**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV 2003-404-5913**

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|---|---|---|
| IN THE MATTER OF | the Arbitration Act 1996 |
| BETWEEN | WESTMED FINANCE LIMITED & ORS<br>Plaintiffs |
| AND | WILSON PARKING NEW ZEALAND (1992) LIMITED<br>Defendant |

Hearing: 11 February 2004

Appearances: L McEntegart for Plaintiffs
J Carter for Defendant

Judgment: 8 April 2004

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**JUDGMENT OF KEANE J**

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Solicitors:

Glaister Ennor, Auckland for Plaintiffs
Carter & Partners, Auckland for Defendant



[1] On 23 September 2003 Mr I.W. Gribble, a registered valuer, acting as a sole arbitrator, decided for the next three years the current market rent payable by Wilson Parking New Zealand (1992) Limited for 400 leased carparks in the Farmers Carpark, Hobson Street, Auckland.

[2] In fixing the rent the Arbitrator deducted $55,000 for Wilson's occupancy expenses, and made a 7.5 percent allowance for profit and risk; and Westmed Finance Limited, and the other lessors, who hold the unit titles to the 400 carparks, appeal that aspect of the Arbitrator's decision, relying on a right of appeal reserved in the arbitration agreement 'on any question of law arising out of the award.'

[3] They contend that the expenses attributed to Wilson as lessee by the Arbitrator are never incurred by Wilson in that capacity. Those costs accrue instead, they say, to the building manager, as it happens Wilson, under a collateral agreement relating to the entire building, in which there are between 1342 and 1349 carparks.

[4] As members of Body Corporate No 170346, the ultimate owner, they say, they and the owners of the other carparks in the building pay Wilson a fee for the services it supplies and the expenses it incurs as building manager. The Arbitrator's award, they contend, allows Wilson a premium for services it must provide under the collateral agreement, and imposes a penalty on them under the lease.

[5] Wilson says that, in reality, Westmed and the other lessors are trying to accord the management agreement priority over the lease. But the lease and the agreement are co-extensive one with the other and equal in status. Expenses may be incurred under one, or under the other or partly under both. That is an issue of fact, rather than law, which it was for the Arbitrator to decide.

[6] A distinguishing feature of the lease, on which Wilson relies, is that 301 of the 400 carparks that it leases are stipulated to be casual. Administering those carparks, Wilson says, carries a cost of a kind not incurred for carparks occupied permanently. These expenses must be attributable to the lease, and allowed for in the market rent assessed. Wilson cannot be expected, it says, to absorb those costs under the building management agreement.

[7] If on this appeal Westmed prevails and the issue is remitted, as it wishes, to the Arbitrator, Wilson wishes all related matters of fact to be at large. Wilson's cross-appeal, to which Westmed objects as informal and too late, serves that purpose only.

**Context**

[8] In about 1995 the carpark building, then owned I understand by Farmers Carpark Limited, was subdivided under the Unit Titles Act 1972, each carpark constituting a separate unit title. Body Corporate No 17346, of which all unit title holders became members, was formed to take title to the building, and presumably the land. The body corporate appointed FCL to manage and maintain the building, and FCL seemingly took title to the 400 carparks in issue.

[9] On 7 June 1996 FCL subcontracted its management responsibilities to Wilson; and on 30 October 1997 stepped out altogether, assigning its interest under the management agreement to the body corporate.

[10] On 7 June 1996 also, FCL leased to Wilson the 400 carparks in issue for a term beginning on 15 December 1995 and ending on 31 March 2006, with a right of extension for ten years. FCL's interest as lessor is now held by Westmed and others.

[11] The rent payable under the lease was initially $800,000 per annum, subject to market rent reviews on 31 March 1999, 2002 and 2005, and in the years in between Consumer Price Index adjustments. This present appeal relates to the 2002 review, under which the Arbitrator fixed the current market rent at $983,000 plus GST.

