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AJZNER v CARTONLUX PTY LTD - [1972] VR 919

SUPREME COURT OF VICTORIA
PAPE , J

28-30 June, 5 July 1972

Landlord and tenant -- Lease for fixed term -- Option for extension of term -- Rent for extended period to be determined by arbitrator in default of agreement -- Arbitrator to be appointed by secretary of Real Estate and Stock Institute -- Submission by parties requesting appointment of valuer to determine rent -- Valuer appointed and determines rent -- Parties bound by determination of valuer.

Arbitration -- Provision in lease for appointment of arbitrator to determine rent for extended term -- Whether reference by parties to arbitrator or valuer -- Whether to conduct judicial inquiry or determine according to his skill and experience -- Whether necessary to conduct hearing and call evidence -- Open reference -- Arbitration Act 1958 (No.6200).

A lease for five years contained an option to the lessee for extension of the term for a further five years 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, but the parties were unable to agree upon the rental. The parties each then signed a "submission" requesting the president of the RESI to appoint a valuer to determine the rental. A valuer was duly appointed and after inspecting the premises and considering a written statement by the lessee, determined the rental at a figure in excess of that which the lessors had, in negotiation, been prepared to accept. On the lessee refusing to sign a lease at the rental so determined, the lessors issued a writ for specific performance.

Held: (1) the lease did not require a reference to an arbitrator who was to conduct a judicial inquiry in accordance with the provisions of the Arbitration Act, but merely a reference to a person appointed in accordance with the lease who was to make a determination according to his skill and experience.

(2) Even if the lease required the appointment of an arbitrator in the strict sense--

(a) Such an arbitrator would have been entitled to determine the rental without calling evidence and without conducting a hearing;

(b) the parties by their consent had agreed to the appointment of a valuer or appraiser and were bound by his determination.

(3) The reference was an open reference and the referee was entitled to determine a rental in excess of that which the lessor had been prepared to accept.

(4) Specific performance should, accordingly, be decreed.

Trial of Action

The material facts appear sufficiently from the headnote and fully from the judgment, infra.

A R Castan, for the plaintiffs.

H Emery, for the defendant.

Pape , J:

In order properly to understand the issues in this case and the arguments submitted to me thereon, it is necessary to state the facts somewhat more fully than is usual. The plaintiffs were the owners of factory premises situate at 67-73 Rupert Street, Collingwood, and by an indenture of lease, made on 24 November 1965 they demised those premises to the defendant, Cartonlux Pty Ltd, for a term of five years commencing on 1 January 1966, at a clear weekly rental of $116 payable monthly at the rate of $502.67.

[1972] VR 919 at 920

By CL18 of this lease it was provided that in case the premises at any time during the term be destroyed or damaged by fire so as to be unfit for occupation and use, and the policy or policies effected by the lessors shall not have been vitiated or payment of insurance moneys refused in consequence of some act or default of the lessee, a fair proportion of the rent reserved according to the nature and extent of the damage sustained shall be suspended until the premises shall again be rendered fit for occupation and use, "and in the case of difference touching this proviso the same shall be referred to arbitration in accordance with the provisions of the Arbitration Act 1958 or any statutory modification thereof for the time being in force".

By CL20 it was provided that if the lessee shall not be in default under the lease it shall have the option of extending the term of this lease for a further period of five years upon the following conditions:--

1. The option shall be exercised in writing not later than three months before the expiration of the term thereof.

2. The rent for the extended period shall be such sum 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.

3. The covenants herein contained (this option and the amount of rent excepted) shall apply during the extended period. By CL21 it was provided that if the lessee shall desire to purchase the premises during the term created by the the lease or within the extended period mentioned in CL20, it shall give the lessors notice in writing stating the offer to purchase at a stated price, and should the lessors not accept the stated price and should agreement on the purchase price be not reached within 14 days "then the purchase price for the said premises shall be determined by a valuer to be appointed by the President for the time being of the Real Estate and Stock Institute of Victoria or his nominee, and such purchase price as is determined by the valuer shall be binding on both lessor and lessee".

It was common ground that the defendant duly exercised its option in accordance with the requirements of CL20(1) above set out, on 14 May 1970.

On 21 May 1970 the solicitors for the plaintiffs wrote to the solicitors for the defendant a letter in which they acknowledged receipt of the notice of exercise of the option, and stated that their client was willing to enter into a fresh lease for a further term of five years at a weekly rental of $145.

On 1 June 1970 the defendant's solicitors answered this letter and offered to pay a weekly rental of $123, and on 4 June 1970 the plaintiffs' solicitors wrote to the defendant's solicitors stating that their clients did not accept the offer of $123 but required payment of rental at the rate of $145 per week.

By 24 June 1970 no reply had been received from the defendant's solicitors to this last-mentioned letter, and a reminder to this effect was sent to the defendant's solicitors on 24 June 1970. Apparently this reminder did not provoke any action, and on 24 July 1970 the plaintiffs' solicitors wrote again to the defendant's solicitors. In this letter it was stated that if the defendant did not wish to lease the premises for $145 per week the plaintiffs required it to vacate the premises on the expiration of the current lease. It was then said: "Finally if your client wishes to avail himself of an arbitrator as is provided in the lease we would be obliged if you would submit the name of a valuer to us for consideration." It is to be noted in regard to this latter portion of the letter that the writer appears to have overlooked the fact that the appointment of the arbitrator was by CL20(2) of the lease to be made by the secretary of the Real Estate and Stock Institute of Victoria and not by the parties. The reference to a valuer is also of significance, but only, I think, because it shows that the plaintiffs regarded a valuer as being the most suitable appointee.

