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IN THE SUPREME COURT OF NEW ZEALAND
OTAGO AND SOUTHLAND DISTRICT
DUNEDIN REGISTRY

M.9/70

IN THE MATTER of an Arbitration

BETWEEN : HALSBURY CHAMBERS LIMITED a duly incorporated company having its registered officer at Dunedin.

Plaintiff

AND : DIAMOND GRILL LIMITED a duly incorporated company having its registered office at Dunedin.

First Defendant

AND : WILBUR HALSEY STEWART of Dunedin, Restauranteur

Second Defendant

Hearing : September 17, 1970.

Counsel : Marks for plaintiff
Wood for defendants

Judgment: December 9, 1970.

RESERVED JUDGMENT OF WHITE J.

This is an application by the plaintiff to set aside the award of an umpire, or in the alternative, to remit the award for reconsideration on the general ground that on its face the award is erroneous in law.

The plaintiff is the owner and lessor of a building in Dunedin. The first and second defendants are joint lessees of premises in the building. The term of the lease was for seven years from 31st October 1962, the lease providing in Clause 25, for a renewal for one further term of seven years at :

> ".. a rental to be agreed on between the parties and failing such agreement to be determined by arbitration in the manner hereinbefore provided such renewed rental to be in any event no less than the present rental such lease to contain the same covenants, conditions and agreements as are herein contained except this present provision for renewal provided however that this clause shall have no force or effect unless in the said schedule it is stated affirmatively that a right of renewal is to appertain to this lease. In calculating such rental no reduction shall be made in respect of any lessees improvements."

Clause 19 provided for arbitration in the event of any dispute arising :

> "... so as to have all the incidents and consequences of an arbitration under the Arbitration Act 1908."

The valuers appointed by the parties were unable to agree on an annual rental and it was agreed that, acting pursuant to the terms of Clause 19 of the lease, they had appointed an umpire (another valuer) to determine the matter. All three met on 17th December 1969 and at this meeting the plaintiff's valuer proposed an annual rental of $5,500 and the defendant's valuer proposed an annual rental of $4,870.

The affidavit evidence in support of the application was that of the plaintiff's valuer. There are differences between his evidence and the umpire's evidence contained in an affidavit filed in reply. These affidavits contain the evidence on which this matter must be determined. Neither dependent was called on to be cross-examined. I am not in a position to choose between differences in recollection as to what took place and I must deal with the matter on the broad facts on which there is really no dispute.

It is clear from the affidavit of the umpire that he enteredupon the arbitration pursuant to Clauses 19 and 25 of the lease, that he met the two valuers on 17th December 1969 and that they inspected the premises that day. He states that as neither valuer suggested that independent witnesses should be called, nor that any evidence should be taken on oath at or before the meeting on 17th December, he "followed the normal procedure in such circumstances and arranged for the two valuers to make their respective representations concerning the rental to be fixed". As background it will be convenient to quote paragraphs 6 and 7 of the affidavit of the plaintiff's valuer :

6. I presented my evidence first, asking a total rental of $5,500.00 per annum based on a comparison with other premises in the same area as those concerned in the agreement to lease. The said ARTHUR STANLEY CAYZER then made submissions asking a rental of $4,870.00 per annum based apparently on the following formula :

(a) 10% of government valuation of improvements

plus (b) Ground rental increase approximately 50%

plus (c) Rates included at approximately $900.00

No comparisons regarding other properties in the area were given, but the financial position of the lessee was introduced and emphasised by the said ARTHUR STANLEY CAYZER. He said he had seen accounts and if my rental was to be paid the lessee would have to go bankrupt. I objected to the introduction of this evidence on the ground that the rental had to be assessed on the basis of the premises occupied without taking into account the lessees financial circumstances. The said ARTHUR STANLEY CAYZER also said that his rental of $4,870.00 included an allowance for the proposed demolition and reconstruction of the Government Life Building, one building removed from the premises concerned in the agreement to lease. The said JOHN OGILVIE MACPHERSON said that the said ARTHUR STANLEY CAYZER's rental could a lso be high enough to put defendants out of business.