[12] The lease and the agreement each state that they are 'inter dependent' and 'collateral': cls 20.1 and 23.1 respectively. In April 2002 at an arbitration preceding that under appeal, concerned with how they relate one to the other, when the arguments on this appeal were first rehearsed, that was confirmed by the Hon Sir Ian Barker QC. The sense of his decision can be taken from these passages:

> It is clear that the interrelationship clauses in both documents mean that the valuer must take account of the BMA when considering the appropriate rental to be paid...
>
> Where there are several alternative formulae, all of them enabling a just and reasonable conclusion to be reached, it is for the arbitrator, as the judge of facts, to determine for him/herself which rule is accepted for guidance.
>
> What account the valuer does or does not take of various provisions in the lease, what account the valuer takes of overlapping provisions in both documents or of those relating to the role of ... (Wilson) as manager is a matter for the valuer to determine upon hearing the evidence, particularly the evidence of valuation methodology.

[13] That is my own conclusion. But, to answer Westmed's principal ground of appeal, I stress rather that the Arbitrator was obliged to take account of all the terms of the lease as well as those of the agreement.

**Assessment issue**

[14] 'Current market rent', the term used in cl 3.7 of the lease, under which the rent is reviewed and fixed, must mean what it is understood to mean in the market. The lease does not define it, but prescribes instead what is to be taken into account in fixing what it is to be for the next three years and conversely what is not.

[15] Whoever fixes the current market rent, it can be a valuer, an umpire or a sole valuer (Mr Gribble was acting as an arbitrator), must, as cl 3.7(d)(ii) of the lease stipulates, have regard to:

> (aa) the current market rent payable for comparable premises leased by a carpark operator as a commercial fee paying carpark at the relevant Review Date;
>
> (bb) any abnormal use by the lessee of the premises or the facilities and services; and
>
> (cc) the provisions of this lease and, in particular, to any liability on the part of the lessee under this lease to pay any additional charges.

[16] Conversely, whoever decides what the current market rent is to be must disregard, as cl 3.7(d)(iii) says:

(aa) any deleterious condition of the premises, if such condition results from any breach of this lease by the lessee;

(bb) that portion of the term which has expired, and determine the current market rent of the premises at the relevant date as if the term commenced on such a date;

(cc) the provisions of this lease, insofar as they place any restrictions upon the right of the lessee to assign or transfer the lessee's estate or interest in this lease or sublet the premises;

(dd) any restriction on the use of the premises imposed by this lease;

(ee) any other use to which the premises may be lawfully put other than a commercial carparking operation.

[17] Clause 3.7 concludes:

> For the avoidance of doubt, the current market rental shall not be the retail charge-out rate payable by the public for use of carparks in the Building.

**Award**

[18] Westmed argued before the Arbitrator, as it has on this appeal, that when the lease and agreement are read together all operating expenses of the building are intended to be and are covered by the management fee payable to the manager under the agreement. There are no costs, which can properly be deducted from the assessed rental under the lease.

[19] Wilson argued, by contrast, that whatever part of the operating expenses of the building can be attributed to the 400 park carparks should be deducted from the assessed rental as 'additional charges' (cl 3.7(d)(ii)(cc)), taking into account what the agreement and the lease each calls for, more especially because 301 of those leased carparks are casual and need active administration.

[20] After reviewing the terms of the lease and the agreement, and the nature of the duties imposed under each, the Arbitrator concluded:

> ... the majority of costs of the lessee are met through the BMA or, in the case of rates and insurance by the owners. However there is some overlap, particularly relating to management of the specific 400 carparks not specific to the BMA.

[21] Then, after referring to the evidence as it related to the expenditure actually incurred, particularly a schedule prepared by Mr T.W. Ellis, Wilson's regional manager, the Arbitrator said:

> After reviewing ... (that schedule), and making adjustments where I considered necessary, I have made an allowance of $55,000 PA from the total expenses of Wilson's parking of $320,468 including depreciation, for costs associated with the Lease, separate from those applicable under the BMA.

**Grounds of appeal**

[22] On this appeal Westmed contends that the Arbitrator erred in law in two senses: (i) in not attributing all operating expenses associated with the operation of the building to the agreement; and (ii) in not giving reasons for deducting from the current market rent assessed under the lease the specific sum yearly of $55,000 for operating expenses.

[23] Westmed contends as well that, in making an allowance of 7.5 percent for profit or risk under one of the valuation methods identified in the award, the Arbitrator had to have been influenced by his conclusion as to Wilson's risk in respect of costs incurred under the lease. If then he was wrong in his attribution of expenses to the lease that too should be revisited.