[1972] VR 919 at 921

This letter was replied to by the defendant's solicitors on the 3 August 1970. In this reply it was stated that the defendant had instructed Messrs. G. D. Langridge and Son to inspect the premises and determine their fair value, which they had stated to be $7000 per annum (or about $134.50 per week). It was then said that the defendant would not lease the premises at $145 per week, but was prepared to pay $130 per week.

On 4 August 1970 the plaintiffs' solicitors wrote in which it was said: "It seems that we are missing the basic point in this matter in that our client insists on $145 per week rental. If your client does not wish to pay this amount then the president of the Real Estate and Stock Institute is to appoint an independent valuer to give the necessary rental figure. We are not prepared to accept figures from local valuers but insist on the lease being observed as is stated. Your client can elect either to pay the rental of $145 per week or seek arbitration." It is to be noted again that the reference is to an independent valuer appointed by the president of the Real Estate and Stock Institute rather than to an arbitrator appointed by the secretary of that body.

On 5 August 1970 the defendant's solicitors wrote in reply that their client had instructed them that he wished the rental to be determined by an arbitrator appointed by the secretary of the Real Estate and Stock Institute pursuant to CL20(2) of the lease, and asked for suggestions as to how this should be brought before an arbitrator. This request was in strict accordance with CL20(2) of the lease.

On 19 August 1970 the plaintiffs' solicitors wrote a letter to the defendant's solicitors enclosing a copy of a letter of the same date which they had forwarded to the president of the Real Estate and Stock Institute. The terms of this letter were: "We act for B Ajzner and others, the lessors as noted in the enclosed lease. You will note that pursuant to CL20 of the lease failing agreement between the parties as to extended term of such lease the president of the Real Estate and Stock Institute is to appoint a valuer to determine the rental in question and we would be obliged if you would make the necessary appointment and advise us as to the fees payable to the Real Estate and Stock Institute in this matter."

On 25 August 1970 the assistant secretary of the Real Estate and Stock Institute wrote to the plaintiffs' solicitors a letter enclosing "the usual submission forms to be signed requesting the president to appoint a valuer to determine the

rental of the above premises". It was then stated that it was usual for each party to sign the submission and forward a cheque for half the appropriate fee based on the scale set out on the attached form--that the amount is usually based on the current rental, any adjustment being made on the completion of the determination, and that on completion and return of the form the matter would be placed before the president for his appointment. The form of submission referred to was addressed to the general secretary of the Real Estate and Stock Institute and read: "We Beryl Ajzner, Chaim Packanowski, Giovanni Basso, Fiorina Basso and Keith Effron herewith request the president of the Real Estate and Stock Institute of Victoria to appoint a valuer for the purpose of determining the rental of premises known as -- "(this was left blank)"--and agreed to bear half the cost of such valuation unless there is any prior agreement to the contrary. Cheque on account of the fee (being half the scale based on the current rental) is enclosed."

[1972] VR 919 at 922

A similar form made out for signature by Szloma Rubinstein, director of the defendant company on its behalf, was also enclosed.

On 26 August 1970 the plaintiffs' solicitors wrote to the defendant's solicitors a letter enclosing a photocopy of the letter dated 25 August 1970 and also enclosing the lessee's copy of the submission form for completion by the defendant and suggesting that on its return the defendant's cheque for $45, being its half of the fee, be enclosed.

On 22 September 1970 the defendant's solicitors wrote a letter to the plaintiffs' solicitors referring to an earlier telephone conversation, and confirming that they had forwarded to the secretary of the Real Estate and Stock Institute the submission form signed by the lessee together with their cheque for $45 being the lessee's share of the cost of valuation, and asking that they let the secretary have the plaintiffs' part of the submission form and their share of the cost of valuation as soon as possible.

On 28 September 1970 the plaintiffs' solicitors wrote to the general secretary of the Real Estate and Stock Institute enclosing their client's completed submission form and their cheque for $45, and asked that the president make the necessary appointment. They also enclosed the original lease. A copy of this letter was sent to the defendant's solicitors.

On 30 September 1970 the assistant secretary of the Real Estate and Stock Institute wrote letters to the plaintiffs' solicitors and the defendant's solicitors, advising them that the president had appointed A. A. Macvean of Coverlid and Davies Pty Ltd, 166 Swan Street, Richmond as the valuer to determine the rental of the subject premises. The letters concluded thus:

"Copy of lease submitted has been forwarded to the valuer together with cheque for $90. Should your client have any additional information which he considers the valuer should take into account, would you please ask that he forward details in writing to him. In due course copy of his determination together with any adjustment of account will be forwarded to you."

