Wellington City v National Bank of New Zealand Properties Ltd

Supreme Court Wellington
15 September 1969; 3 October 1969
Wild CJ

Court of Appeal Wellington
11 November 1969; 19 December 1969
North P, Turner J, McCarthy J

Arbitration – Setting aside and referring back an award – Error in law on its face – Rental for renewal lease to be fixed by valuation – Agreed principle of law – Prudent lessee – Factors for consideration – Prospect of increase in value of land – Whether umpire misdirected himself in law.

Two leases of land owned by the City, each for a term of 21 years and with a perpetual right of renewal, expired in 1968. Pursuant to the provisions of the leases the fixing of the rental for the renewal leases was submitted to arbitration. It was agreed by all that the principle stated in *Drapery and General Importing Co of New Zealand Ltd v Mayor etc of Wellington* (1912) 31 NZLR 698 governed the case and that in the absence of comparable leases, the only satisfactory method of assessing the rental for the ensuing period was to ascertain the unimproved value of the land and then apply an appropriate rate of interest. The arbitration proceeded accordingly and the umpire published his award with which the City's arbitrator concurred. The Bank applied to the Supreme Court to remit the award to the umpire for reconsideration upon the ground that upon its face the award was erroneous in law. Wild CJ concluded that the umpire was wrong in law in regarding the *DIC* case as precluding him, when employing the rent-fixing method agreed on, from having regard to the prospect of an increase in the value of the land, and remitted the award to the umpire for reconsideration. The City appealed.

Held, 1 The umpire was fully entitled to reject the respondent's submission that "the tenant is entitled as of right to an accounting of the capital growth which the landlord enjoys".

2 There is nothing wrong with the way the umpire put the matter in his award and it is not possible to say that he misdirected himself in law or misapplied a principle of law.

Cases mentioned

Drapery and General Importing Co of New Zealand Ltd v Mayor etc of Wellington (1912) 31 NZLR 598
Champsey Bhara & Co v Jivraj Balloo Spinning and Weaving Co Ltd [1923] AC 480; [1923] All ER Rep 236

Appeal allowed. Order made in Supreme Court discharged.

In the Supreme Court:

MOTION on behalf of the National Bank of New Zealand Properties Ltd to remit an award to the umpire for reconsideration on the ground that upon its face the award is erroneous in law.

Patterson and *Watts* for the applicant.
Cooke QC and *R T Remp,* for the respondent.

Cur adv vult

Wild CJ: This is a motion on behalf of the National Bank of New Zealand Properties Ltd (which I shall call "the Bank") to remit an award to the umpire for reconsideration upon the ground that upon its face the award is erroneous in law.

The Bank is the lessee under two memoranda of lease from the Wellington City Corporation (which I shall call "the City") of two small pieces of land adjoining each other in Panama Street in the heart of the commercial centre of Wellington. The leases are in similar form, each running for a term of 21 years from 1 February 1947 with a perpetual right of renewal for like terms requiring the rental to be fixed by three independent persons, one to be appointed by the tenant, one by the City and the third by the two so appointed. The City having appointed Sir Arthur Tyndall and the Bank Mr M O Barnett, those two gentlemen then appointed the Honourable Sir Douglas Hutchison, a retired Judge of this Court (whom I shall call "the umpire"). The umpire sat with the two arbitrators at the hearing which extended for three days during which a number of valuers and professional experts on each side gave evidence. The arbitrators disagreed and the umpire accordingly entered on his duties and subsequently published his award with which the City's arbitrator concurred.

The umpire began his award by quoting from *Drapery and General Importing Company of NZ Ltd v Mayor etc of Wellington* (1912) 31 NZLR 598 the Court of Appeal's statement in relation to a similar lease as to the basis on which the valuers must proceed. That statement is as follows:

> "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."

In this case it was agreed by the parties that that principle governed the case.

The umpire went on to point out that neither the *DIC* case nor any of the others following it required the ground rent to be arrived at by any particular means. The classic method, he said, would be by way of comparison with ground rent for other properties, but that method was not available in the present case for nearly all the comparable leases had expired at the same time. In that situation the valuers had given their evidence by assessing the unimproved value of the land and taking what their view was an appropriate rate of interest on that. The umpire said that that was the basis upon which counsel had put their cases and being, in his opinion, the best available basis, he would adopt it. Accordingly he proceeded to consider the evidence with a view to determining the unimproved value of the land. Having arrived at that he then came to consider the interest rate to be applied. He mentioned the wide field covered by the evidence put forward and said that he received no great assistance from extreme figures advanced on both sides—8% and 7.998% submitted by two of the witnesses on behalf of the City, and 3% and 2.1% submitted by two witnesses on behalf of the Bank. He explained why he discarded the two high figures on the City's side and then proceeded to discuss the two low figures on the Bank's side. He said:

> "Mr Pullar and Mr Nathan both proceed on the basis of considering the return which the lessor will receive from its investment in the land: and it was on this basis that the actuary prepared his tables. Mr Pullar said:
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> '. . . I consider that the appropriate rate to be employed in determining the annual rental on inner city leases should be the interest rate paid on long-term Government stock issues *less* an allowance for the annual capital gains increment which can reasonably be expected on the land',
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> and so, deducting the one from the other, he arrived at his 3%. In cross-examination he stated even more strongly that his attention was directed to, and his opinion formed on, the return to the lessor. The paper submitted by Mr Nathan, while looking at the prospective returns to both lessor and lessee, directs attention first to the return to the lessor:
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> A ground lease as a growth type of investment, offers one of the soundest securities obtainable as the lessor not only owns the land but has prior lien over any buildings erected thereon which are often of a very substantial nature.

> Bearing in mind the fact that land values have shown only a consistent rise in and around Wellington City since the start of the century (with the exception of a short period around 1931) and the gilt-edged nature of the security, one would expect the investment yield to a lessor to be somewhat lower than that obtained from leading public companies".

He contended that, if the lessor, in an example given by him, obtained an arbitrary interest rate of $3^1/_2$% on the increasing Government value of the land, the total average return to him on the original value of the land over a very long period, having regard to the continuous increase in the value of the land, would be over 13% and, if projected into the future, considerably more than that.

