

## REVIEWING THE REVIEWERS ARBITRATORS V. VALUERS

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### 1. Introduction

Surprisingly, for all its practical importance very little has been written upon the vexed question of rental review clauses where the mechanism stipulated is arbitration or valuation, although there have been a number of significant decisions upon these clauses both here and in the United Kingdom. Rental fixing is such a fundamental matter to both parties that it should not be open to the doubts and ambiguities which many such clauses present. In truth, no really standard clause has emerged and a variety of different clauses pervade the scene. The following is an attempt to examine some of the basic concepts involved in the interpretation of these clauses and to suggest some means by which there could be a more equitable balance between the parties involved, without greater expense, inconvenience and uncertainty.

The unsatisfactory resolution of differences between lessor and lessee in Queensland led recently to the enactment of the *Retail Shop Leases Act 1984 (Qld)*. Some say this Act was unnecessary, and they may well be right. However, an examination of the cases upon the subject reveals the difficulties that can arise from what should really be a very simple matter. It may be that terms such as 'market rental' are difficult to define or that no two parties, lessor or lessee, could in any event agree on the amount involved if such a term were properly defined.

### 2. Expert or Arbitrator

Many leases provide that rental review should be undertaken by a valuer acting as an expert and not as an arbitrator. Such a person is usually nominated by agreement between the parties or in the absence of such agreement, is then appointed by a named official, e.g. the President of the Law Society or Real Estate Institute for the time being.

What, therefore, is the essential difference between a valuer acting as an expert and a valuer acting as an arbitrator? This question may be answered by looking more closely at the meaning of the word 'valuation' and the word 'arbitration'.

The dividing line between the two is obviously a fine one, but analysis of the authorities discloses that the existence or absence of a dispute is the distinguishing feature. In *Collins v. Collins* the Master of the Rolls said:

It appears to me that the case of *Leeds v. Burrows* draws the proper and fit distinction between an arbitration in the proper sense of the term, and an appraisal or valuation for valuation undoubtedly precludes differences, in the proper sense of the term; it prevents differences, and does not settle any which have arisen.<sup>1</sup>

As with so many other words with imprecise connotations, it is often insufficient simply to rely on the exact terminology used in the agreement. *Re King and Acclimatization*

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1. (1858) 26 Beav. 306 at 313; 53 E.R. 916 at 919. Quoted with approval by Jacobs J. in *Australian Mutual Provident Society v. Overseas Telecommunications Commission (Australia)* [1972] 2 N.S.W.L.R. 806 at 813.

*Society of Queensland*<sup>2</sup> is an example of a person appointed as an 'arbitrator' being held by the Court to be merely a valuer as no arbitration had been intended. Accordingly, regard ought to be had to the subject matter of the agreement referred for the determination of the appointee, to use a neutral term, whether he be labelled a 'valuer' or an 'arbitrator'.<sup>3</sup>

In *Ajzner v. Cartonlux Pty Ltd*,<sup>4</sup> a lease contained a renewal option for the lessee and provided that, 'The rent for the extended period shall be such as shall be mutually agreed upon and in default of agreement a sum to be determined by an arbitrator appointed by the Secretary for the time being of the Real Estate and Stock Institute of Victoria, but in no case to be less than the present rent'. The lessee exercised the option and, the parties being unable to agree as to rental, each party signed a submission requesting the President of the R.E.S.I. to appoint a valuer to determine the rental. After inspecting the premises and considering a written statement by the lessee, the duly appointed valuer fixed the rental at a figure in excess of that which the lessors had been prepared to accept during negotiations. The lessee then refused to sign the lease for the extended period.

Pape J. held that despite the use of the word 'arbitrator', the clause required that the appointee determine by open reference an objective fact, namely rental, relying on his skill in the determination of rentals.<sup>5</sup> This was contrasted to determination by judicial inquiry of a dispute where the scope of reference may be limited by the extent and area of the dispute. Therefore the higher rental stood as the appointee was not subject to constraints as regards his reference. His Honour was also satisfied that even if the clause required the appointment of an arbitrator in the strict sense, the appointee was not obliged to act otherwise than he did,<sup>6</sup> or alternatively, the parties had waived this requirement by their conduct.<sup>7</sup>

*Ajzner's* case would then seem to outline the minimum standard required for an arbitration strictly so called. There was no hearing and no witnesses were called. The appointee needed merely to act judicially and to rely on his own expertise in arriving at his determination.

Two principles of arbitration should however be kept in mind. The first is that an arbitrator acting judicially has no power to call witnesses himself — all he can do is to consider the evidence which the parties place before him.<sup>8</sup> That an arbitrator derives his authority from the agreement of the parties and that his powers and duties are only those that the parties have agreed to place upon him,<sup>9</sup> is the second principle.