Thereafter the defendant's managing director, Rubinstein, wrote a letter to Mr. Macvean drawing his attention to a series of matters affecting the factory premises, namely, that of the total area of 10,000 square feet, an area of 800 square feet at the rear was of no use, that there was no parking space; that the lane leading to the garage was too narrow to allow access by motor vehicles, which had to be left in the street; that the goods entrance was too narrow; that rain constantly entered one side of the building which was in very bad condition, and that the toilet facilities were in a shocking condition. He concluded his letter by saying: "I feel you should consider all these factors and take them into account when determining the rental." It does not appear that this letter was ever brought to the notice of the plaintiffs or their solicitors. This letter was undated and it is not clear when it was received, but Mr. Macvean said he thought he received it between his first visit to the premises in October 1970 and his second visit in December 1970. At any rate, it is certain that he received it before he had made his determination.

On 12 November 1970 the plaintiffs' solicitors wrote to the assistant secretary of the Real Estate and Stock Institute

a letter asking for a progress report, and on 16 November 1970 the defendant's solicitors wrote to Coverlid and Davies Pty Ltd (the company with which Macvean was connected) a letter in which they said: "We note that the lease and cheque for $90 were forwarded to you in September in relation to the determination of the rental for the above premises. We shall be pleased if you will let us have your determination as soon as possible."

[1972] VR 919 at 923

On 22 January and 26 January 1971 plaintiffs' solicitors wrote to the secretary of the Real Estate and Stock Institute and to Coverlid and Davies Pty Ltd letters asking for expedition, and on 10 February 1971, the solicitors for each of the parties received from Mr. Macvean a letter in identical terms to the following effect: "Pursuant to my appointment as a valuer to determine the rental of the property at the above address in the terms set out in CL20 of a lease dated 24 November 1965, I report having determined the rental for the option period at $8400 per annum." This is equivalent to $700 per month or $161.50 per week.

On 12 February 1971 the plaintiffs' solicitors wrote to the defendant's solicitors a letter advising them of the determination and asking for the payments of rental to be made accordingly, and on 16 February 1971 they wrote a further letter enclosing a lease in duplicate of the subject premises for a further term of five years at a rental of $700 per month. This lease was in the same terms as the lease dated 24 November 1965 except for the rental reserved and the exclusion of the option contained in CL20.

On 23 February 1971 the defendant's solicitors wrote to the plaintiffs' solicitors a letter which I set out in full:--

"We acknowledge receipt of your letters of 12 February and 16 February. In our view, Macvean of Coverlid and Davies Pty Ltd did not carry out his duties as an arbitrator pursuant to CL20 of the lease, and apparently misunderstood what was required of him. "An arbitration is clearly a decision between two competing claims. In this the competition between claims arose because agreement could not be reached. Your clients asked for a rental of $145 per week and in our letter to you of 3 August 1970 we offered $130 per week based upon the determination of Messrs. G D Langridge and Son. "In your letter to us of 4 August, you stated that your clients insisted upon $145 per week, thus bringing the matter in issue between the parties and in our letter of 5 August, we stated that we wished the rental to be determined by an arbitrator appointed by the Real Estate and Stock Institute of Victoria pursuant to CL20(2) of the lease. "Coverlid and Davies Pty Ltd were then appointed arbitrators, the lease was submitted to them and we understand that both parties made submissions. It seems clear to us that the decision made by the arbitrator should not have indicated a rental in excess of $145. It would seem to us that the proper course is to have the matter arbitrated and that in the circumstances it would not be proper to have Mr. Macvean act as arbitrator, but that a request should be made to the Real Estate and Stock Institute for the appointment of an arbitrator."

A copy of this letter was sent by the defendant's solicitors to Mr. Macvean. On 24 February 1971 the plaintiffs' solicitors wrote a letter to the defendant's solicitors in these terms:--

"We have your letter of 23 instant. We do not agree with your contention therein and would have thought it was quite clear at all times that both parties were to be bound by the rental as determined by a valuer appointed by the secretary of the Real Estate and Stock Institute. "CL20(2) of the relevant lease is quite specific in that if there is a failure to mutually agree on rental, then the matter is to be determined by an arbitrator and it is our contention that the rental was properly determined by Mr. Macvean. Unless we receive the lease together with our costs and disbursements thereon by Thursday, 4 March 1971, we are instructed to issue a writ to specific performance in this matter without further notice to your client. "Would you kindly advise us if you are authorised to accept service of such writ."

[1972] VR 919 at 924

In these circumstances, the writ was issued by the plaintiffs on 5 March 1971. By the statement of claim endorsed thereon the plaintiffs claimed specific performance of the contract for a lease constituted by the above correspondence,

damages for breach of contract, and alternatively possession. By para. 5 of the statement of claim it was alleged that "The plaintiffs and the defendant were unable to agree upon the rental to be paid by the defendant during the further term and in accordance with CL20(2) of the said lease the plaintiffs and the defendant requested the president of the Real Estate and Stock Institute of Victoria to appoint an arbitrator to determine the rental to be paid during the further term", and by para.6 it was alleged that "Pursuant to the said request the president of the Real Estate and Stock Institute of Victoria appointed one A. A. Macvean, a valuer, of 166 Swan Street, Richmond to determine the rental for the further term in accordance with CL20(2) of the said lease". Paragraph 7 alleged that Macvean duly determined the rental at $8,400 per annum.