These views were put forward consistently with a submission which Mr Patterson made that the tenant is entitled as of right to an accounting of the capital growth which the landlord enjoys. However, in my opinion, this submission and these views have no application to the present case. They might well be applicable to he case where one is seeking to find a value on the willing seller willing buyer basis. That basis applies where the notional seller and the national buyer are not contractually bound to one another, and one has to ascertain the point at which they will enter into the contract of sale and purchase. In seeking to find that point, one has, of course, to take into account all considerations that affect each party. But that is not this case. In this case, the lessor is already bound to give the lessee his new term of 21 years, and subject to a possible minor qualification to which I shall advert in a moment, it is matters that affect the lessee and the lessee alone that are important in arriving at what he is prepared to pay. It was not by any oversight that the Court of Appeal in the *DIC* case referred only to what the prudent lessee would pay and said nothing of what the lessor would receive. An award by Sir George Finlay, sitting as umpire in an arbitration in 1959 between the Auckland Harbour Board and Briscoe & Co Ltd, was put in, not of course as an authority or precedent but simply as containing a summary of the cases following the *DIC* case. [I have looked at all the cases mentioned by him and all the other cases cited in the argument.] I mention that award now because the learned umpire made this same point then. He said:

> "The contention that the lessor should make some sacrifice because it enjoys the benefits of an appreciation in value of the land seems irrelevant in view of the fact that what has to be ascertained is what a prudent tenant would pay. It is the motives which inspire the tenant which are 'material, not what the landlord should or should not do – short of accepting a fair rent – or should or should not suffer.'
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> The qualification to which I referred, if it is a qualification, is this. I think that, if the prudent lessee is asked to pay a rent based on too high an interest rate, it is probable that he will then ask what the return to the lessor is likely to be. I think that this would be the case if he were asked to pay the $6^1/_4$% suggested by Mr Bradshaw, particularly as he would know that rates of $4^1/_4$% have long been current in Wellington and a rate of 5% in Auckland and elsewhere. I think that he would not agree to pay at the rate of $6^1/_4$%, and, having ascertained, in answer to his question, what the return to the lessor would be by way of accretion of value of the land, he would be still more unlikely to agree to pay at that rate.

In setting out that portion of the award I have underlined the two passages which the Bank claims contain error of law.

As I have said, the parties at the arbitration were at one that the rent that a prudent lessee would give for the lease in question should be ascertained by applying an appropriate rate of interest to the unimproved value of the land. The submission for the Bank was that in determining that appropriate rate of interest the prospect that the land might increase in value was a material factor. Mr Patterson contended that in the passages that I have underlined the learned umpire rejected that submission and that in so doing he erred in law. That contention raises two questions for determination – did the umpire reject the submission and, if he did, was he wrong in law?

In the first passage the submission for the Bank is put by counsel in rather graphic terms but I think it is clear from the sentence that follows it that the learned umpire rejected the submission as having no application to the case. That view is reinforced by the second passage in which the learned

umpire says that subject to a possible minor qualification "it is matters that affect the lessee and the lessee alone that are important in arriving at what he is prepared to pay". Taking that statement and the earlier rejection of the submission for the Bank together I think it is fair to conclude that the learned umpire was saying that in ascertaining what a prudent lessee was prepared to pay it was matters that affect the lessee alone that are important, and that in determining an appropriate rate of interest on the unimproved value he need not have regard to the prospect of capital growth.

Is that view correct within the authority of the *DIC* case which, as counsel agreed, states the law? After careful consideration I have come to the conclusion that it is not. I do not think that the dictum of the Court of Appeal requires arbitrators, where they proceed (as they did here by common consent) to determine an appropriate rate of interest on unimproved value as a means of ascertaining what a prudent lessee would give, to ignore the prospect that the land may increase in value. I see everything in the words used by the Court of Appeal to exclude that consideration. On the contrary, I think that the concept of the prudent lessee requires that regard be had to it. A prudent lessee will not confine his consideration to matters affecting himself. In my opinion it is of the essence of prudence that in considering what he should give as rent for land during the term of the lease a prudent lessee will consider also what the lessor is likely to derive from the land during that term. One of the things he may derive, depending on the circumstances of the case, is a capital appreciation for, as Mr Cooke agreed, increase in the value of land in a central city area is not just inflationary but in part at least real, because of the scarcity of such land.

I noted that Mr Cooke did not seek to support the two passages in question as a matter of law. Nor did he suggest that they were not material. His argument was that they were merely statements of what the learned umpire considered important in applying the prudent lessee test to the particular facts. He said that the umpire was putting a proposition of fact or discretionary judgment and not of law. I have considered this argument but I do not think it can be upheld because, immediately following the second passage, the learned umpire went on to say that "It was not by any oversight that the Court of Appeal in the *DIC* case referred only to what the prudent lessee would pay and said nothing of what at the lessor would receive." In the context it seems to me plain that he was there drawing on the Court of Appeal's dictum as a matter of law to support the view he had just expressed.

Mr Cooke argued, and I think rightly, that in the cases that have been decided since the *DIC* case the Courts have been careful to apply the Court of Appeal's dictum as originally given without expanding it. He said it ought not to he elaborated. I agree with that. But I do not think I am elaborating it in this judgment. All I am saying, is that I respectfully think the learned umpire was wrong in law in regarding the *DIC* case as precluding him, when employing the rent-fixing method agreed on, from having regard to the prospect of an increase in the value of the land. I need hardly add that the weight that arbitrators give to that consideration is entirely a matter for them. But in my view they are not bound by authority to disregard it.

I have considered whether the reference to the "possible minor qualification" saves the second passage from being regarded as erroneous in law. Having regard to the way in which that qualification is expressed, and to the example given of its limited application, I do not think it does. In my opinion the true position is as I have stated it.

In accordance with the Bank's application the award is remitted to the learned umpire for reconsideration.

Order accordingly.

From the whole of the foregoing judgment the Wellington City appealed.
In the Court of Appeal.

Cooke QC and *Stevenson,* for the appellant.
Patterson and *Watts,* for the respondent.

Cooke, for the appellant:
A line of authorities going back to 1912 established the basis on which valuers must proceed under such clauses as cl 3 in the present lease. The award proceeded on the basis laid down in *Drapery and General Importing Co of New Zealand Ltd v Mayor etc of Wellington* (1912) 31 NZLR 598.

It is common ground that the lease contemplates a uniform rent throughout each 21-year term. It is also common ground that during each term the land is likely to increase in value. There will be an increase in nominal value because of inflation, but there will also be an increase in real value because land is a limited commodity, the possession of which is naturally of ever increasing value especially in the case of land in the heart of the commercial centre of the capital City.

In the present case the respondent claims and the Chief Justice holds in effect that the award ignored the improvement in the lessor's position at the commencement of each 21-year term and further, that the award ignored that in such a way as to constitute an error of law on the face of the award. The appellant contends that the award did not ignore that factor and that there is not an error of law on the face of it as alleged.