The *Arbitration Act* 1973 (Qld) although clearly contemplating the convening of a hearing, in that Part IV provides a set of rules governing the conduct of proceedings, does not impose any statutory obligation upon an arbitrator to hold a hearing or to ask that witnesses be called or documents be produced.

In *Australian Mutual Provident Society v. Overseas Telecommunications Commission (Australia)*,<sup>10</sup> the New South Wales Court of Appeal, on a special case stated for the opinion of the Court pursuant to that State's equivalent of s.29 of the *Arbitration Act* 1973 (Qld) was divided as to the characterization of the appointee.

2. [1913] St.R.Qd. 10. Reversed on another point on appeal to the High Court (See (1913) 17 C.L.R. 223).

3. This 'subject-matter' test was formulated by Williams J. in *Re Hammond and Waterton* (1890) 62 L.T. (N.S.) 808.

4. [1972] V.R. 919.

5. *Ibid.* at 931.

6. *Ibid.* at 932.

7. *Ibid.* at 933.

8. A. Walton, *Russell on Arbitration*, (1970) at 222, 236.

9. *Ibid.* at 174-5.

10. *Supra* n.1.

Failing agreement between the parties, the rental was to be a percentage of the fair annual market rental determined by two valuers, one appointed by each party, and, failing that, the valuers were to refer the question of rental to a 'properly qualified valuer chosen by them who shall act as an arbitrator and such reference shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act'. Hutley A.J.A. and Taylor J. found the third appointee to be a true arbitrator. Hutley A.J.A. supported this conclusion by referring to the decisive intention of the parties in not only calling the person an 'arbitrator', but in providing that he was to conduct the inquiry in accordance with the Arbitration Act.<sup>11</sup>

The rent review provision further specified that the 'fair annual market rent' of the premises was the 'best annual rental' that, in the opinion of the valuers or arbitrator could reasonably be obtained for the whole of the demised premises with vacant possession at such rental determination date, together with the right to name the building. In answer to a question asked in the case stated, the Court held that the arbitrator was entitled to take into account evidence of negotiations between the parties prior to the execution of the lease, but not draft leases prepared prior to the execution thereof. Indeed, Jacobs P. took the matter one step further and stated that 'in the present case the best annual rent within the meaning of the lease can only be ascertained by the valuers, and, therefore, by the umpire, if they, and now he, have regard to the particular meaning given by the parties to those words in their previous course of conduct disclosed by the negotiations'.<sup>12</sup>

The position of an arbitrator vis-a-vis a valuer may be put thus:

The function of a valuer or calculator has been said to be, not to settle disputes, but to prevent or preclude them . . . On the other hand, where a person is appointed, not to assess or value or calculate simply in accordance with his own skill and knowledge, but to resolve a dispute by considering competing valuations, he is an arbitrator.<sup>13</sup>

Indeed, Lord Diplock in *Sudbrook Trading Estate Ltd v. Eggleton and Others*<sup>14</sup> proposed that the very use of the term "Valuer" (with a capital "V" at any rate) necessarily implied that the price to be fixed must be 'fair and reasonable as between the lessors and lessees'. A valuation by a professional valuer involves an intangible process whereby, after having regard to certain matters, a rental figure is reached. The ordinary routine matters taken into account are those outlined in texts such as *Rost and Collins on Land Valuation*. Such matters include, for example, any increase or decrease in the cost of essential outgoings (including local authority rates and insurance premiums); the impact of new developments (including shopping centre, suburban and housing development and highway rerouting); and rental values in the locality.<sup>15</sup>

The accurate classification of an appointee as either a true arbitrator or valuer acting as an expert is important for a number of reasons, not least of which is for the purpose of ascertaining the duties and powers of the appointee and the immunity from challenge of his decision. In terms of time and money, the advantage would seem to be with valuation in that it is inevitably less time-consuming and less costly than arbitration by judicial inquiry.

### 3. Time for Review — Not of the Essence

In addition to providing the mechanism by which rental is to be reviewed, rent review clauses usually specify time constraints within which such mechanism is to operate. The

11. *Ibid.* at 818.

12. *Ibid.* at 815.

13. *Isca Construction Co. Pty Ltd v. Grafton City Council* (1962) 8 L.G.R.A. 87 at 92 per Brereton J. with whom Herron A.C.J. and Manning J. concurred on this point.

14. [1983] A.C. 444 at 477.

15. See *Ex parte Yuco Pty Ltd* [1978] Qd.R. 235 at 236.

imposition of time limits could conceivably result in the clear intention of the parties at the time of execution of the lease being frustrated by human error at some later stage.