[24] Wilson contends that the award is consistent with the lease and the agreement, and does not seek to disturb the Arbitrator's attribution of expenses to the agreement and to the lease. Indeed Wilson argues that this attribution is a question of fact for the Arbitrator alone, and cannot be assailed on appeal.

[25] Wilson disagrees with the inference Westmed takes as to the genesis of the profit/risk allowance; the Arbitrator did not himself state that he took Wilson's operation expenses into account. Wilson wishes all matters to be at large should I remit these issues to the Arbitrator.

**Jurisdiction**

[26] The right to appeal any error of law under cl 5 of the Second Schedule to the Arbitration Act 1996, is a right reserved under the arbitration agreement itself: cl 5.

[27] There can no question, I consider, that any issue touching how the lease and the agreement are to be understood singly, or in relation one to another, has to be a question of law. I do not understand that to be contested. But any finding of fact which the Arbitrator made has to be incontestable unless it was founded on an error as to the effect of the lease, the agreement or both.

[28] In *Pupuke Service Station Limited v Caltex Oil (NZ) Limited* [2000] 3 NZLR 318, 339 (PC), a case under the 1908 Act, Lord Mustill stated (para 2):

> Where the criticism is that the Arbitrator has made an error of fact, it is an almost invariable rule that the Court will not interfere. Subject to the most limited exceptions, ... the findings of fact by the Arbitrator are impregnable, however flawed they may appear.

[29] In *Gold and Resource Developments (NZ) Limited v Doug Hood Ltd* [2000] 3 NZLR 318 (CA), Blanchard J, speaking for the Court, suggested strongly, while not expressing a final view, that 'whether there was any evidence to support a particular finding of fact made by the arbitrator was not a question of law in the context of the 1996 Act.' The Court thought it important to confirm the arbitrator's role as the finder of fact (article 19(2) of the first schedule of the Arbitration Act 1996), and the intent of the Act that awards be final.

[30] What method an arbitrator uses to reach a value is normally a question of fact. In *Pupuke*, which like this case concerned rent under a lease, and there the market value of the property leased, Lord Mustill continued to say, in a passage not reported:

> A more unpromising subject for the judicial view of an award it would be hard to imagine, for a valuation is not a mechanical exercise, to be performed according to rote, but a broad weighing of necessarily imprecise data directed to the individual transaction in hand. Having entrusted this task to an arbitrator the parties should abide by the result, unless the arbitrator has employed a method clearly outwith the contemplation of the contract ...

[31] That leaves the interesting question as to the sufficiency of the arbitrator's reasons for award. If findings of fact are for the arbitrator, to what extent can there be an appeal on the footing that he or she has not set out in a detailed sense what those findings are?

[32] The context within which that issue is to be assessed is the 1996 Act. It is not, by way of general analogy, whatever duty is imposed on judges or other judicial officers. In *Pettitt v Dunkley* [1971] 1 NSWLR 376 (CA), for instance, a decision on which Westmed relies, the New South Wales Court of Appeal held unanimously that judges are under a duty to give reasons, and if they fail to do so they make an error of law. That duty has not crystallised in New Zealand thus far: *Lewis v Wilson & Horton Ltd & Ors* [2000] 3 NZLR 546 (CA).

[33] As it happens, the 1996 Act does impose on arbitrators a duty to give reasons, and a failure to comply may amount to an error of law. Article 31(2) of the 1985 Convention, set out in the First Schedule to the 1996 Act, stipulates:

> The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

A failure to comply with Article 31(2) can result in an award being set aside: *Opotiki Packing and Cool Storage Limited v Opotiki Fruit Growers Co-operative Limited (in receivership)* [2003] 1 NZLR 205, 220 (CA), para 25, Gault J.

[34] In this case the parties did not excuse the Arbitrator from giving reasons for his award; in fact they stipulated in cl 4 of the arbitration agreement that 'the award shall be a fully reasoned one.'

[35] The issue is then rather as to the content of the duty. How complete and particular do the arbitrator's reasons need to be? The principal reason for the duty, apart from telling the parties why the award is as it is, must be to ensure that if the arbitrator makes an error of law that is apparent, and can be corrected on appeal. But what is called for will differ with the case.

[36] An error of law can sometimes stand apart from the facts, as to which there is no right of appeal, and can be obvious even when the reasons given are sparse. But sometimes the facts and the law are intimately related, and whether or not there has been an error of law may only emerge if there has been an explicit finding of fact. The absence of findings of fact could then frustrate the right of appeal.