7. THE said ARTHUR STANLEY CAYZER and the said JOHN OGILVIE MACPHERSON and myself inspected the said premises and on return to the said ARTHUR STANLEY CAYZER's office the said JOHN OGILVIE MACPHERSON stated that he would hear further evidence as to the effect the proposed demolition and reconstruction would have on the premises in question. We then left and returned later and the said ARTHUR STANLEY CAYZER at this time had re-assessed his rental asking now a basic rental of $4,500.00 with a reduction to $3,900.00 for as long as the demolition and construction work was in progress. He quoted as evidence in support of this contention that the Belvere Cake Shop directly adjoining the A.M.P. Building in Princes Street, Dunedin had suffered a reduction in turnover during demolition. He mentioned nothing about reconstruction. He produced no accounts or figures to support the statement or to show the extent of the reduction in turnover. He also quoted the example of Stark's Chemist Shop in the Southern Cross Hotel building saying that the lease had been renewed at the same rental because of demolition and rebuilding of the new hotel directly adjoining. He gave no figures, accounts or other details. I objected to the introduction of such evidence without proof and I submitted to the said JOHN OGILVIE MACPHERSON than any reduction in turnover to be suffered by the defendants could only be proved from balance sheets after the work was completed, and that any reduced rental would be penalising the landlord for something over which he has no control. I also submitted that since the type of business carried on was quite different from those quoted, such evidence could not be

> taken as evidence that the business in question would suffer a reduction in turnover. I also submitted that the case in question was distinguishable because the premises were not directly adjoining the Government Life Building. I also pointed out that no evidence had been brought to show the nature and extent of demolition or reconstruction work, nor had any details of scaffolding or hoardings or interferences with footpaths been introduced. I also stated that the said JOHN OGILVIE MACPHERSON would be going beyond his duties as an umpire by varying the terms of the agreement to lease, if he provided for a reduction of rental while demolition and reconstruction of the Government Life Building was in progress. This ended the arbitration. "

The umpire agreed that statements had been made by the defendant's valuer and himself as stated in paragraph 6 of the plaintiff's valuer's affidavit but he added, "These were purely in the nature of comment" and he took " no cognisance of them in making his award". The umpire also stated that he has no recollection or record of the objections which the plaintiff's valuer said he raised as set out in paragraph 7 of his affidavit, but I quote paragraph 11 of the umpire's affidavit which I accept :

> "11. THAT I gave the said Arthur Stanley Cayzer and the said Graeme Stanley Dawson the fullest opportunity to make representations and to express their views and opinions concerning the rental to be paid under the said Agreement to Lease and carefully considered the same and gave full weight to their respective opinions and representations before reaching my decision and making my award."

The umpire's award, having merely stated that the arbitrators had failed to agree, was as follows :

> "Now I the said John Ogilvie Macpherson have met the said arbitrators and in accordance with the evidence presented to me do hereby fix and determine the rental in accordance with the said lease as follows :
>
> 1. The rental value for the period from 31st October 1969 to such date as scaffold and or hoardings are erected for demolition of Government Life Building in Rattray Street shall be $4870 per annum.

2. The rental value for the duration of the scaffold and or hoardings in connection with the demolition and rebuilding of the Government Life Building shall be $3900 per annum.

3. From date of removal of scaffold and hoardings till expiry of lease the rental shall be $4870 per annum. "

This award was made on 18th December 1969 and was challenged on various grounds pursuant to ss.11 and 12 of the Arbitration Act 1908. Mr Marks relied substantially on his first ground that the umpire had exceeded his jurisdiction. He submitted that the effect of paragraph 2 of the Award was to vary the terms of the lease whereas the terms of reference were limited to fixing an annual rental and that there was no power under Clause 25 to add a further term. Mr Marks' contention was that the umpire imported a further or additional term into the lease by adding a condition to the rental relating to an adjacent property and that this amounted to misconduct in the legal sense. He also contended that the umpire improperly admitted evidence and had not acted judicially.

I think it is essential to arrive at what is the real issue in the case and dispose of some matters that were debated. As I have already indicated it was not disputed that there was an arbitration, but it was contended by Mr Wood that the parties had arranged an arbitration by experts who were intended to make their valuations according to their individual skill, knowledge and experience. On this matter Russell on Arbitration 17th Ed. p.29 was referred to, where it is said :

"... there may be cases where a dispute has arisen in which the third person is an arbitrator though by reason of his knowledge of the subject matter or his skill it is not intended that he should hear evidence or hold a judicial inquiry".

In my view that was the position in this case. Mr Marks referred to Walford Baker & Co v Macfie & Sons (1915) 84 L.J. K.B. 2221, 2223 where it was said by Lush J. that if :

> "an umpire allows to be given and acts upon evidence which is absolutely inadmissible, and which goes to the very root of the question before him this Court has ample jurisdiction to set the award aside on the ground of legal misconduct".