In Queensland, prior to 1978, retrospective adjustment of rental for the whole of a review period seemed possible only where the lessor acted within a reasonable time and did not delay and make a late application for review. If he did so delay, the rental could only be increased in respect of rental accruing after the giving of the requisite notice.<sup>16</sup>

The House of Lords decision in *United Scientific Holdings Ltd v. Burnley Borough Council*<sup>17</sup> may, if followed in Queensland, come to the dilatory landlord's aid. In brief, that case concluded that there is a presumption that time is not of the essence and therefore failure to adhere to the timetable is not fatal unless the lease expressly specifies time to be of the essence or the interrelation of the rent review clause and the other clauses or the surrounding circumstances are such as to displace this presumption. Indeed, not only did the landlord's failure to exercise promptly their rights to review in accordance with the requirements of the review clause not deprive them of their rights to review, but the rents fixed pursuant to the delayed review became payable retrospectively.

It is interesting to note that their Lordships themselves indicated that the linking of the review clause to an option to determine might displace the presumption that time is not of the essence. This line of thought has now been applied by the Court of Appeal<sup>18</sup> where a twenty-year lease contained provisions for the landlord to review rental at seven and fourteen years and for the tenant to determine the lease at the same points, in each case upon six months' notice. It was held that the presumption raised by *United Scientific Holdings* was displaced and that time was of the essence for the two interrelated provisions and that the landlord's notice of intention to review was accordingly out of time and invalid.

Another method of overcoming the presumption is to establish estoppel. Where one party has stood aside and allowed the other to act on the assumption that the former will not enforce his rights, then estoppel may arise as it did in *James v. Heim Gallery (London) Ltd.*<sup>19</sup> His Honour, Judge Thomas sitting as a judge of the High Court, held that the representations by word and conduct of the lessors for some five years whereby the lessees, having challenged the lessor's late notification of review were allowed to continue paying the existing rental, set up a promissory estoppel. The claim for revised rent, until the date the lessors reinstated their claim, failed.

As a result of the *United Scientific Holdings* decision, two practical drafting suggestions may be proposed. The first was made by two members of the House of Lords in that case,<sup>20</sup> namely, that the best way of eliminating all uncertainty in future rent review clauses (as regards compliance with the timetable) would be simply to state expressly whether or not stipulations as to the time by which any step provided for by the clause is to be taken, should be treated as of the essence. In Queensland, however, the solution is not so simple. Where the review mechanism is arbitration, even if the review provision goes so far as to say that any claim for review is barred unless notice to appoint the arbitrator is given or the arbitrator is appointed or some other step to commence the arbitration proceedings is taken within a fixed time, a Judge may extend the time as he thinks proper provided no undue hardship would be caused.<sup>21</sup>

The second suggestion would be that the rent review clause be drawn to confer a right on both landlord and tenant to initiate the review procedure. This would provide the tenant, if

16. *Re Ipswich Road Properties Pty Ltd's Lease* [1974] Qd.R. 215.

17. [1978] A.C. 904 cited with approval by the Full Court in *Karenlee Nominees Pty Ltd v. Gollin & Co. Ltd* [1983] V.R. 657 at 665.

18. *Legal and General Assurance (Pension Management) v. Cheshire County Council* (1984) 269 E.G. 40.

19. (1979) E.G. 227.

20. [1978] A.C. 904 at 936 (Lord Diplock) and at 947 (Lord Salmon).

21. *Arbitration Act* 1973 (Qld), s.36.

desired, with a means of avoiding a massive account for retrospective arrears of reviewed rental where a landlord delays in, but is not estopped from, initiating the procedure.

#### 4. Is the Mechanism in the Rent Review Clause Sufficiently Certain to be Given Effect?

The necessity for certainty of mechanism stems from the fact that uncertainty as to whether a new rental would be fixed is fatal to an application for specific performance, which application is usually a party's only means of obtaining an effective remedy. The alternative unsatisfactory remedy would be an award of damages of an amount equivalent to the monetary loss sustained by the party's inability to lease the premises at a fair rental or as is otherwise provided. Such an award would in most instances be nominal and of no true assistance to the applicant.

Some guidance on the question of whether a mechanism is sufficiently certain to be given effect has been supplied by the High Court in *Booker Industries Pty Ltd v. Wilson Parking (Qld) Pty Ltd*.<sup>22</sup> The whole Court, which comprised Gibbs C.J., Murphy, Wilson and Brennan JJ., held that the mechanism contained in the relevant rent review clause was sufficiently certain to warrant a qualified order for specific performance.

The clause under consideration read as follows:

... the Lessee shall have the right to be granted a further lease of the demised premises ... upon the same terms and conditions as herein contained save and except that the rental ... shall be such rental as may be mutually agreed between the Lessor and the Lessee and failing agreement then such rental as may be fixed by an arbitrator nominated in accordance with ... Clause 3.05(b), but in any event the rental shall not be less than the rental payable in the last year of the first term.