The Courts have laid down the prudent lessee test as the proper approach to claims of this kind and have done so largely to ensure that the lessee is not made to pay an unfair rent but have refrained from elaborating the test or from going further to protect the lessee: the *DIC* case *(supra)* at 605; *Gosford v Alexander* [1902] 1 IR 139; *Re Lunds Lease* [1926] NZLR 541; *Re Brechin and DIC Ltd* [1928] NZLR 241; *Mayor etc of New Plymouth v Bonner* [1929] NZLR 217; *Re a Lease Wellington City Corporation to Wilson* [1936] NZLR s 110.

The *DIC* case and its prudent lessee test is well established in New Zealand. The lessee's submission that it was entitled as of right to an accounting of the capital growth which the landlord enjoys has no support in principle or authority and would be manifestly unfair to the lessor. As the land is appreciating and money depreciating in value, the lessor in 20 years out of the 21-year term is likely to receive as rent a diminishing percentage of the true market value of his asset. The lessee however, already participates in the increase in value through his right to use the land or through the opportunity of increasing rents of his tenants.

As to the first passage complained of in the award, the umpire and arbitrator who agreed with him were right in saying that the respondent's submission had no application to this case. As to the second passage complained of – this has to be read in its context and particularly with a later passage giving it a qualification. The passage complained of is merely a statement of what the umpire and the arbitrator considered important when they applied the prudent lessee tests to the facts. It is a proposition of fact or a principle of economics – not a proposition of law. As such it is a matter of common sense and if necessary I would submit is correct. *Thayer on Evidence* 249. The question of capital benefit to the lessor cannot be looked at in isolation or from the lessor's point of view. It can only be looked at from the extent the prudent lessee would be influenced or motivated by it.

In his judgment, the Chief Justice has understated the submission of the Bank. I accept the umpire rejected the submission but the submission he rejected was the sweeping one. Neither proposition can be spelled out of the award. If the Chief Justice is laying down as a proposition of law what the prudent lessee will take into account, it may well go too far. But I have no serious quarrel with the proposition as one of fact or commonsense subject to this – that I would have submitted the prudent lessee would consider the lessor's position in a secondary or subsidiary way and would be mainly concerned with his own position.

I did not seek to support the second passage as a matter of law. I said as to the first – it was rightly rejected. The umpire said, drawing on the Court of Appeal dictum, the law requires me to view the position through the eyes of the lessee. The umpire did not say or imply that he was precluded and it is indisputable that he did take into account the possibility of an increase in the value of the land. There was in truth no error of law in either passage complained of and the award should not be set aside.

Stevenson, in support.

As to the principles for setting aside an error of law shown on the face of an award see 2 *Halsbury's Laws of England*, 2nd ed, p 60, para 127. The Chief Justice in interpreting parts of the award has made certain references as to the meanings conveyed by the umpire: *Champsey Bhara Co v Jivraj Balloo Spinning Co* [1923] AC 480; [1923] All ER Rep. 235, *Giacomo Costa Fu Andrea v British Italian Trading Co Ltd* [1963] 1 QB 201; [1962] 2 All ER 53.

Patterson, for the respondent:

The passage in *Halsbury* is not relevant because this matter came fore the Supreme Court under s 11 of the Arbitration Act 1908 as an application to remit the award to the umpire for reconsideration, see *Russell on Arbitration*, 17th ed 308.

The *DIC* case gave particular attention to the productive capacity of a property as a method of assessing the rent. While one does not find the words "productive capacity" used in the judgments one does find a rejection of the interest on unimproved value method and the key to the words "prudent lessee" which are the kernel of the judgments is the Irish case of *Gosford v Alexander* [1902] 1 IR 139 cited in argument but not referred to in the judgments.

There are in the authorities, three methods outlined of valuation of a ground rent:

1. The productive capacity method exemplified by *Gosford's* case.
2. The comparable rental method. The umpire described that as the classic method.
3. Interest on unimproved value method.

In the present case it was the third method that was adopted by common consent of both sides. What this Court said in the *DIC* case is referable to the first method only and the question of the relevant factors in the application of the third method has not received judicial consideration. The respondent accepts the prudent lessee test as expounded in the *DIC* case (supra) questions 4 and 7 at p 604 and answers at p 605.

Where the third method of assessment of a ground rent is applied, the correct test is what rate of interest ought fairly be paid to remunerate the landlord's capital in the form in which it is invested, ie in land. The appropriate rate of interest must be assessed from rates that are paid on other classes of investment. There was no evidence of the rates of interest which would have been payable or which were payable or which were payable under leases of comparable properties.

The umpire misdirected himself by taking the *DIC* case as authority excluding him from following Mr Pullar and Mr Nathan in their approach to the problem. The prospect of capital growth was a vital factor. We claimed it went in the tenant's favour and the landlord claimed it went in his favour. The umpire rejected the factor altogether and in that he erred: *Lomax v Peter Dixon and Son Ltd* [1943] KB 671 and the *Editorial Note* [1943] 2 All ER 255. I adopt that Note.

Under the third method of assessment of valuation it must be recognised the landlord's profits comprise two elements, viz, capital appreciation and rent, so that in arriving at the rent, the capital appreciation must be taken into account one way or the other. On the merits it must go in reduction of the rent.

Capital appreciation: There is the real increase in value occasioned by the increasing scarcity of land. There is also the nominal appreciation caused by alteration in the value of money. Both of those factors are relevant in company interest yields on Government stock mortgages and the like. The umpire erred in law in rejecting the prospect of capital growth as a relevant factor. On the question of remitting an arbitrator's award where he has excluded relevant factors from consideration see *Williams v Wallis and Cox* [1914] 2 KB 478; *Trayfoot v Lock* [1957] 1 WLR 351; [1957] 1 All ER 423; *Lithgow City v Construction Services* [1957] SR (NSW) 619.

Mr Cooke's outline of the respondent's contention is not correct. Our contention is that in assessing the ground rent by the third method it is wrong to ignore the prospect of capital appreciation.

My learned friend submitted that our case is manifestly unfair to the landlord because the rent decreases as a percentage of the increasing value. I answer that the rent is only part of the landlord's profits and the increase in value is the other part of his profit. In the case of building leases of which this is one, his proposition entails that the rent is increasing as the buildings are growing older. That is manifestly unfair to the lessee.

Cur adv vult

North P: An appeal from the judgment of the Chief Justice in which he directed that an award of an umpire be remitted to him for reconsideration on the ground that the umpire had misdirected himself in law.

The question we are called upon to determine in this appeal is a narrow one. It arises from the award of the Honourable Sir Douglas Hutchison who was appointed umpire in an arbitration directed to the ascertainment of the ground-rent for an ensuing period of 21 years in respect of two leases which contained a perpetual right of renewal held by the respondent over land situated in Panama Street which is in the heart of the commercial centre of Wellington.