By the defence, the defendants admitted the lease and the exercise of the option, and the facts alleged in paras.5 and 6 of the statement of claim. As to para.7, it was pleaded that "if the said Macvean did determine the said rental at $8400 (which is not admitted) then such rental was not determined by arbitration in accordance with the terms and provisions of the said lease but by means of an independent and cursory valuation without any proper reference to the parties or any of them". There was then a counter-claim for relief from forfeiture should it be found that the defendant had committed any breaches of the covenants contained in the lease.

By the reply, it was pleaded that if Macvean did not determine the rental by arbitration but by means of an independent and cursory valuation without proper reference to the parties (which was denied) then the defendant consented to his so acting and thereby waived any right it might otherwise have had to insist upon the rent being determined in any other manner.

As Mr. Emery, who appeared for the defendant, called no evidence, Mr. Castan, who appeared for the plaintiffs, addressed first. In the course of his submissions he elaborated an argument which he forecast in his opening to the effect that CL20(2) on its proper construction did not provide for arbitration stricto sensu, but merely for an appraisement or valuation by a third party.

In his address Mr. Emery pointed out that paras.5 and 6 of the statement of claim referred to the appointment of an arbitrator, and thereupon Mr. Castan applied for leave to amend the statement of claim, which after allowing him some time to consider the scope of the proposed amendments, I allowed, reserving the question of costs. Paragraphs 5 and 6 of the statement of claim were then amended to allege that consequent upon the failure of the parties to agree on the rental, the plaintiffs and the defendant requested the president of the Real Estate and Stock Institute to appoint a valuer to determine the rental. Mr. Emery then made consequential amendments to the defence, para.4 of which then read: "As to para.5 hereof it admits that the plaintiffs and the defendants were unable to agree upon the rental to be paid by the defendant during the further term but otherwise denies each and every allegation therein contained and says further that in accordance with CL20(2) of the said lease the plaintiffs and the defendant requested the president of the Real Estate and Stock Institute of Victoria to appoint an arbitrator to determine the rental to be paid during the further term. It was agreed between the plaintiffs and the defendant that the said request be made to the president in lieu of the secretary of the Real Estate and Stock Institute of Victoria as required by the said CL20(2)." Paragraph 4A as amended read: "Save that the said appointment was to determine the said rental in accordance with the provisions of CL20(2) of the said lease it admits the allegations in para.6."

The reply was amended by the insertion of paras.1A and 1B which were as follows:--

"1A: If as alleged in para.4 [of the defence] in accordance with CL20(2) of the said lease the plaintiffs and the defendant requested the president of the Real Estate and Stock Institute of Victoria to appoint an arbitrator to determine the rental during the further term (which is denied) then the president of the Real Estate and Stock Institute of Victoria did appoint an arbitrator to determine the rental during the further term and the arbitrator duly made such a determination in accordance with the said CL20(2)("1B: If as alleged in para. 4A the said appointment was to determine the said rental in accordance with the provisions of CL20(2) of the said lease (which is denied) such

appointment and determination were duly made in accordance with the provisions of the said CL20(2)."

Apart from the tender of exhibits the only witness called on behalf of the plaintiffs was Allan Arthur Macvean, a Fellow of the Commonwealth Institute of Valuers and a Fellow of the Real Estate Institute. He produced a letter of appointment from the assistant secretary of the Real Estate and Stock Institute of Victoria dated 30 September 1970, which was admitted in evidence. This letter read:--

"I would confirm telephone conversation that you have been nominated by the president as a valuer to determine the rental of the above premises. "This appointment has been made following your assurance that you have not acted for either of the parties in the dispute and that there is no other reason why you should not act as an impartial valuer. As the nominated valuer to determine the rental, duties are those of an assessor to determine the rent after having had regard to all factors which should be considered when making a valuation for rental purposes. "You are only required and in fact advised to inform the parties as to the rent you have determined and are not obligated to state the reasons for arriving at your determination. "However, you should keep full record of all relevant data and information so that this will be available should there be any subsequent investigation as to the basis of your determination. "In advising of your appointment I have asked that the parties set out details in writing of any special matter which they consider should be taken into account. Details are set out on the attached sheet, would you be good enough to send an account for any adjustment together with your determination to each party in due course."

Macvean said that after receiving that letter he inspected the outside of the property and took its dimensions and that on two occasions before the end of the year he spoke to Rubinstein at the premises but that it was not then practicable to make a full scale inspection of the premises and it was agreed that he should return later. Paragraphs 2 and 3 of an affidavit in opposition to a summons for final judgment made by Szloma Rubinstein sworn on 3 May 1971 were put to him in which it was deposed that "On an afternoon in October 1970 at 5 p.m. two men called at the premises and informed me that they were from Coverlid and Davies, that they had been appointed to value the place and wished to see it. I asked them to call back as I had to leave urgently. They called again in December 1970 at about 5 p.m. On this occasion I informed them I had had the property valued and in answer to their question informed them that the valuation was $133. They, or one of them, said that that figure was fair enough. They again remained about five minutes during which they inquired of me how the business was and there was a very short discussion about the business, in which I informed them the plaintiffs were claiming $145 for rental and I should pay $133 as that was the valuation. In para. 3 the deponent swore that so far as he was aware there was no other visit to the premises by the alleged arbitrator and the defendant was never at any time asked to or given an opportunity to make any submission to or put any facts before the alleged arbitrator."