Thereafter, Clause 3.05(b) provided for the appointment of a single arbitrator to be nominated by the President for the time being of the Queensland Law Society Incorporated.

The lessee duly gave notice of the exercise of the option, but the lessor declined to recognise it and the lessee remained in possession of the premises after the expiry of the term of the lease. The lessee sued the lessor for specific performance of the renewal clause and the lessor sued the lessee in a separate action for recovery of possession.

The question which the majority of the Court addressed was phrased as being whether the renewal agreement contained in the lease was a 'concluded agreement'.<sup>23</sup> An illustration of the most basic incomplete agreement and consequently by virtue of the authorities, an unenforceable agreement was shown as being where a lease provided for a renewal 'at a rental to be agreed'.<sup>24</sup> This much is easily comprehensible. By comparison, the subject clause was viewed as providing an entire mechanism for determining the rental for the renewed term and was complete or certain in that no further agreement of the parties was required.

Another case illustrative of the English judicial attitude although relating to an option to purchase, is *Sudbrook Trading Estate Ltd v. Eggleton*<sup>25</sup> discussed at length in the following section.

#### 5. Can the Court Substitute its own Valuation or Machinery Instead of that Proposed by the Terms of Lease?

The substitution by a Court of its own machinery for that agreed upon by contracting parties has long been a controversial topic and is closely related to the question of uncertainty and the availability of specific performance. Indeed it may be argued that the

22. (1982) 149 C.L.R. 600.

23. *Ibid.* at 826.

24. *Ibid.*

25. [1983] A.C. 444.

logical result of a Court being able to fix a price in the event of failure of the contractual machinery would be that there could be no uncertainty in the contract and consequently no bar to relief by way of specific performance.

The strict view on substitution derived from the long and settled line of English authorities dating back to *Milnes v. Gery*<sup>26</sup> has been summarised as follows:

... first, in ascertaining the essential terms of a contract, the court will not substitute machinery of its own for machinery provided by the parties, however defective that machinery may prove to be. Secondly, where machinery is agreed for the ascertainment of an essential term, then until the agreed machinery has operated successfully, the court will not decree specific performance, since there is not yet any contract to perform. Thirdly, where the operation of the machinery is stultified by the refusal of one of the parties to appoint a valuer or an arbitrator, the court will not by way of specific performance, compel him to make an appointment. All three of these principles stem from one central proposition, that where the agreement on the face of it is incomplete until something else has been done whether by further agreement between the parties or by the decision of an arbitrator or valuer, the court is powerless, because there is no complete agreement to enforce.<sup>27</sup>

This line of authority has now been overruled by a majority of the House of Lords in *Sudbrook Trading Estate Ltd v. Eggleton*.<sup>28</sup> In that case the lessees of four adjacent industrial premises under four separate leases gave the lessors notice exercising options to purchase the reversion in fee simple but the lessors contended that the options were unenforceable and refused to nominate a valuer to determine the price of the reversion. Each lease contained an identical clause granting the lessees an option of giving to the lessors notice in writing of their desire to purchase the reversion 'at such price not being less than X as may be agreed upon by two valuers one to be nominated by the lessor and the other by the lessee and in default of such agreement by an umpire appointed by the ... valuers'.

Their Lordships were inclined to a liberal view of the role of substitution and made declarations that valid options had been conferred and had been effectively exercised. Further, specific performance of the contracts constituted by the exercise of the options was ordered, together with an inquiry as to the fair valuation of each of the reversions, the amount of such valuation in each case to be certified.

Lord Diplock based his rationale for this decision on the tenet that English law does not allow a party to a contract to rely on self-induced frustration to his own advantage, there being more than a mere agreement to make an agreement.<sup>29</sup> Lord Fraser of Tullybelton based his decision 'on the general principle that, where the machinery is not essential, if it breaks down for any reason the court will substitute its own machinery'.<sup>30</sup>

The fact that the valuers and umpire were neither named nor identified did not point to the specified mode of ascertaining the price being an essential term.

The Australian judiciary appears to adopt a 'middle-of-the-road' approach to substitution. The High Court in *Booker Industries Pty Ltd v. Wilson Parking (Qld) Pty Ltd*<sup>31</sup> has indicated that even before the recent decision of the House of Lords, the English authorities could not be fully accepted in Australia in that decisions such as *Butts v.*

26. (1807) 14 Ves. Jun. 400.

27. *Supra* n.25 at 459, 460 per Templeman L.J. (C.A.) and approved by the House of Lords as an accurate summary.

28. *Supra* n.25.

29. *Ibid.* at 479. Lords Scarman and Bridge of Harwich agreed with Lord Diplock's speech.

30. *Ibid.* at 484. Lords Diplock, Scarman and Bridge of Harwich expressed agreement with Lord Fraser of Tullybelton's speech.