The award of the umpire recorded that the two parties were agreed that the true basis on which the valuers must proceed in ascertaining the ground-rent for the ensuing period of 21 years was laid down by this Court in *Drapery and General Importing Company of New Zealand Ltd v Mayor of Wellington* (1912) 31 NZLR 598. Yet as no particular means of arriving at the ground-rent was laid down in that case, all the valuers who gave evidence in the arbitration proceedings were of opinion that in the absence of comparable leases, the only satisfactory method of improved value of the land and then apply an appropriate rate of interest. The umpire agreed that this was so and said that he proposed to adopt the approach which the valuers on both sides favoured.

Accordingly the learned umpire proceeded to determine the unimproved value of the two pieces of land, and then went on to consider that would be the appropriate rate of interest to be employed in determining the annual rent for the ensuring period of 21 years. As is not uncommon in arbitrations of this nature, the views of the valuers on both sides were somewhat divergent. One of the valuers called by the respondent was Mr Pullar who expressed the opinion that the appropriate rate to be employed in determining the annual rental on inner-city leases would be the interest rate paid on long-term Government stock issues less an allowance for the annual capital gains increment which could reasonably be expected. The umpire recorded in his award that in cross-examination this witness stated even more strongly that his attention was directed to and his opinion formed on the return to the lessor. A second witness called by the respondent was Mr Nathan and he too, it would appear, expressed a similar opinion and emphasised that in view of the rise in the value of city land since the beginning of this century, a low rate of interest would nevertheless give the appellant more than 13% return on the original value of the land. The umpire, having recorded these opinions, then went on to state:

"These views were put forward consistently with a submission which Mr Patterson made that the tenant is entitled as of right to an accounting of the capital growth which the landlord enjoys. However, in my opinion, this submission and these views have no application to the present case. They might well be applicable to the case where one is seeking to find a value on the willing seller willing buyer basis. That basis applies where the notional seller and the notional buyer are not contractually bound to one another, and one has to ascertain the point at which they will enter into the contract of sale and purchase. In seeking to find that point, one has, of course, to take into account all considerations that affect each party. But that is not this case. In this case, the lessor is already bound to give the lessee his new term of 21 years, and, subject to a possible minor qualification to which I shall advert in a moment, it is matters that affect the lessee and the lessee alone that are important in arriving at what he is prepared to pay. It was not by any oversight that the Court of Appeal in the *DIC* case referred only to what the prudent lessee would

pay and said nothing of what the lessor would receive. An award by Sir George Finlay, sitting as umpire in an arbitration in 1959 between the Auckland Harbour Board and Briscoe & Co Ltd, was put in, not of course as an authority or precedent but simply as containing a summary of the cases following the *DIC* case. (I have looked at all the cases mentioned by him and all the other cases cited in the argument). I mention that award now because Sir George Finlay made this same point the. He said:

'The contention that the lessor should make some sacrifice because it enjoys the benefits of an appreciation in value of the land seems irrelevant in view of the fact that what has to be ascertained is what a prudent tenant would pay. It is the motives which inspire the tenant which are material, not what the landlord should or should not do – short of accepting a fair rent – or should not suffer.'

The qualification to which I referred, if it is a qualification, is this. I think that, if the prudent lessee is asked to pay a rent based on too high an interest rate, it is probable that he will then ask what the return to the lessor is likely to be. I think that this would be the case if he were asked to pay the $6^1/_4$% suggested by Mr Bradshaw, particularly as he would know that rates of $4^1/_4$% have long been current in Wellington and a rate of 5% in Auckland and elsewhere. I think that he would not agree to pay at the rate of $6^1/_4$%, and, having ascertained, in answer to his question, what the return to the lessor would by way of accretion of value of the land, he would be still more unlikely to agree to pay at that rate. It was suggested by Mr Cooke as a minor point in his submissions that the fact that Mr Justice Smith, in *Re a lease Wellington City Corporation to Wilson* [1936] NZLR s 110 fixed a rate of interest at 1 percent below the current first mortgage rate would support one's accepting Mr Bradshaw's rate as being something like 1 percent below the now current first mortgage rate. But would it? The first mortgage rate in 1936 was $4^1/_4$% to $4^1/_2$%, and the rate fixed was rather under three-quarters of that higher figure. If one applied a proportionate reduction to the now current first mortgage rate, the resultant figure would be just a little over 5%. I think that the acceptable interest rate must be found in the range from $4^1/_4$% to 5%, and, on my consideration of this, I have come to the conclusion that I should fix it at $4^3/_4$%."

The respondent, being dissatisfied with the approach adopted by the learned umpire in fixing the interest rate at $4^3/_4$%, commenced proceedings in the Supreme Court seeking an order that the award be remitted to him for reconsideration upon the ground that the award was upon the face of it erroneous in law. These proceedings came before the learned Chief Justice on 15 September 1969 who, in a reserved judgment, held that the approach adopted by the learned umpire was wrong in law and accordingly be made an order remitting the award to the umpire for reconsideration. This appeal is from that judgment.

Before I proceed to consider the arguments we heard from counsel, it may be helpful if I define the principles which, in my opinion, require to be applied when the Court is asked either to set aside an award or remit it to the arbitrators or umpire, as the case may be, on the ground that an error of law appears on the face of the award. These principles were considered by the Judicial Committee of the Privy Council in *Champsey Bhara and Company v Jivraj Balloo Spinning and Weaving Company Limited* [1923] AC 480; [1923] All ER Rep. 235, in a judgment of the Board delivered by Lord Dunedin. He said:

"The law on the subject has never been more clearly stated than by Williams J in the case of *Hodgkinson v Fernie:* 'The law has for many years been settled, and remains so at this day. That, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final Judge of all questions both of law and of fact. . . . The only exceptions to that rule, are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think, firmly established, viz, where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established.' This view has been adhered to in many subsequent

cases, and in particular in the House of Lords in *British Westinghouse Co v Underground Electric Railways Co* . . . Now the regret expressed by Williams J in *Hodgkinson v Fernie* has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. *An error in law on the face of the award means, in their Lordships' views, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous.* It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound" (*The italics are mine*) (*ibid*, 486; 237).