[37] The arbitrator's duty seems fairly stated by Smart J in the New South Wales case *Menna v HD Building Pty Ltd* (1 December 1986, unreported), where there is a similar duty to give reasons, which was adopted by Rogers CJ in *Imperial Leather Co Pty Ltd v Macri & Marcellino Pty Ltd* (1991) 22 NSWLR 653, 657:

> Elaborate reasons finely expressed are not to be expected of an arbitrator. Further, the Court should not construe his reasons in an overly critical way. However, it is necessary that the arbitrator deal with the issues raised ... and make all necessary findings of fact. ... The reasons must not be so economical that a party is deprived of having an issue of law dealt with by the Court.

[38] Equally, the regime under the Arbitration Act itself allows the statement of reasons to be revisited. Article 33(1)(a) entitles a party to request corrections of a minor character, like errors in computation. More significantly, article 33(1)(b) entitles a party to request the arbitrator to interpret a specific point or part of the award.

[39] To 'interpret' an aspect of an award may mean to clarify it: to make an obscure statement clear by confirming what it means. Or it might mean to explain that aspect of the award by supplying some further fact or reason to give sense to what is otherwise obscure.

[40] In deciding whether a party is entitled to rely, as an error of law, on an absence of reasons to support an aspect of an award, the Court might well take into account whether that party could have resorted to article 33(1)(b), recognising always that the other party would have had to agree.

**Principles of interpretation**

[41] The fundamental issue is whether the Arbitrator misunderstood the lease or the agreement, or their relationship one to another, as to expenses incurred to operate and maintain the building at large, and the carpark in particular.

[42] What the lease and agreement mean, what they allow or require, depends on what they say, but not literally. What they mean is what they 'would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract': *Investors Compensation Scheme Limited v West Bromwich Building Society* [1988] 1 All ER 98 at pp 114-115, HL, Lord Hoffman, adopted in *Boatpark Limited v Hutchinson* [1999] 2 NZLR 74, 81 (CA).

[43] Lord Hoffman explained that the background '... includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man' . Conversely, as he said, 'it excludes, the previous negotiations of the parties and their declarations of subjective intent.' What the document means, he continued to say 'is what the parties using those words against the relevant background would reasonably have been understood to mean' even if they 'used the wrong words or syntax'.

[44] But there are bounds. In *Yoshimoto v Canterbury Golf International Limited* [2004] 1 NZLR 1, 5, (PC) Lord Hoffman deprecated the Court turning the language of a contract to its own understanding of the commercial objective to be served. The words of the contract must come first. 'It is not for the Courts', he said, 'to substitute a different criterion on the ground that it would satisfy the commercial objective equally well or better.'

**Lease**

[45] The lease defines the areas as to which Wilson has rights and duties as lessee. The 400 carparks comprise the 'premises' but two other definitions are pertinent.

> "Building" means the buildings or any part ... together with plant, machinery, fixtures and fittings ... and any extensions or alterations ...
>
> "Common areas" means those parts of the Building ... designated by the lessor for common use and enjoyment ... and includes accessways, ... entrances, vestibules, passages, stairways, landings, galleries, ramps and ... shared toilet facilities (if any) and all appurtenances and conveniences ... not the subject of exclusive operation pursuant to this Lease or any other lease in the Building and includes all areas designated as common property on the unit plan.

[46] Wilson is entitled to use the premises for carparking, and any related uses with consent; and the common areas and facilities for their purposes (clss 5.1- 5.2). Clause 5.13 imposes on Wilson a correlative duty to ensure that 301 of the carparks, defined as the 'short-term visitor carparks', 'are made available to the public for casual motor vehicle carparking of limited duration', and a duty to supply carparking for the disabled to the extent any governing authority requires.

[47] Wilson has a more general duty to be clean and quiet and orderly (clss 5.3-4), and more specific duties to conserve the building and the facilities (clss 5.5-5.7). But Wilson is not liable to make structural repairs, alterations or additions to the premises unless the lease imposes the duty (cl 5.8).

[48] Wilson must, at its own expense, at all times, keep the premises in good order, repair and condition, but is excused reasonable wear and tear or damage caused by extraordinary extraneous events unless directly responsible (clss 7.1-7.3).