31. *Supra* n.22 at 606.

*O'Dwyer*<sup>32</sup> and *Kennedy v. Vercoe*<sup>33</sup> had already established that a term may be implied whereby both parties are obliged to do all that is reasonably necessary to procure fulfilment of a condition precedent such as obtain a landlord's or Minister's consent. The facts of the *Booker* case were similar to those in *Sudbrook* except that the former concerned a rent review provision rather than an option to purchase.

The Court gave a limited decree for specific performance ordering that the lessor should do whatever was reasonably necessary to ensure that the rent was fixed, and, upon the rental being fixed, should renew the lease. By way of *obiter* in their majority judgment, Gibbs C.J., Murphy and Wilson JJ. expressed the opinion that if the President of the Law Society declined to appoint an arbitrator or if the person nominated failed to carry out the task assigned to him, then the renewal would not be effected, the lessee's exercise of the option would have been fruitless and by implication, no machinery could be substituted by the Court.<sup>34</sup>

Should contingencies such as these arise in respect of rentals to be fixed by way of arbitration in the true sense of the term, assistance may be only as far away as the *Arbitration Act 1973* (Qld). By that Act, certain powers are given to the Court<sup>35</sup> and the parties<sup>36</sup> to appoint a new arbitrator in specified circumstances and to a party to have its own arbitrator act as sole arbitrator if the other party fails to appoint.<sup>37</sup>

To the extreme left of the Australian judicial spectrum is the uninhibited view expounded by Brennan J. in the *Booker* case where His Honour found that there was no impediment to granting an unlimited decree of specific performance requiring a lessor to grant a lease to the lessee containing a clause relating to the fixing of the rental drawn in conformity with the clause in the previous lease. If the machinery should fail, the rental would be fixed by the Court as 'where the express terms of a lease reveal an hiatus in the machinery for fixing the rent, the court will lean towards a construction of the lease which treats the machinery merely as a means of ascertaining what is capable of being ascertained objectively as a fair and reasonable rent and which thus avoids an hiatus in an essential stipulation'.<sup>38</sup>

This interpretation of a rent clause was said to apply where the lessee has been in possession prior to the failure of the contractual machinery and, unless otherwise stated, also where the machinery fails before the lessee is put into possession if the commencement of the term is not dependent on the prior fixing of the rental.

The conclusion to be drawn, therefore, is that while the Courts are certainly prepared to enforce the parties' implied obligations to do all that is reasonably necessary to ensure the contractual machinery functions as intended, it is doubtful whether an Australian court will readily substitute its own machinery where the contractual machinery fails.

## 6. Challenging Results

### (a) Valuation

For the purpose of challenge, two classes of valuations have been categorised, namely, speaking and non-speaking valuation. A speaking valuation is 'one which, on its face discloses the method of valuation'<sup>39</sup> by giving reasons or calculations and by logical definition, a non-speaking valuation is one which does not.

32. (1952) 87 C.L.R. 267.

33. (1960) 105 C.L.R. 521.

34. *Supra* n.22 at 605.

35. Sections 17 and 34.

36. *Ibid.* s.14(a).

37. *Ibid.* s.14(b).

38. *Supra* n.22.

39. *Mayne Nickless Limited v. Solomon* [1980] Qd.R. 171 at 178 per Sheahan J.

The latter category variety, enjoy immunity from invalidation on the ground of error or mistake and may only be impeached for fraud or collusion.<sup>40</sup> As stated by Lord Denning M.R. in *Campbell v. Edwards*:

It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith they are bound by it. Even if he has made a mistake, they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be different. Fraud or collusion unravels everything.<sup>41</sup>

Indeed, it seems clear that speaking valuations may be challenged for fraud or collusion. What is not clear is whether this class of valuation may be set aside for mistake, the rationale being that if the valuer has obviously failed to have regard to the relevant factors or has proceeded on an erroneous basis, it would be inequitable to hold the parties bound by such a valuation as it is not the valuation by which they contracted to be bound. The English authorities have left this question open, and, so too have their Australian counterparts.

It became unnecessary for the Full Court in *Mayne Nickless Limited v. Solomon*<sup>42</sup> to determine the question finally. Here, the rent review clause provided that the rent payable was to be fixed by reference to a mathematical calculation which required that the market value of the demised premises be determined by a valuer. The duly appointed valuer prepared a speaking valuation which, on its face, disclosed that the method of valuation used was that of replacement costs less depreciation. The lessee company did not, as it should have, move to have the valuation set aside in an action brought by it for that purpose,<sup>43</sup> but rather, pleaded this matter by way of defence in an action by the lessor for arrears of rent. The valuation was attacked in that it was alleged that the 'replacement cost less depreciation' method of valuation was not an acceptable method of determining the market value of commercial premises; that comparable sales including an earlier sale of the premises and the 'Use Restrictions' on the premises had not been taken into account; that the valuer had taken the wrong view of the availability of similar premises in the area; that the valuer had regard to 'the functional obsolescence' of the premises; and that a significant difference in the valuation given by the appointed valuer and by a valuer called as a witness was so large as of itself to suggest error or mistake in the method of valuation.