When this was put to him Macvean said that it was correct that he originally called at the premises in October and that it could be correct that he next called in December. He denied that he had been told that the defendant had a valuation of $133 or that the plaintiffs were claiming $145, and he said that the first he heard of these figures was after he had made his written determination. He said that he had received the undated letter from Rubinstein, and that so far as it was possible or necessary he had taken the matters mentioned in that letter into consideration in making his determination. He also said that he made a full inspection of the premises at some time between the resumption of work at the factory in 1971 and the date of his determination, and that he remained on the premises for three-quarters of an hour or more. During this visit Rubinstein accompanied him on his inspection for part of the time, and pointed out the limits of the building and the area at the back that he had spoken of in his letter, and also discussed with him the lavatory accommodation. He also pointed out the disadvantages of the entry to the premises and said that it was insufficient to enable easy access for large vehicles, which Macvean said he took into account. He said that after the inspection he had an uninterrupted discussion with Rubinstein. He also said that he had received no submissions from the plaintiffs with regard to the rental. When cross-examined he told Mr. Emery that there never had been any suggestion that he should act as an arbitrator, and his duties as he understood them were to look at the premises and make his own assessment of their rental value. He thought it was part of his duty to interview any tenant in possession,

and said that he arrived at his determination as a result of his experience in valuing and in leasing and letting property and as a result of enquiries made of other estate agents or valuers in the area. Neither Rubinstein nor the owners made any request to him to give evidence or to have a hearing.

Since the defendant called no evidence, that of Macvean stands uncontradicted, and I have no hesitation in accepting it. It appears from this evidence and I so find that Rubinstein had every opportunity of putting any relevant matters before Macvean and that he availed himself of this opportunity not only at the factory but also by submitting exhibit "T" to Macvean. I am satisfied that Macvean was not told of the defendant's offer of $133 per week or of the valuation on which it was based, and that he was not told that the plaintiffs were asking $145 per week. Paragraph 3 of Rubinstein's affidavit of 3 May 1971, is thus plainly incorrect.

[1972] VR 919 at 927

The argument put by Mr. Castan on behalf of the plaintiffs was first, that in all the circumstances of this case and upon its proper construction, what the parties had agreed to by CL20(2) of the lease was not an arbitration, but an appraisement or valuation which is what they asked for and what they got. Secondly, he argued that even if what was required by CL20(2) was an arbitration, and Macvean must be regarded in law as an arbitrator, in the circumstances of this case he was entitled to come to a determination as the result of his own skill and knowledge and that there was no necessity to hold formal hearings and hear oral submissions by the parties and to take evidence when none had been tendered by the parties. In other words, what he argued was that even if Macvean had been appointed as an arbitrator, he would have been entitled to act in precisely the same manner as that in which he had in fact acted. Thirdly, he argued that even if the lease required an arbitrator in the full sense to be appointed, here the parties had by agreement engaged to accept the determination of a valuer arrived at as the result of his own skill and experience, and that both were bound by his determination.

Mr. Emery's argument was that on its proper construction CL20(2) read in conjunction with CL18 and 21 of the lease required the determination of the rental to be submitted to arbitration in accordance with the provisions of the Arbitration Act 1958. He contended that although Macvean had been appointed to determine the rental, he was not appointed as an arbitrator, but as a valuer, that he did not act as an arbitrator, and that in fact he made no award. The result of the success of this argument would be, he contended, that the rental had never been determined by arbitration in accordance with CL20(2) of the lease, and until it had been so determined, specific performance could not be decreed. He fairly conceded that if I found that Macvean was properly appointed and had made his determination, then the defendant was bound thereby, must pay the rental so determined as from the expiration of the lease, and that a decree for specific performance should be made.

In view of this concession, the most satisfactory way of dealing with the matter is to examine Mr. Emery's argument and determine its validity.

The foundation upon which Mr. Emery's argument is built is one of semantics, for the contention that CL20(2) amounts to an agreement to refer the question of the rental to arbitration in accordance with the Arbitration Act is based upon the use of the word "arbitrator" in the phrase "and in default of agreement a sum to be determined by an arbitrator appointed by the secretary of the Real Estate and Stock Institute of Victoria". Mr. Emery sought to support this conclusion by reference to CL18 and CL21 of the lease. He pointed out that in CL18 (which relates to the suspension, in the case of fire damage, of "a fair proportion of the rent reserved according to the nature and extent of the damage sustained") it is provided that "in the case of any difference touching this proviso [and that is how it appears in the document] the same shall be referred to arbitration in accordance with the provisions of the Arbitration Act 1958". He also pointed out that in CL21 (which relates to determination of the purchase price pursuant to an option to purchase given by the said clause) it is provided that "should agreement on the purchase price be not reached within 14 days then the purchase price shall be determined by a valuer to be appointed by the president for the time being of the Real Estate and Stock Institute of Victoria or his nominee".

