach.

As indicated, I do not consider that either absolute proposition is correct in relation to such a lease as this, but rather that the arbitrator or umpire is to assess a rent which is fair to the lessor but is to have particular regard to the factors which would affect the mind of a prudent lessee in relation to the premises in issue and the terms of the lease in issue.

The economics of a particular activity are not brought into account by that test, nor are considerations arising from the lessee's business on adjoining, but legally separate, premises. Any element of fairness to the landlord would be at least diminished if his rent was determined or affected by his neighbour's decisions.

In my view the umpire correctly stated the applicable law in his references to *DIC Ltd v Mayor of Wellington* (1912) 31 NZLR 598 and *Wellington City and the National Bank of New Zealand Properties Ltd* [1970] NZLR 660 and in his reference to an award made by the Rt Hon Sir Clifford Richmond who said in relation to a local authority lease provision "I have to fix a figure which I think would appeal to the prudent lessee as conservative but not unreasonably so".

I consider also that the umpire was correct in concluding that *Mahoney v Giltrap* related to a different situation, and that it was not an error of law for the umpire to conclude that "here the actual profitability as related to the present use of the site is of little or no relevance in determining the fair annual rent of the land disregarding the buildings or improvements thereon".

There is nothing in his references to decisions in the Courts which suggests that he applied the decisions rather than the terms of the lease. In fact, in my view, the umpire correctly assessed the effect of the Court's decisions as to such terms.

Mr Camp argued that it was an error of law to disregard the existence of the present buildings and other improvements. He related that to disregard of the economics of the operation. In my view that is not shown to be an error of law. The lease required disregard of the value of improvements in the assessment (the improvements being petrol pumps and underground tanks). The only reason apart from value for having any regard to the presence of the buildings could be in relation to the **use** of the land and the attitude of a prudent lessee in respect of the rent to be paid. As to that, the use is not confined by the lease other than to "commercial", and the umpire had regard to the use of the land as affected by town planning considerations which is not limited to the present use.

What weight should be given to use in assessing what is fair to the lessor and what a prudent lessee would pay is not a question of law but a matter of evaluation by the umpire.

In my view none of the errors of law which the lessee has contended exist is apparent in the award, either in particular statements made by the umpire or in his approach throughout the award. He was entitled to treat the makers of economics of the operation and use of the land as he did. His references to "highest and best use" I conclude were to matters of valuation formulae or approach in the assessment of the value of the land, which was entirely within his competence and jurisdiction. Having considered those matters, the umpire assessed the rental having regard to what a prudent lessee would consider he should take into account in respect of rent. That was a proper approach.

Accordingly the action to set aside the award fails. The defendant is entitled to the costs of the proceedings.