The Court took the view that if a speaking valuation could be impeached for mistake then such mistake 'must appear from a reading of the valuation',<sup>44</sup> and not, for instance, from cross-examination of the valuer but that even if the errors did not necessarily have to appear on the face of the valuation, on the facts, no error had been established.

It should, however, be noted that Sheahan J. by way of *obiter* stated that he was strongly inclined to the view that both the speaking and non-speaking classes of valuation should not be impeachable for error or mistake where the valuer is chosen by the parties. The proper remedy, based upon a House of Lords precedent,<sup>45</sup> for the party adversely affected, is to sue the valuer for damages for making a negligent valuation. The considerations inclining His Honour to this view concerned the resultant problems which might arise if a speaking valuation were impeachable for error, namely, the circumstances, kinds or degrees of error

40. *Campbell v. Edwards* [1976] 1 W.L.R. 403.

41. *Ibid.* at 407.

42. *Supra* n.39.

43. *Ibid.* at 174 per Sheahan J. with whom Lucas S.P.J. and Kelly J. agreed.

44. *Ibid.* at 178.

45. *Arenson v. Casson Beckman Rutley & Co.* [1977] A.C. 405 where an auditor of a private company who on request valued shares in the company knowing that his valuation was to determine the price to be paid for the shares under a contract of sale was held liable to be sued by the seller or the buyer if he made the valuation negligently.



required before a valuation should be set aside and the effect of such setting aside. To this end, His Honour seems to have assumed that if a valuation were set aside, the Court was not able to substitute its own valuation or machinery.

These considerations are examined in more depth by the Full Court of the Supreme Court of Victoria in *Karenlee Nominees Pty Ltd and Anor v. Gollin & Co Ltd*.<sup>46</sup> Here, a speaking valuation provided comprehensive reasons and included a schedule of comparable sales and their analyses and a schedule of rent return calculations as a cross check. Without reference to whether the theoretical possibility of impeachment for mistake was a practical option, the Court stated that a judge can decline to act on a speaking valuation if 'mistake in a relevant sense, or lack of good faith, or fraud'<sup>47</sup> emerges. Mistake in a relevant sense was illustrated by reference to cases where the wrong property had been valued or mathematical errors of any substance had occurred. As the Court stated:

The mere attribution of too much or too little weight by . . . (a valuer) to matters which bear upon the ultimate valuation arrived at cannot be considered a mistake vitiating a valuation . . .<sup>48</sup>

Mistake in a relevant sense must therefore be taken to be of narrow scope and application.

It was held that the trial judge was wrong in rejecting a valuation on the basis that he himself would not act upon that valuation. Further as this particular rent review clause was silent as to the method of valuation, no obligation was placed upon the valuer to disclose or publish his reasoning or calculations.

#### (b) Arbitration

By striking comparison to this non-requirement of furnishing reasons as regards valuations, is the statutory requirement imposed upon an arbitrator not only to make his award in writing but to furnish contemporaneously a written statement of the reasons for the award.<sup>49</sup> This requirement may only be dispensed with upon written authorisation of the parties.<sup>50</sup>

Part VI of the *Arbitration Act* 1973 (Qld) thereafter has a code of procedures for challenging the arbitration and/or assisting an arbitrator.<sup>51</sup> By application made to a single Judge of the Supreme Court, or when the subject matter is within the jurisdiction of the District Court, to that Court, an award may be modified or corrected or set aside. On the other hand, an arbitrator may state any question of law arising in the course of reference in the form of a special case for the decision of the Court.<sup>52</sup> The Court may then remit the matter with or without directions for reconsideration by the arbitrator.<sup>53</sup>

The source of the Court's most far-reaching power, namely to remove an arbitrator and/or to set aside an award, derives from s.32 of the Act and is exercisable where a Court is satisfied that there has been misconduct on the part of the arbitrator or in his conduct of the proceedings or that an award has been improperly procured. Under the Act, there are four non-exclusive heads of misconduct.<sup>54</sup>

They are (i) corruption, fraud or undue influence in relation to the arbitrator; (ii) evident partiality or bias by the arbitrator; (iii) any excess of powers or imperfect execution of

46. *Supra* n.17.

47. *Ibid.* at 669.

48. *Ibid.* at 671.

49. *Arbitration Act* 1973 (Qld), s.24(1).

50. *Ibid.*

51. See *Ex parte Kirra Investments Pty Ltd* [1975] Qd.R. 360.

52. *Arbitration Act* 1973 (Qld), s.29.