[1972] VR 919 at 928

His argument was that these two clauses showed that the draftsman had in mind the difference between an arbitration and a valuation, and that when in CL20(2) he used the words "determined by an arbitrator" the use of the word "arbitrator" must be taken to import a submission to arbitration in accordance with the Arbitration Act. He said the CL18 and CL20 are both dealing with rentals, which are to be determined by arbitration, whereas CL21 is dealing with purchase price, which is to be determined by valuation.

In my view, this argument is fallacious, and that in fact CL18 and CL21 if anything give support to Mr. Castan's first argument. CL18 is, I think, dealing with a wider subject-matter than mere fixation of rental, for it requires the arbitrator to determine how much of a predetermined rental is to be suspended "according to the nature and extent of the damage sustained". The first and all important task of the arbitrator is thus to ascertain the nature and extent of the damage sustained, for it is on this that the extent of the suspension of part of the rental is to be based. This type of inquiry is, I think, one which must be conducted "in a judicial manner" according to judicial rules (see Re Dawdy and Hartcup (1885) 15 QBD 426, per Lord Esher, MR at pp. 429 and 430) and is properly the subject of arbitration in accordance with the Arbitration Act. Furthermore, under CL18 what is referred to arbitration is the "difference touching this proviso" and a difference between the parties is essential to constitute a submission to arbitration proper. But when one comes to consider CL20(2) and CL21 an affinity between them is obvious. Neither provides for a difference between the parties to be referred to another to determine, as is the case in CL18. Each simply provides that in default of agreement the rental or the purchase price is to be a sum determined by an arbitrator in one case and a valuer in the other. In each case the matter referred for determination is the simple ascertainment of a sum of money as rental or purchase money. I cannot understand why, if, in dealing with the matter mentioned in CL20(2), it was intended that differences between the parties were to be referred to arbitration in accordance with the provisions of the Arbitration Act (which is the usual method of describing an agreement to refer to arbitration) the same form of words as was used in CL18 was not used in CL20(2), and I am driven to the conclusion that the draftsman had no very clear idea of the difference between an arbitrator and an appraisor or valuer where arbitration in its true sense was not contemplated.

I think it is plain that the mere use of the word "arbitrator" in CL20(2) does not have the effect contended for by Mr. Emery.

The word has an imprecise connotation, for in a general sense any person engaged to give an authoritative decision as between parties may be said to be an "arbitrator" whereas in a particular sense the word may refer to an "arbitrator" appointed in accordance with the Act, and the mere fact that a man is called an "arbitrator" does not per se establish that he is to proceed judicially in accordance with the Arbitration Act. In Taylor v Yielding (1912) 56 Sol Jo 253, Neville, J, in a case in which the facts were somewhat similar to the facts in this case held that where two valuers (and in case of a difference, an umpire) had been appointed to value shares, the valuers were to be regarded as arbitrators. But the fact that the subject- matter of the reference was shares in a company the value of which could only be ascertained after a consideration of the affairs of the company, and the fact that an umpire was appointed, distinguish the case on the facts from this case. I cite the case, however, not for the decision on the facts, but because Neville, J, at p. 253 said: "The cases are quite clear that you cannot make a valuer an arbitrator by calling him so, or vice versa." There are many cases in the books where a man has been appointed as an arbitrator but where it has been held that no arbitration was intended but that he was merely a valuer: see Re Hammond and Waterton (1890) 62 LT (NS) 808; Bottomley v Ambler (1877) 38 LT (NS) 545; Collins v Collins (1858) 26 Beav 306; 53 ER 916, and Re King and Acclimatization Society of Queensland, [1913] St R Qd 10. (This latter decision was reversed by the High Court (see 17 CLR 223) but on a point which did not affect the decision that the "arbitrators" were merely appointed to value.) Conversely, in Re Hopper (1867) LR 2 QB 367, and in Taylor v Yielding, supra, it was held that where "valuers" were appointed to determine the compensation payable to a lessee on delivering up possession, and to value shares in a company they were to be regarded as arbitrators stricto sensu. It was thus apparent that the mere use of the word "arbitrator" in CL20(2) does not conclude the matter and establish that formal arbitration proceedings were intended. The test was stated by Williams, J., in Re Hammond and Waterton, to which I have already referred, at p.809, where his Lordship said: "The view which I take is this, that in every case it is necessary to look, not only at the exact words of the agreement, but also at the

subject-matter with which the agreement deals. Then it can be ascertained whether the parties intended that a mere valuation should take place or an arbitration."

[1972] VR 919 at 929

In Re Dawdy and Hartcup, to which I have also referred, Lord Esher, MR, said at p.429: "The word 'arbitration' in s17 of the Common Law Procedure Act has been construed as meaning an arbitration to be conducted according to judicial rules, where the person who is appointed arbitrator is bound to hear the parties, to hear evidence if they desire it, and to determine judicially between them. He must have a matter before him which he is to consider judicially. As a consequence of this, it has been held that if a man is, on account of his skill in such matters, appointed to make a valuation, in such a manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge, and his skill, he is not acting judicially; he is using the skill of a valuer, not of a judge...We must, therefore, look at the agreement and see whether one or more persons are appointed to value, and in what way they are to act...There is nothing to shew that they" (i.e. those appointed) "are to hear the parties, and determine judicially between them. The case comes within the authority of Collins v Collins (1858) 26 Beav 306; 53 ER 916, and Bos v Helsham (1886) LR 2 Ex 72...Re Hopper (1867) LR 2 QB 367, is not inconsistent."