Now it is perfectly plain, if I have correctly understood the authorities, that the Courts have consistently declined to be drawn into considering principles of valuation save in so far as they depend on purely legal considerations. Of course if a lease, for example, contains a formula for fixing a rent, the arbitrators or the umpire must comply with the directions given to them in the instrument. But short of anything like that, the method of valuation which finds favour with the arbitrators or the umpire is essentially a matter for them. In this connection I cannot do better than to refer to the observations of their Lordships in *North and South-Western Junction Railway Co v Assessment Committee of the Brentford Union and overseers of the Poor for the Parish of Acton* (1888) 13 AC 592. In that case Lord Halsbury LC said:

"The problem propounded by the statute is plain enough in its form; it is simply to ascertain what rent a tenant from year to year would give for the occupation of the tenements, subject to certain deductions. The Courts have from time to time given decisions as to what are and what are not proper considerations in arriving at a conclusion on that subject when the facts are found before them. But the case as stated in each of the alternative propositions suggests to your Lordships for decision questions of fact, and even suggests the question which of two alternative methods is the best for arriving at the conclusion of fact. My Lords, no Court has ever given directions in such a ease. As the Master of the Rolls said, when the process by which the conclusion has been arrived at has been set forth the Courts have decided whether or no the process so adopted was in accordance with or against the provisions of the statute. I asked the very learned counsel who argued the question whether he could point to a single instance where a Court has given directions as to the preferable course when it was admitted that neither course was in itself contrary to law. . . .I am therefore of opinion, my Lords, that your Lordships should avoid establishing a precedent which has never I believe, hitherto been adopted, namely of giving directions to the arbitrator how he should arrive at the fact" (*ibid*, 593).

Lord Watson had this to say:

"My Lords, there are principles of valuation which depend on purely legal considerations, and any misapplication of these is open to correction by the Courts. But there are also certain so-called principles of valuation, which are simply formulae for arriving at the solution of questions of fact, which have commended themselves to valuators of experience. There may be several alternative formulae of that kind, all of them capable of leading to a just and reasonable conclusion. It is for the arbitrator, who is constituted the judge of the facts, to determine for himself which rule of that kind he will accept for his guidance" (*ibid*, 594).

In my opinion, the attitude adopted by this Court in the *Drapery and General Importing Co* case is consistent with the views of their Lordships in the case I have last cited. In this case, the Court was concerned with leases expressed in somewhat similar terms to the present lease. The lessee company sought by an originating summons to secure from the Court a direction as to the way the valuation of the ground-rent should be ascertained. Two questions were asked which are relevant to he present case. These were:

"4. Is the fair annual value of the said land to be ascertained by arriving at its fee-simple value as if no building existed thereon, and fixing the fair ground-rent at some percentage on such

freehold value without any regard to any building actually existing thereon or to the purpose for which any such building is designed, suitable, and used?

7. What, under the provisions of each of the said two leases, is the true basis on which the valuers should ascertain the fair annual ground-rent of the land included in the said lease only, without any buildings or improvements, for the renewed term?

As to question 4, the Court is of the opinion that the proper answer is 'No'. The interpretation of the clauses referred to will appear in answer to question 7. As to question 7, 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 or improvements on the land."

Although the award of the umpire, as I have earlier mentioned, recorded that both parties agreed that the true basis on which the valuers must proceed was correctly stated in the *DIC* case, nevertheless in this Court Mr Patterson invited us to regard the *DIC* case as applicable only to cases where the umpire or the arbitrators proposed to fix the ground-rent by having regard to the productive capacity of the land in question. He submitted that there were three recognised methods of determining the ground-rent, namely the productive capacity method; the comparative rental method; and the interest on unimproved value method. His contention was that the *DIC* case was only relevant when the arbitrators decided to apply the first of these methods. I should say at once that I cannot accept Mr Patterson's submission. In my opinion it has always been accepted that the formula laid down by this Court in the *DIC* case was of general application. In my opinion, the negative answer given by the Court to question 4 did no more than reject the contention of the lessee that the fair annual value of the land was to be ascertained by arriving at its fee simple value and then fixing the fair annual ground-rent at some percentage of such freehold value. In short in my opinion this Court, consistent with the views expressed in the House of Lords, was unwilling to be drawn into giving a direction that the valuation must be made by adopting one particular method.

In this Court Mr Cooke for the respondent invited us to reject Mr Patterson's submission that the respondent was entitled as of right to an accounting of the capital growth which the landlord enjoys, he submitted that this contention had no support either in principle or by authority and that the umpire was right to reject it. I agree with Mr Cooke's submission for I know of no such principle of law and indeed when Mr Patterson was challenged he was unable to refer us to any such statement of legal principle, still less to any authority supporting his contention. If I understood Mr Patterson's argument correctly, it was this: land in the centre of the City of Wellington over a period of 50 years has, as one would expect, consistently increased in value. This being so, he contended that the tenant had a legal right to a share in this capital growth. Presumably, I gathered, because the centre of the City owes its prosperity to the efforts of those who have erected buildings and created what may be described as a commercial centre. Why this should be so I do not understand. On the contrary, I think that there was force in Mr Cooke's submission that in the case of a lease with a perpetual right of renewal, the very reason for a re-assessment of the ground-rent being made every 21 years was to enable the landlord to catch up on the increased value of the land in each successive 21-year period. He pointed out – I thought with some effect – that if the value of land in the City of Wellington progressively increased, then in the nature of things, for the larger part of the 21-year period, the landlord has to be content with a rent less than he would have been entitled to receive if the ground-rent was fixed annually. Thus if the land doubled in value in 21 years and the rent at the commencement of the period was fixed at 5%, by the end of the 21-year period the landlord would be receiving only $2^1/_2$%. I certainly do not propose to be drawn any further into a consideration of matters which are essentially one for valuers to advance, but I am quite satisfied that the learned umpire in this case was fully entitled to reject Mr Patterson's submission for the reasons he gave.

But it was submitted before the learned Chief Justice and again before us that even if the umpire was not obliged, as a matter of right to an accounting of the capital growth which the landlord

enjoys, nevertheless the umpire wrongly concluded that he was precluded from giving any weight to Mr Patterson's submission by reason of what was said by this Court in the *DIC* case. I have carefully considered this second submission which found favour with the Chief justice in the Court below but, with great respect for the view he took, I do not think his interpretation of what the umpire said was justified. 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: "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 my opinion, there was nothing wrong with the way the umpire put the matter in the passage I have cited from his award and I am not prepared to hold that he stated "some legal proposition which is the basis of the award and which you can then say is erroneous."

For these reasons I am of opinion that the appeal should be allowed.

This being the view of us all, the appeal accordingly is allowed and the order made in the Supreme Court is discharged.

Turner J: This is an appeal from a decision of the Chief Justice given at Wellington on 3 October last, in which he remitted to an umpire for reconsideration on award fixing rent, on the ground that the umpire had misdirected himself in law.

By two memoranda of lease registered numbers 24693 and 24694, both dated 6 August 1948, the appellant Corporation leased certain city land to the Sun Insurance Office Ltd for 21 years from 1 February 1947, perpetually renewable by the lessee for successive periods of 21 years, the rental for each renewed term of 21 years to be fixed by valuation as set out in the leases. The relevant clause in each lease reads as follows:

> "In ascertaining such new rental the valuers shall not take into consideration the value of any building or improvements then existing upon the said demised premises but they shall value the full and improved ground rental of the said premises that ought to be payable during the said new term."