53. *Ibid.* s.30.

54. *Arbitration Act* 1973 (Qld), s.4.

powers (which expressly includes failure to comply with the statutory requirement to supply written reasons); and (iv) failure to make a final and definite award.

Of less drastic consequence is the Court's power to make an order modifying or correcting the award in the same circumstances described in the *Karenlee Nominees*<sup>55</sup> case as constituting mistake in a relevant sense, namely, where there is an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award.<sup>56</sup> In addition, this power may also be invoked where an arbitrator has awarded upon a matter not submitted to him,<sup>57</sup> or the award is imperfect in matter of form provided neither the matter not submitted nor the form affects the merits of the decision.<sup>58</sup>

## 7. Rights Against Valuers/Arbitrators

In the case of an arbitrator, the only statutory form of censure is removal and, where removal is on the basis of failure to use all reasonable dispatch in proceeding with the reference and making the award, loss of entitlement to remuneration in respect of services.<sup>59</sup> Curiously enough, this financial penalty is not expressed as applicable where more serious forms of misbehaviour such as fraud have resulted in the removal. Arbitrators also enjoy immunity from negligence at common law in that, by definition, they are 'judicial' officers.

Valuers do not share this initial immunity and the House of Lords decision mentioned previously<sup>60</sup> shows there is an avenue available to a person adversely affected by a negligent valuation to sue the relevant valuer. Statutory obligations may also be imposed.<sup>61</sup> It is however, all very well that the liability exists, but given that it has been notoriously difficult to prove negligence in respect of a valuation of property, is there really any practical benefit in the existence of such liability? This may be illustrated by example.

*Baxter v. F.W. Capp & Co. Ltd*<sup>62</sup> came before the King's Bench Division because the plaintiff, in reliance upon a valuation of property by a partner of the defendant estate agency, with no knowledge of the locality made two advances by way of mortgage over the property and suffered loss upon a mortgagee's sale. The estate agent had inspected the property and valued it at 1800 pounds and recommended an advance of 1200 pounds upon first mortgage and subsequently an advance of 150 pounds on second mortgage. A forced sale of the property realized 850 pounds and Goddard L.J. reluctantly found that the estate agent had been negligent and the measure of damages was the whole loss sustained by the plaintiff including the expenses of the abortive sales, insurance premiums, builder's account for upkeep of the property, mortgagee's expenses and disbursements and the agent's commission upon the ultimate sale of the property, in addition to the balance principal advanced and the interest unpaid.<sup>63</sup>

The difficulty in proving negligence is stated by Goddard L.J. to derive from the fact that . . . valuation is very much a matter of opinion. We are all liable to make mistakes, and a valuer is certainly not to be found guilty of negligence merely because his

55. *Supra* n.17.

56. *Arbitration Act* 1973 (Qld), s.31(a).

57. *Ibid.* s.31(b).

58. *Ibid.* s.31(c).

59. *Arbitration Act* 1973 (Qld), s.20(3).

60. *Supra* n.45.

61. E.g., Rule 11 Professional Code of Real Estate Agents, *Auctioneers and Agents Act* 1971 (Qld) (Order in Council, 11th July, 1974).

62. [1938] 4 All E.R. 457.

63. *Ibid.* at 466.

valuation turns out to be wrong. He may have taken too optimistic or too pessimistic a view of a particular property.<sup>64</sup>

Nevertheless, negligence was proven in the instant case but only because the evidence was overwhelmingly damning. It was the valuer's primary duty to use reasonable care in coming to the valuation for which he was employed. This duty had been breached in that the valuer despite not having practised in the locality, failed to make any local inquiries as to the value of that or similar properties in the locality and failed to inquire as to previous purchase prices of that particular property. The 'remarkable' fact that the defendant was unable to call as a witness any valuer to support the figure of his valuation was noted by the Court.<sup>65</sup>

More recently,<sup>66</sup> damages have been awarded to a plaintiff who purchased a new property on the basis of a letter received from the defendant firm of estate agents confirming that 'a reasonable asking price' for his own property was 100,000 pounds. A sale of this latter property was eventually effected for 36,000 pounds.

As in the *Baxter* case, the decisive factor was that the person giving the 'valuation' was not sufficiently experienced and in this case was merely an employee with no formal qualifications, only nine months experience of estate agency, six months of which had been in New Zealand. An award of over 40,000 pounds in damages for breach of duty was made.

By virtue of these two successful suits for negligence, it may be concluded that it is only in cases of gross disparity in valuations and blatant disregard for available assisting data, that a negligence action shall result in any practical remedy for the party adversely affected by a negligent valuation.