[49] Wilson has specific duties to maintain and repair lighting, surface areas, and electrical or plumbing facilities or other services installed in the premises, which it has damaged or broken, or if it changes the layout, unless under its rules the body corporate is left with that responsibility. Wilson is also responsible for keeping the premises clean and tidy, controlling pests and removing rubbish and waste (cl 8).

[50] Westmed has rights to enter, to issue notices to repair and to recover costs (clss 9.1-5). Wilson must give the lessor and the body corporate notice of any accident on the premises or the common areas, or any known or reasonably ascertainable defect or want of repair in the premises, or any necessary services (cl 9.7).

[51] There is a regime relating to alterations to the premises, and governing signs and advertising (clss 10, 11). Wilson has to keep the premises insured (clss 12.1-4) and carries the risk (cl 12.5). Westmed is under no liability for any loss or damage arising out of Wilson's occupancy, unless it is in breach of a specific duty (cl 12.7).

**Building management agreement**

[52] The building management agreement contains parallel but different terms:

> "Building" means the building erected on the Land.
>
> "Property" means collectively the building, the Carparks, all accessory units on the Plan and the common property.
>
> "Common property" has the meaning attributed to that term under the Act and in addition shall mean and include all personal property of the Body Corporate.

"Common property" means primarily, as the statutory definition has it, 'so much of the land as is not comprised in any unit': s 2, 3(1)(b)), Unit Titles Act 1972.

[53] The building manager has a licence, free of charge, to occupy the common property at the main entrance to and exit from the building, where the ticketing and control office is located; and also other areas within the building where traffic control and revenue collection equipment are to be found (cl 2.1).

[54] The manager is appointed to provide services, which are defined extensively in paragraph 3.1 as they relate to the common property, and the facilities to be found there.

[55] The building manager must pay all gas, electricity, telephone and other charges relating to the operation of the property, whoever has the benefit; electricity for separately metered signage is the exception (cl 3.3). Equally the manager must, at its sole expense, keep the marking, numbering and signage and paved areas of the entire property in good repair (cl 3.4).

[56] The cost of labour, and any distinct costs called for so that the building can function - signage, ticketing, accounting, uniforms and the like, building security,

electrical, lift and access control equipment and systems in good working order – also lie with the manager, as do any related service agreements (cl 3.5). The manager must employ staff to comply with its duties and meet all related costs of staff and contractors (cl 6.1).

[57] In addition there are scheduled works (schedule 1), which impose on the manager duties mostly relating to the property, and in two cases the building. The only duty relating to the common property is to report promptly to the body corporate any repairs needed, or hazards which require remedy (schedule 1.6). The body corporate can direct the manager to carry out work relating to the common property, but bears the expense (cl 3.1(k)).

[58] The first scheduled duty is to caretake the property, and keep it open between 7 am and 11 pm each week day other than Saturdays, Sundays and public holidays (para 1).

[59] There are duties to keep the interior of the property clean, specific to the common areas, but otherwise general (schedule 1, para 2); to maintain lighting in all parts of the property, excluding exterior lighting (para 3); to keep all fire safety equipment in good order and make sure the property is safe (para 4); and to operate a 24 hour telephone and switchboard service for the proprietors and the occupiers of the carparks (para 5).

[60] There are duties to treat the property to eradicate insects and pests (para 8), and to collect and remove rubbish and waste from the property (para 9); to keep the building secure by surveillance and security patrols (para 10); and to ensure that the building complies with statutory and other codes (para 11).

[61] For these services Wilson as manager receives a management fee, reviewed and adjusted yearly, against movements in the Consumer Price Index (cl 5).

**Synthesis of lease and agreement**

[62] Simply by juxtaposing the lease and the agreement as I have confirms, I consider, the Arbitrator's conclusion, foreshadowed in the award of the Hon Sir Ian Barker QC. The lease and the agreement overlap in a general sense: each imposes duties relating to the building, or parts of it. They also overlap specifically: each, to take an obvious instance, imposes similar duties relating to rubbish and pests. All of these duties carry a cost. Are those expenses to fall under the lease, or under the agreement, or are they to be divided?

[63] The duties imposed by the agreement, as Westmed says, are often general, and make no saving exception. Taken alone they could well be understood to impose on the manager an equally general duty and liability. Again the duties relating to rubbish and pests are a convenient example. As against that, as Wilson says, and as the Arbitrator held, those duties must be set against similar duties under the lease.