The leases now stand in the name of the respondent bank. They recently fell due for revaluation, and the revaluation for the 21-year term commencing on 1 February 1968 has raised the question which is the subject of the present appeal. Lessor and lessee each appointed a valuer, in terms of the provision in the leases in that regard, Mr M O Barnett being appointed for the Bank, and Sir Arthur Tyndall for the City Corporation. The valuers appointed as their umpire the Honourable Sir Douglas Hutchison, a retired Judge of the Supreme Court. The award was ultimately that of the umpire, the Corporation's valuer, Sir Arthur Tyndall, concurring in it; there is no dispute that an award so made was binding on the parties if made on correct principles. Sir Douglas not only made his award in writing, but set out in it the reasoning by which he had arrived at his result. The Bank was not content with the rental fixed by the award, and being advised that the umpire had misdirected himself on the law in making the award. He remitted it to the umpire for reconsideration accordingly. From this decision the City Corporation has now appealed to this Court.

It is impossible to deal satisfactorily with Mr Cooke's submissions in support of the appeal without first ascertaining and recording (a) what was the submission of Mr Patterson, both to the umpire and to the Chief Justice, which formed the basis of the Chief Justice's decision, (b) how the umpire dealt with that submission and (c) the reasoning by which the Chief Justice held that the umpire, in deciding as he did, had misdirected himself on the law. Mr Patterson's general

submission, made in this Court as before the Chief Justice, and earlier before the learned umpire was that the final selection of an appropriate interest-rate to be applied to the improved value of the land the valuers or umpire ought as a matter law to have taken into account, or to have been left free to take into account, the principle that (and I now quote verbatim from the submission made by Mr Patterson):

> "... The tenant is entitled as of right to an accounting of the capital growth which the landlord enjoys."

Mr Patterson explained that by this submission was meant that the rate interest selected, if the valuers applied the principle, should be lower than it would otherwise have been, because the principle for which he contended required the valuers, in fixing the rent which the lessee should pay, to appropriate to the lessee some or all of the "unearned increment" which the growth of the City adds to the capital value of the landlords' investment with the effluxion of time.

Having set out Mr Patterson's submission, I will now record the passages of his award in which the learned umpire dealt with it, and to record exactly the complaint which Mr Patterson now makes about this passage in the umpire's decision. The award first records the umpire's view, which was accepted before us by both parties, that in arriving at the rental for a renewed term in leases of this nature the principle on which the valuers should proceed is as set out in *Drapery and General Importing Co of New Zealand v Mayor etc of Wellington* (1912) 31 NZLR 598, a decision of the Court of Appeal. There it was said by Stout CJ that:

> "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 for the land for the term, and on the conditions as to renewal and other terms, etc, mentioned in the lease."

Both counsel agreed, moreover, that the learned umpire was right when he went on to say that:

It is quite clear that no particular means of arriving at the ground-rent is laid down by the *DIC* case or by any of the other cases, a comparison with ground rents paid for other properties, having, of course, due regard to all relevant differences, would be the classic method of arriving at the ground-rent of any particular property. That method, however, is not available here, for almost all the comparable leases have expired at the same time, and the ground-rents of all the other properties for the next period of 21 years have still to be determined. Under these circumstances, all the valuers who gave evidence have arrived at their view of what the ground-rent for these properties should be by assessing the unimproved value if the land and taking what in their view is an appropriate rate of interest on that. This was the basis on which counsel made their submissions, and in my opinion it is the best available basis, and I adopt it.

It was further agreed before us by counsel that the umpire had adopted the most satisfactory course available in the circumstances when, following the method adopted by the valuers he proceeded first to ascertain the unimproved value of the land, and then to select a rate of interest appropriate to the circumstances which, applied to the unimproved value, would fix the rent to be paid.

No exception was taken by either counsel to he way in which the umpire went about fixing the unimproved value of the land, or to the figure which he fixed in this regard. It was only at the stage where he went on to select the appropriate rate of interest, by the application of which to the unimproved value the new rent was to be calculated, that Mr Patterson took exception to his award.

At this point in his reasoning the learned umpire observed that various witnesses had put forward rates ranging from 8%, contended for by Mr Harris, a public accountant, and Mr McAllister, a business and economic consultant called for the Corporation, to a 2.1% proposed by Mr M J Nathan, estate agent and valuer, called by the Bank, and 3% proposed by Mr Pullar, the head of the Economics and Statistics department of the Bank itself, having rejected the rate supported by Mr Harris and Mr McAllister as failing to take into account the fact that the lessee already had a perpetual right of renewal (they had suggested the wisdom of a lessee acquiescing in a rental high

enough to encourage lessors generally to grant perpetual leases) the umpire went on to consider in detail the justification advanced by Mr Pullar and Mr Nathan for a rate as low as 3%, he said (and I find it convenient to set out what he said on this point in full):

> "Mr Pullar and Mr Nathan both proceed on the basis of considering the return which the lessor will receive from its investment in the land, and it was on this basis that the actuary prepared his tables. Mr Pullar said:
>
> > . . . I consider that the appropriate rate to be employed in determining the annual rental on inner-city leases should be in the interest rate paid on long-term Government stock issues less an allowance for the annual capital gains increment which can reasonably be expected on the land, and so, deducting the one from the other he arrived at his 3%. In cross-examination he stated even more strongly that his attention was directed to and his opinion formed on, the return to the lessor. The paper submitted by Mr Nathan, while looking at the prospective returns to both lessor and lessee directs attention first to the return to the lessor.
> >
> > A ground lease as a growth type of investment, offers one of the soundest securities obtainable as the lessor not only owns the land but has prior lien over any buildings erected thereon which are often of a very substantial nature. Bearing in mind the fact that land values have shown only a consistent rise in and around Wellington City since the start of the century (with the exception of a short period around 1931) and the gilt-edged nature of the security, one would expect the investment yield to a lessor to be somewhat lower than that obtained from leading public companies.
> >
> > He contended that, if the lessor, in an example given by him, obtained an arbitrary interest rate of $3^1/_2$% on the increasing Government value of the land, the total average return to him on the original value of the land over a very long period, having regard to the continuous increase in the value of the land, would be over 13% and, if projected into the future, considerably more than that.
> >
> > These views were put forward consistently with a submission which Mr Patterson made *that the tenant is entitled as of right to an accounting of the capital growth which the landlord enjoys. However, in my opinion, this submission and these views have no application to the present case*. They might well be applicable to the case where one is seeking to find a value on the willing seller willing buyer basis. that basis applies where the notional buyer are not contractually bound to one another, and one has to ascertain the point at which they will enter into the contract of sale and purchase. In seeking to find that point, one has, of course, to take into account all considerations that affect each party. But that is not the case. *In this case, the lessor is already bound to give the lessee his new term of 21 years, and, subject to a possible minor qualification to which I shall advert in a moment, it is matters that affect the lessee and the lessee alone that are important in arriving at what he is prepared to pay."*