In my opinion no question of improper evidence arises in this case, the fact being that there was no proposal to call evidence and that each valuer stated his valuation with reasons. The umpire, having heard the valuers, arrived at his own conclusion. In the present case the nature of the arbitration was such that the two valuers and the umpire would normally meet as they did and that the umpire would listen to the opposing opinions and then make his own determination. It is quite clear that the valuers and umpire were appointed because of their knowledge and experience and in the circumstances of the case they were not bound to hear evidence. In Mediterranean & Eastern Export Co.Ltd v Fortress Fabrics (Manchester) Ltd (1948) 2 All E.R. 186, it was held that an arbitrator having been appointed because of his knowledge and experience in a trade was entitled to make his determination without hearing expert evidence. Lord Goddard C.J. said (at p.189) :

> "The modern tendency is, in my opinion, more especially in commercial arbitrations, to endeavour to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submissions and has not violated any rules of what is so often called natural justice, the Courts should be slow indeed to set aside his award."

In Wellington City v National Bank of New Zealand Properties Ltd (1970) N.Z.L.R. 660, the principles to be applied when the Court is asked to set aside an award or

remit it to arbitrators or an umpire on the ground that an error of law appears on the face of the award are set out. The facts of the case and the grounds of the present application are different but in my view the general statement of the principle applies. At p.669 North P. said :

> "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."

The umpire's duty in general terms where the lease contained no formula for arriving at the rent on renewal was stated (in a ground rent case) in the following sentence from Drapery & General Importing Co of New Zealand v Mayor & councillors of Wellington (1912) 31 N.Z.L.R. 598 and cited by Turner J. in Wellington City v National Bank of New Zealand Properties Ltd (supra) on p.673 :

> "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. "

It is in accordance with these principles that the question whether the umpire exceeded his jurisdiction must be considered. It is clear that the umpire has decided the matter which was referred to him and that the general intention of Clause 2 of the Award was to provide for a reduced rent during a period of demolition and rebuilding. It seems to me that if it were known that during that period the public would not have access to the lessee's premises there could be no question that it would be taken into account. In my view the umpire has simply endeavoured

to provide for the particular foreseeable circumstances. Applying the principles to which I have referred it is not for the Court to express an opinion on the method of valuation or the extent of the reduction for that is the expert's opinion having regard to the foreseeable circumstances during the second term. The provisions of the lease prevent the new rental being fixed at a figure below the existing rental but any increase for the second term must depend on all the circumstances which a prudent lessee would take into account in determining the rental he would be prepared to pay for the new term.

The question remains whether in determing the rental for the new term the umpire was required to fix a uniform rental for the whole period. In short, does the lease contemplate a uniform rent throughout the term so that the variation of the annual rental provided for by Clause 2 of the Award must be held to be outside the terms of the submission? While it is clear that the umpire endeavoured to provide a flexible formula, I have come to the conclusion that he was required as a matter of law to fix a uniform annual rental throughout the new term. It is clear from the argument in Wellington City v National Bank of New Zealand Properties Ltd (supra) that it was common ground that the lease in that case contemplated a uniform rental throughout the period. In the present case the rental to be paid is that "detailed in the said schedule" which is described as, and in fact was, the"amount of annual rental". While the words 'annual rental' do not appear in Clause 25 of the lease I consider that on reading Clause 25 with the opening paragraph of the lease and with the schedule, it is clear that what the valuers and arbitrator were called on to determine was the annual rental for the period of renewal.

That was what was submitted to arbitration and in my opinion a uniform annual rental for the whole period of the renewed term was required, the annual rental to be such a rental for the period of the renewed lease as having regard to the terms and conditions of the lease, a prudent lessee would give.

I think I should add that on the question of certainty, I regard the award as unsatisfactory because the beginning and end of the period of a reduced rental is not defined with precision. The fact that it would be difficult to define these points of time precisely without leaving room for a new dispute, and that providing for any special circumstances would be likely to present difficulties of that kind, support the view that, in the absence of a special formula, a uniform rent throughout a renewed term is contemplated. The fact is that in fixing a rental for a term there are many imponderables which no doubt must be weighed in order to arrive at an overall result.

For these reasons I order that the award be set aside and the case remitted to the umpire for his re-consideration. I allow the plaintiff $75.00 costs and disbursements.

SOLICITOR FOR THE PLAINTIFF :

Messrs Aspinall,Joel & Hall,
Solicitors,
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SOLICITOR FOR THE DEFENDANTS :

Messrs Tonkinson & Wood,
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