In Re Carus-Wilson and Greene (1886) 18 QBD 7, the same learned Judge said at p.9: "If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an enquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial enquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances."

[1972] VR 919 at 930

Lindley, LJ, said at p.10: "A valuer may be, in one sense, called an arbitrator, but not in the proper legal sense of the term. In the ordinary case of arbitration there is a dispute which is referred. The object of the valuation, on the other hand, is to avoid disputes. There is nothing in the nature of a dispute when the valuer is appointed. It is a term of the agreement for sale that the timber shall be valued and that the purchaser shall take it at the valuation. It is a mere matter of fixing the price, not of settling a dispute." See also Finnegan v Allan, [1943] KB 425; [1943] 1 All ER 493, per Lord Greene, MR, and Lord Goddard at p.43 6; Bottomley v Ambler, supra, per Thesiger, LJ, at p.546, and Gray v McMath, a Canadian case which is reported at [1902] 1 Ont WR 445.

Basing his argument as I suspect on these latter observations of Lindley, L. J., and Lord Esher, Mr. Emery submitted that I should find that a true arbitration was intended in this case because there was a dispute or difference between the parties--a dispute between the demand on the one side for a rental of $145 and an offer on the other side of $130 and that the scope of the arbitration was confined to this area of difference. I must confess to having some difficulty in understanding quiet how far these observations in Re Carus-Wilson and Greene in relation to avoiding disputes from arising go, for I find it difficult to imagine any case where a matter is referred to another for determination where there is not some dispute or difference. No reasonable man would incur the expense of referring a matter to the determination of another if both interested parties were in agreement with regard to the matter to be referred. However that may be, the important consideration is, in my view, not whether a dispute has arisen, but what the parties have referred to the determination of another. If there is a dispute and the parties have referred their differences to the determination of another, it may well be that the scope of the reference is limited by the extent and area of the dispute. This may be the position of an arbitration pursuant to CL18 of the lease. But if they have not

referred their differences to the determination of another, but have agreed upon an open reference and have merely referred an objective fact, such as a rental or a price, to him for determination in default of their agreement, then I fail to understand why the mere fact that they, at some stage, have disagreed should lead to the conclusion that an arbitration stricto sensu was intended. In this case the difference arising from the offer and counter-offer has relevance only to show that there has been a default of agreement which brings the agreement to refer into operation.

Here, in my view, the parties have not referred their differences to an "arbitrator"; all they have done is to say that in default of agreement the rental is to be such sum as is determined by an arbitrator, thereby leaving him at large to determine an appropriate rental. The distinction between the two cases adverted to is well illustrated by the case of Thomson v Anderson (1870) 9 Eq 523. That was a case where on the dissolution of a partnership one partner offered to buy the other's share for 18,000 pounds and the other declined the offer, but was willing to accept 20,000 pounds. They signed a memorandum which recited these offers and by which they agreed to leave it to their banker to say what sum should be paid. Vice-Chancellor Malins held that the banker was an arbitrator and that his authority was limited to awarding a sum not less than 18,000 pounds and not greater than 20,000 pounds At p. 529 his Lordship said: "Upon the construction of that instrument I have not a shadow of doubt, and counsel for the Defendants have not pointed out to me any satisfactory reason why, if it was to be an open reference, those sums of 18,000 pounds and 20,000 pounds were mentioned in the reference at all. If it was to be an open reference, it was improper that any sums should be mentioned, because they were calculated to influence the judgment of the arbitrator. If they intended that the question should be left open, it should have gone to him unbiased by anything that the parties had proposed."

[1972] VR 919 at 931

In my opinion, what CL20(2) required was a determination by a person appointed by the president of the Real Estate and Stock Institute of Victoria of an appropriate rental, and that the mere fact that the clause referred to such a person as an arbitrator does not have the effect of making him an arbitrator within the meaning of the Arbitration Act, who is bound to act judicially. I think it is plain from the words used in the clause and from the description of the appointor that the person to be appointed is to be a person skilled in the determination of rentals, and that it was never intended that his determination should be arrived at as the result of a judicial inquiry. If I may apply to this situation the words of James, LJ, in Bottomley v Ambler, to which reference has been made, at p.546: "The subject-matter of the reference is essentially one of valuation and opinion. The arbitrators were the paid agents of the parties interested and it would be absurd to suppose that they were intended to sit with all the pomp of judges."

Since, in my view, there is an ambiguity created by the use of the word "arbitrator" in CL20(2), it is permissible to look at the conduct of the parties when the question of the rental for the extended term arose as an aid to its construction: see Van Diemen's Land Co v Table Cape Marine Board, [1906] AC 92, per Lord Halsbury, LC, at p.98; [1904-7] All ER Rep Ext 1427; New Zealand Diving Equipment Ltd v Canterbury Pipe Lines Ltd, [1967] NZLR 961, per McGregor, J, at p.978, and McCarthy, J, at p.980; Chitty on Contracts, 21st ed., vol. 1, p.160. Here it was not said in CL20(2) that the "arbitrator" was to conduct a judicial inquiry and what was done by the parties shows that it was never intended that he should do so. If their conduct be looked at, it is plain that both parties acted upon the view that CL20(2) was complied with by the appointment of a valuer to determine the rental without formal hearings and without evidence being called, and that they saw no practical difference between the appointment of an arbitrator and the appointment of a valuer. It was only after an adverse determination had been made that the defendant sought a means of escape from it.