## 8. Retail Shop Leases

Since the enactment of the *Retail Shop Leases Act 1984 (Qld)*<sup>67</sup> the valuer/arbitrator quandary has, to some extent, been eliminated in the retail shop leases sphere. Section 10(2) of the Act provides that where rental is reviewable during the currency of a retail shop lease having regard to the market rent of the premises—

then that market rent shall be determinable by reference to the rent that would be paid for the retail shop if it was unoccupied and offered for rental for the use of which the premises are presently permitted or will be permitted under the lease, and having regard to the terms of the lease, on a free and open market *and the lease shall be deemed to further provide for submission to arbitration of the question of what rent could be so expected if there be no agreement between the landlord and tenant upon that question.* (Emphasis added)

This reference to arbitration is to be construed as a reference to arbitration conducted in accordance with the *Arbitration Act, 1973, (Qld)* unless the lease expressly provides for the mode of arbitration and the lease itself is deemed to be an agreement to arbitrate.<sup>68</sup> It is to be noted that the jurisdiction conferred upon members of the Retail Shop Lease Mediation Panel<sup>69</sup> and upon the Retail Shop Lease Tribunals,<sup>70</sup> bodies established to hear disputes under retail shop leases, expressly excludes jurisdiction to hear any dispute as to the amount of rent payable.

Where the tenant of a retail shop lease qualifies for and exercises the statutory option to renew the lease for a second term pursuant to s.13 of the Act, a problem may arise in respect

64. *Ibid.* at 459.

65. *Ibid.* at 463.

66. *Kenny v. Hall, Pain and Foster* (1976) 239 E.G. 355

67. Operational from 7 March 1984, except for the provisions relating to the Mediation Panel and the Tribunals which commenced on 1 July 1984.

68. Section 4(2) *Retail Shop Leases Act 1984 (Qld)*.

69. *Ibid.* s.23(2).

70. *Ibid.* s.23(2)(b).

of the rental payable during the renewed term. The lease for the renewed term is deemed to provide, in the absence of any rent review provision in the initial lease, that the rental 'shall be determined having regard to the market rent applying to that retail shop.'<sup>71</sup> It is then calculable by reference to s.10(2) as set out above. Where the initial lease provides for a review of rental, that same review mechanism, however inappropriate, is automatically incorporated in the new lease.<sup>72</sup> Consequently, both landlord and tenant ought to give consideration to this eventuality prior to entering into the initial lease.

### 9. Suggested Reforms

The following suggestions are made with a view to overcoming some of the difficulties.

First, as a starting point, there seems no good reason why a valuer should not publish his reasons for arriving at his valuation together with methods of calculation. Apart from the fact that such publication may reveal an obvious error, an opportunity should be given for the lessee to be in a position to mount a challenge to the conclusions. Such an obligation could be simply provided for in the lease.

Secondly, there should be a specific time limit imposed by the lease in which a lessor should undertake his rent review. Failure to notify a lessee of the quantum of rent as reviewed within that period allowed, should disentitle the lessor to the benefit of the additional rent. Such a time should be calculated according to the availability of information upon which the review is based.

Thirdly, less disputes would eventuate if there were a settled formula in the lease based, perhaps, upon Consumer Price Index projections prior to the time the lease was entered into. These projections could be made by anticipating movements in the Index from a study of the fluctuations over the previous, say, five years. In this way, each party would, respectively, know well in advance his likely income and expenditure and future financial planning would be facilitated.

Fourthly, the rent review clause should be deemed to be an essential term of the lease, a breach of which by either party, and particularly by the lessor, would permit the right of termination by the lessee, notwithstanding the exercising of an option by the lessee which may have brought the clause into operation. This may be particularly so where a lessee is in possession, awaiting the submission of a new lease, not yet prepared because of a failure by the lessor to calculate and notify new rental. A lessee should not be prejudiced by the lessor's inaction. This may be overcome by providing that the lessee may initiate the review process.

Fifthly, there should be some more direct access by the parties to the Court (preferably the Supreme Court by summons) to enable a Judge upon suitable affidavit evidence being presented to make a finding upon the actual question of quantum of rent payable. The right to approach the Court in this manner should be written into the rent review provisions on the grounds that the mechanism may fail because a third party nominated therein declines to make the appointment or the person appointed declines to act. Presently, the Australian Courts would leave the parties without a remedy in this instance.

Finally, there seems to be no good reason why the mechanism should not permit both parties to make representations or submissions to the arbiter (whether arbitrator, valuer or judge) and that these submissions, together with the substance of the deliberations, should be reviewable by a Court on the basis mentioned above.

There are no ready solutions. Legislative prescription is not necessarily the answer. Perhaps, it would be more just to permit market forces to continue to dictate the position in the true *laissez faire* spirit of freedom of contract on the basis that the fortunes of the commercial leasing market regularly fluctuate.

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71. *Ibid.* s.13(1)(f).

72. *Ibid.*