I have italicised in the foregoing quotation from the award, the two passages in it of which Mr Patterson complained before the Chief Justice and before us: he made no complaint. Mr Patterson contended that the two underlined passages must be read (a) as holding that the valuers and the umpire were precluded in law from taking into account, in the case before them, the principle which had been contended for by him; (b) alternatively as expressly stating that in the case before him the umpire gave that principle no weight. Mr Cooke, *contra,* contended that the umpire did not reject Mr Patterson's principle as irrelevant as a matter of law, and argued that the text of the award showed that he umpire took into consideration Mr Patterson's submission, and gave it such weight (very little, but some) as in the circumstances seemed to him appropriate; in the alternative, if necessary (though he submitted that it was not necessary for him to go so far) Mr Cooke contended that the umpire was justified in rejecting Mr Patterson's principle as inapplicable as a matter of economics, or even as a matter of law in the case before him.

I will say at once that I do not think that the arguments advanced should persuade the Court to deal separately with the two passages in the umpire's award which I have italicised. I accept Mr

Cooke's submission that the entire passage which I have quoted is to be read together as a whole, and that what is said in the second of the two underlined passages is not a separate pronouncement on the subject, but only an amplification of what has gone before.

What, then, did the umpire hold? I will state in a series of four short propositions what I take to have been its effect. It may be summarised as follows:

1. The umpire first set out Mr Patterson's submission "that the tenant is entitled as of right to accounting of the capital growth which the landlord enjoys."

2. He then stated that this submission, while it might well be one to be taken into account in a case where the parties are to be treated as not yet having contracted, was one not applicable in the present case, where the landlord was contractually bound to renew for 21 years.

3. In fixing the rate in the present case he stated that "it is matters affecting the lessee and the lessee alone which are important in arriving at what the lessee is prepared to pay."

4. He added that this last statement is subject to a "minor qualification" – viz. that if a high interest rate were asked by the lessor, the lessee might be inclined to inquire what the lessee's percentage yield would be on the rate sought.

Having now stated what I conceive to have been held by the umpire, I turn to what was held by the learned Chief Justice when the application was heard before him. After setting out Mr Patterson's submission the Chief Justice said (and again I think it desirable to record what he said on the point in full):

"In the first passage the submission for the bank is put by counsel in rather graphic terms but I think it is clear from the sentence that follows it that the learned umpire rejected the submission as having no application to the case. That view is reinforced by the second passage in which the learned umpire says that subject to a possible minor qualification 'it is matters that affect the lessee and the lessee alone that are important in arriving at what he is prepared to pay'. Taking that statement and the earlier rejection of the submission for the bank together I think it is fair to conclude that the learned umpire was saying that in ascertaining what a prudent lessee was prepared to pay it was matters that affect the lessee alone that are important, and that in determining an appropriate rate of interest on the unimproved value he need not have regard to the prospect of capital growth.

"Is that view correct within the authority of the *DIC* case which, as counsel agreed, states the law? After careful consideration I have come to the conclusion that it is not. I do not think that the dictum of the Court of Appeal requires arbitrators, where they proceed (as they did here by common consent) to determine an appropriate rate of interest on unimproved value as a means of ascertaining what a prudent lessee would give, to ignore the prospect that the land may increase in value. I see nothing in the words used by the Court of appeal to exclude that consideration. On the contrary, I think that the concept of the prudent lessee requires that regard be had to it. A prudent lessee will not confine his consideration to matters affecting himself. In my opinion it is of the essence that in considering what he should give as rent for the land during the term of the lease a prudent lessee will consider also what he lessor is likely to derive from the land during that term. One of the things he may derive, depending on the circumstances of the case, is a capital appreciation for, as Mr Cooke agreed, increase in the value of land in a central city area is not just inflationary but in part at least real, because of the scarcity of such land.

I noted that Mr Cooke did not seek to support the two passages in question as a matter of law. Nor did he suggest that they were not material. His argument was that they were merely statements of what the learned umpire considered important in applying the prudent lessee test to the particular facts. He said that the umpire was putting a proposition of fact or discretionary judgment and not of law. I have considered this argument but i donot think it can be upheld because, immediately following the second passage, the learned umpire went on to say that 'It was not by any oversight that the Court of Appeal in the *DIC* case referred only to what he prudent lessee would pay and said nothing of what the lessor would receive.' In the context it

> seems to me plain that he was there drawing on the Court of Appeal's *dictum* as a matter of law to support the view he had just expressed.
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> Mr Cooke argued, and I think rightly, that in the cases that have been decided since the *DIC* case the Courts have been careful to apply the Court of Appeal's dictum as originally given without expanding it. He said it ought not to be elaborated. I agree with that. But I do not think I am elaborating it in this judgment. All I am saying is that I respectfully think the learned umpire was wrong in regarding the *DIC* case as precluding him, when employing the rent-fixing method agreed on, from having regard to the prospect of an increase in the value of the land. I need hardly add the weight that arbitrators give to that consideration is entirely a matter for them. But in my view they are not bound by authority to disregard it.
>
> I have considered whether the reference to the 'possible minor qualification' saves the second passage from being regarded as erroneous in law, having regard to the way in which that qualification is expressed, and to the example given of its limited application, I do not think it does. In my opinion the true position is as I have stated it.
>
> In accordance with the bank's application the award is remitted to the learned umpire for reconsideration. The bank is allowed $100 costs, and disbursements."

In this passage the Chief Justice, without accepting as a statement of law Mr Patterson's submission that "the tenant is entitled as of right to an accounting of the capital growth which the landlord enjoys", appears to me to hold that a submission of valuation principle to this effect was one which the valuers might take into account, giving it such weight as they might think fit, and was one not to be excluded from their consideration as a matter of law. He held that the umpire had directed himself that such a submission must be excluded as a matter of law, and had therefore misdirected himself. I will now examine each of these conclusions.

The Chief Justice was silent as to his view of the validity as a statement of law of the principle contended for by Mr Patterson that:

> "The tenant is entitled as of right to an accounting of the capital growth which the landlord enjoys."

I will not be as reticent, and will begin by saying forthrightly that I do not accept that the tenant can be entitled in law as of right to any such "accounting" as Mr Patterson submitted to the umpire that the tenant was in law entitled *as of right* to any "accounting" the latter was justified in rejecting that submission and was in fact right when he did so.