[64] The duties in the lease are not to be ignored simply because there are corresponding duties in the agreement. To read the agreement in that latter way would involve concluding that, when the lease was executed, FCL and Wilson understood, and intended, that the duties imposed on Wilson under the lease were to be rendered otiose by those imposed under the agreement. But if that were so, why impose duties under the lease at all?

[65] The agreement and the leave have to be read together. They were executed on the same date, prepared if not by the same hand, then at the same source, and are expressed to be 'interdependent' and 'collateral'. Had the intent been to impose on Wilson under the agreement all the duties and costs relating to the building, including the leased premises, that would have been very easy to say.

[66] Nor can I accept Westmed's argument that the result of giving meaning to the words in the lease results inevitably in Wilson gaining a premium under the lease, and Westmed and the other lessors suffering a penalty under the agreement. To conclude that would be to treat as neutral or irrelevant the feature of the lease that 301 of the 400 leased carparks must be casual: a service that the body corporate had

to offer by some means, which Wilson says carries a distinct cost not fairly compensated for under the agreement.

[67] More fundamentally, to accept Westmed's argument, or indeed to prefer Wilson's response instead, would involve going behind the plain words of the agreement and the lease, in an attempt to decide what must be commercially fair. But that calculation was for FCL and Wilson to make when they entered the lease and the agreement. It is not a calculation for the Court to attempt to divine, and the effect of accepting Westmed's argument would be to deprive a part of the lease of any effect. That is the temptation, which Lord Hoffman warned against in *Yoshimoto*.

[68] Duties imposed by the lease and the agreement must be taken at face value, as the Arbitrator did, and expenses incurred must be attributed according to their apparent logic. Where a duty is imposed exclusively by the lease or by the agreement that is where the expenses are to be attributed. Where the same duty is imposed by both a sensible attribution has to be made. That is what the Arbitrator set about doing.

[69] Westmed may be able to assail on appeal the Arbitrator's decision to attribute expenses to the lease, or to the agreement, if the duty was imposed exclusively by the other. That could constitute an error of law. But it cannot begin to assail on appeal his attribution, where the duties coincide under both. That has to be an issue of fact for the Arbitrator alone.

[70] I do not understand Westmed, in this its principal ground of appeal, to quarrel so much with how the Arbitrator attributed particular expenses. The proposition it makes is far more radical. It argues that the effect of the agreements is that the Arbitrator was required to attribute all expenses to the agreement; and, contrary to cl 3.7(d)(ii)(cc) of the lease, to ignore those aspects of the lease that required expenses to be incurred. I consider that proposition unsustainable.

**Assessment of profit/risk allowance**

[71] Westmed's argument that the Arbitrator made an incorrect allowance for profit or risk rests on the premise that he was wrong when fixing the current market rent under the lease to allow $55,000 operating expenses.

[72] Finding as I do that the Arbitrator was correct in attributing operating expenses to the lease, I need not consider this related argument, or Wilson's counter argument that even if the Arbitrator was wrong to allow the operating expenses, his allowance for profit or risk was quite independent.

**Absence of reasons for allowance**

[73] That leaves the issue whether the Arbitrator, though correct, as I find, in his interpretation of the lease and the agreement, and master of the facts, failed to express his reasons sufficiently; and in that way erred in law.

[74] Westmed, relying on the stipulation in the agreement that the award had to be a fully reasoned one, contends that the Arbitrator fell short in failing to explain: (i) why he deduced that there is an overlap between the agreement and the lease as to operating expenses; (ii) why he concluded that the majority of Wilson's costs are attributable to the agreement; (iii) why he made adjustments to the Ellis schedule, attributing operating expenses to the agreement and the lease, ending with the allowance to the lease of $55,000. Westmed contends that this figure can only have been 'plucked out of the air'.

[75] Westmed's first argument restates in another guise its primary argument on this appeal: that the Arbitrator had no basis for his interpretation of the lease and the agreement. To the contrary, I consider, the Arbitrator not only understood the lease and agreement correctly, he said why. The Arbitrator first outlined the lease, and Wilson's duties as lessee. He then outlined the agreement and Wilson's duties as building manager. He pointed out that those duties at points converge, and he identified the need to attribute some expenses to the agreement, some to the lease, and the need to apportion others.

[76] That process of reasoning, as I have found, faithfully reflects what the lease and agreement require. The Arbitrator, I consider, correctly identified his task, and explained sufficiently how he had done so.

[77] Westmed's second argument and third, both relate to the Arbitrator's use of the Ellis schedule.

[78] There can, I think, be no quarrel with the Arbitrator's decision to rely on the Ellis schedule (a matter for him alone). Mr Ellis, as Wilson's regional manager, was best placed to identify what the operating expenses of the building were, and to identify some basis for attributing expenses to the agreement and to the lease.

[79] The Ellis schedule, without the explanations he set against each expense, was as follows:

**FARMERS CARPARK EXPENSES BREAKDOWN**

| **Related to Building** | | | **Related to Leased Bays** | | |
|---|---|---|---|---|---|
| | | | Wages | $ | 27,234 |
| | | | Wage Overheads | $ | 5,386 |
| | | | Accounting and audit | $ | 875 |
| | | | Advertising and Promotion | $ | 2,843 |
| | | | Amortisation | $ | 581 |
| Cleaning | $ | 19,205 | | | |
| | | | Depreciation | $ | 60,360 |
| Electricity | $ | 35,275 | | | |
| | | | Equipment Lease Hire | $ | 1,034 |
| | | | Excess Insurance Claims | $ | 2,000 |
| | | | Insurance Pub Lia | $ | 1,730 |
| | | | Legal | $ | 24,405 |
| Lift Maintenance | $ | 13,239 | | | |
| | | | Maintenance Contracts | $ | 9,151 |
| | | | HO Mgt Fees | $ | 44,848 |
| BuildingOp Costs | $ | 346 | | | |
| | | | Printing and Stationery | $ | 240 |
| Water Rates | $ | 278 | | | |
| Repairs and Maintenance (50%) | $ | 8,359 | Repairs and Maintenance (50%) | $ | 8,359 |
| Equipment Maintenance (50%) | $ | 10,090 | Equipment Maintenance (50%) | $ | 10,090 |
| | | | Signage | $ | 3,618 |
| Security | $ | 9,643 | | | |
| | | | Cash Handling/Banking | $ | 13,219 |
| | | | Staff Welfare | $ | 180 |
| Telephone Lifts | $ | 1,200 | Telephone landline | $ | 1,610 |
| | | | TDL Leased Lines | $ | 689 |
| | | | Tickets | $ | 3,586 |
| | | | UniformsS | 800 | |
| | $ | 97,632 | | $ | 222,836 |

[80] This schedule, as the Arbitrator recorded, became the subject of close focus:

> Mr Ellis's summary of expenditure was closely scrutinised by the respective Counsel for the parties and submissions [sic] made to me on each of the individual items. Mr Eyles was also examined on these while Mr Stewart stated that if there were costs not included in the management agreement that fell to the Lessee that they would be deducted.

[81] What is interesting about the schedule, apart from the fact that it supplied a ready basis for the Arbitrator to make his analysis, is that his attribution of expenses differs radically from that of Mr Ellis. The total expenses were $320,468. Mr Ellis attributed $222,836 to the leased carparks, and $97,632 to the building. The Arbitrator attributed $265,468 to the building and $55,000 to the leased carparks. To say, as he said, that he merely made adjustments to the Ellis schedule is an understatement. He re-ordered the schedule radically.

[82] This decision, fully open to the Arbitrator on an orthodox understanding of the lease and the agreement, very much favoured Westmed. If any party had a reason to quarrel with it, and question how it was made, it was Wilson, but Wilson is content to accept the Arbitrator's decision.

[83] The Arbitrator could, I accept, have set out his reasoning more extensively than he did. But he set out the essential basis for it, and a more complete statement of his reasons would not have given Westmed any comfort. Fuller reasons could not have identified any significant error of law on which Westmed was entitled to rely. Also, had Westmed chosen, it could have requested the Arbitrator to interpret this aspect of his award, as long as Wilson agreed.

[84] I conclude that the reasons the Arbitrator gave suffice.

**Conclusion**

[85] For the reasons which I have given the appeal will be dismissed. Wilson will have costs on scale 2B.

Signed and dated at Dublin this 8th day of April 2004

P.J. Keane J