But I do not understand the Chief Justice to have held to the contrary, he was – perhaps commendably, if I may respectfully say so – silent on the validity of the principle contended for in Mr Patterson's submission, if the same were regarded as a submission of law. Remaining silent as to the validity of the principle contended for, regarded as a submission of law, he treated it as a submission of economics or of the principles of valuation made to the umpire by Mr Patterson, and held that the umpire was bound in his deliberations to take the submission into account regarded in this light, giving such weight as he might think fit, and that he could not properly exclude it as a matter of law from consideration. But did the umpire so exclude it? It seems to me that he received the submission; that he considered it; that he observed that it might be applicable in a different kind of case; and that he finally gave it little or no weight in arriving at his result. In putting it substantially on one side he said that the important considerations in this case – ie the important considerations of valuation principle or economics – were matters affecting the lessee and the lessee alone; but he said that even in a case such as the one before him it was possible that the kind of consideration which Mr Patterson was urging upon him might have some effect in a minor way. He then proceeded to fix the rent without further reference to the principle contended for by Mr Patterson.

I do not think that the umpire held that he was precluded as a matter of law from taking Mr Patterson's submission into account. I think that he received it, considered it, and then put it on one side as having little or no relevance in the case before him. This he was entitled to do. It is not for the Court to direct an arbitrator or umpire as to which of the principles of valuation should in a given

instance influence him. And I respectfully think that the Chief Justice was wrong when he concluded that the umpire had misdirected himself in law.

If I had been entitled in this judgment to re-examine the umpire's conclusion as a matter of economics, and not of law (which I am not) I might have observed that in a situation such as the one before the Court demand, and not supply – the amount which lessees are willing to pay, not the return to lessors on their investment – is the factor which, economically speaking, determines rental. The level of *rent* is fixed according to economists, purely by the margin of advantage which the given land enjoys over marginal land. In the case before us, *ex hypothesi*, this advantage cannot be directly measured by the usual method of observing the actual rents paid for comparable land, since there is no other land to serve as a standard of comparison. In such a case rent may be regarded as similar to the price of a monopoly; but again it is demand which ultimately exclusively determines price level. It is impossible for other landlords, in competition with the bank, to increase the supply of sections in Panama Street and so depress the price. In such a situation the bank's land is worth simply what people will pay for it. If there is insufficient demand, the price will fall with falling demand, and cannot be sustained at a higher level because the landowner is offered that he thinks is an insufficient return. If on the other hand there is a keen demand, and fierce competition, the price will not be held down because the landlord's return is already high. These seem to me to be commonplaces of economic theory. I would myself as a matter of common sense cordially have agreed with the learned umpire that in the valuation of a rent such as he was essaying "... it is matters that affect the lessee and the lessee alone that are important in arriving at what he is prepared to pay."

After all, what the valuers are required to do is to "value the full and improved ground rental of the said premises that ought to be payable during the new term."

The valuers are not, as I conceive the matter, to devise a figure from their own inner consciousness as a solution of the problem before them; what they are to attempt to do is to *ascertain* a value which, independently of the valuers' existence or calculations at all, is already a fact, capable of being perceived through eyes sufficiently expert. It is the market value, postulating a market, which they are asked to ascertain. The *methods* by which the valuers set about ascertaining this value will be selected by their expertise, and may be different in different circumstances. But the resultant valuation should ideally be the same, whatever method be used. It is still the same question that is asked – what is the rental ... that ought to be payable? – and the question being the same, the answer ought to be the same. Mr Patterson, asked by a member of the Court whether a rent ascertained by taking his "principal" into account will not be of a different order from a rent fixed as upon a comparison of other rental values ruling in the City, replied – as I think he had to do – that it would be different. This in my opinion damns Mr Patterson's principle. It is true that in the case before us the valuers found it impossible to use the method of comparing other rentals obtainable for similar properties in the neighbourhood. This was because of a circumstantial accident. There was no neighbouring or comparable property the rental of which could be used as a standard of comparison. But this accident should not be allowed to indicate a method of valuation so different as necessarily to lead to a result quite different from that which would have been obtained had there been neighbouring property to which to refer for the purposes of comparison.

But I will not take up more time discussing matters which after all are questions, of valuation practice rather than of law. As the appeal stands I think, with great respect to the learned Chief Justice, that he was wrong when he held that the umpire had directed himself, as regards the probability that the land might increase in value, that he must "exclude that consideration" from his deliberations. I think that his decision was no more than that, giving proper notice to the submission advanced by Mr Patterson, he considered that it was unimportant on the case before him and therefore gave it little or no weight in his result. I think that he was entitled to give the submission as much or as little weight as he thought and that in giving it – as he did – none or virtually none, he did not err in law. Finally, in my opinion not only did he not err in law; his attitude seems to me

to have been thoroughly justifiable on the facts. I respectfully disagree with the conclusion of the learned Chief Justice that it is necessarily " . . . of the essence of prudence that in considering what he should give as a rent for the land during the term of the lease a prudent lessee would consider also what the lessor is likely to derive from the land during that term," and that one of the things that the lessor is likely to derive, and therefore which the lessee will take into consideration, is capital appreciation. For myself, I would respectfully have thought this factor, for the reasons which I have tried to set out, of little or no importance, as did the learned umpire, with whose consideration of the whole matter I find myself in agreement.

But all this is by way of digression into economic theory, into which I have been led by considerations really not relevant to this appeal. For the reasons which I have previously given I would allow the appeal and confirm the award of the umpire.

McCarthy J: I agree with the President that this appeal should be allowed, and I do so generally for the reasons which he has given. Like him I know of no authority for Mr Patterson's basic submission that the umpire, Sir Douglas Hutchison, erred in a matter of law by excluding from his consideration in favour of the lessee, "an accounting of the real increase in value" of the land. I agree, too, that it is impossible to say that Sir Douglas misapplied *Drapery and General Importing Co of New Zealand v Mayor, etc of Wellington* (1912) 31 NZLR 598.

Even if it were permissible for us to embark upon a consideration of what was the most acceptable principle or process of valuation for the valuers, and later the umpire, to have adopted in this case – and I believe it is not – we have no evidence whatsoever upon which we could possibly hold that the feature of increasing value should in cases such as this be taken into consideration in favour of the lessee and as I am completely inexpert in such matters, I would not feel justified in entering upon any discussion of the topic.

I would therefore allow the appeal and uphold the award of the umpire.

Appeal allowed

Solicitors for the appellant: *Senior Legal Officer*, Wellington City Corporation (Wellington).
Solicitors for the respondent: *Brandon, Ward, Macandrew and Co* (Wellington).