The letter dated 19 August 1970 shows that both parties acquiesced in the letter written by the plaintiffs' solicitors to the president of the Real Estate and Stock Institute of Victoria requesting him to appoint a valuer to determine the rental of the premises. Both defendant and the plaintiffs signed the submission forms, making a similar request, the defendant availed itself of the opportunity of making unilateral written submissions (which it could not have done had this been an arbitration in the strict sense--see Russell on Arbitration, 18th ed., pp.181-5) and by letter dated 16 November 1970 the defendant asked the valuer to expedite his determination. All of this tends to support the construction I have put on CL20(2).

I do not think that Macvean was limited in his determination to deciding on a rental within a range of $130 to $145, for what was referred to him was not the differences between the parties, but the determination of a rental as an objective exercise. I think, therefor, that what was done in this case was in accordance with CL20(2) of the lease and that the defendant is bound by the determination of Macvean.

[1972] VR 919 at 932

Although Mr. Emery's argument that Macvean had never been appointed as an arbitrator was maintained consistently throughout his submissions, I have endeavoured to show that whether Macvean was appointed as an arbitrator or as a valuer depends upon the nature of the determination he was required to make and the procedure to be adopted in making it, rather than by the label attached to him in CL20(2). But I feel bound to say that if I were wrong in holding that CL20(2) did not call for the appointment of an arbitrator in the strict sense of the word, and if in law Macvean had been appointed as an arbitrator or was bound to act as such, I still cannot feel satisfied that he was thereby required to act otherwise than as he did. Mr. Emery argued that if Macvean had been appointed as an arbitrator he should have ascertained the differences between the parties; that he should have elicited that the tenant had offered $130 and the landlord had demanded $145. I do not agree with that submission. 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: see Russell on Arbitration, 18th ed., pp. 222, 236, 237. Neither party here requested any hearing and neither party asked the arbitrator to hear witnesses. Furthermore, any evidence of the offers made by the parties would have been inadmissible, for an offer made by an interested party is not evidence of value, and the only question for determination was a fair rental value. Nor was it necessary for the arbitrator to ask for witnesses to be called.

In my view, even assuming that this was an arbitration strictly so called, it was the type of arbitration where the arbitrator was entitled to rely upon his own expertise in arriving at a determination. In Eads v Williams (1854) 4 De GM and G 674; 43 ER 671; [1843-60] All ER Rep 917 (which was a case of arbitration) Lord Cranworth, LC, said at (ER) p.676: "I do not agree in the suggestion, that it was incumbent on the referees to examine witnesses; I do not think, when a matter is referred to surveyors or other persons of skill to fix the value of property to be bought or let, that the meaning is that they are necessarily to examine witnesses; they are intrusted from their experience and observation to form a judgment which the parties referring to them agree shall be considered satisfactory. I do not therefore think that in the present case it is an objection that the referees did not examine witnesses, provided they bona fide meant to say that they knew enough of the subject to decide properly without doing so."

Here the parties were invited to make any submissions in writing relevant to the matter to be determined. The defendant did so, but he did not as he might have done say that he had obtained a valuation from Langridge of $133, nor did he invite the arbitrator to hear Langridge's evidence.

In Jordeson and Co v Stora (1931) 41 Lloyd LR 201, arbitrators and an umpire were appointed in a dispute relating to a timber contract. The award of the umpire was attacked, inter alia, on the ground that he came to a decision without hearing evidence or allowing the parties to present argument. Branson, J, at pp.203-4 said: "Now, I think that the fact that the umpire was an expert in the timber trade and was appointed because he was such an expert must not be lost sight of. I think the parties must be taken to have assented to his using the knowledge which they chose him for possessing; I do not mean to say knowledge of special facts relating to a special or particular case, but that general knowledge of the timber trade which a man in his position would be bound to acquire. For example, had he gone and examined this cargo by himself and had looked and seen with his own eyes that it contained a large percentage of timber which to his own knowledge was faulty, I have no doubt that he could probably use that knowledge without having to do what a Judge might have to do, and that is, call in an expert to give evidence before him that those timbers were unsound and for particular reasons. It is not right to apply to that type of arbitration the strict rules of law and evidence which are applied in this Court." See also Johnston v Cheape (1817) 5 Dow 247; 3 ER 1318, per Lord Eldon, at (Dow.) p. 264; (ER) p. 1323; French Government v Tsurushima Maru (1921) 8 Lloyd LR 403, per Bankes, LJ, at p. 404, and The Myron, [1969] 1 Lloyd's Rep 411, per Donaldson, J, at pp. 415, 416.

[1972] VR 919 at 933

The matters I have referred to were mentioned by Mr. Emery in his argument, not because he was contending that in law there had been an arbitration and an award which he was seeking to set aside (for I think this could only be done by a motion to set aside the award) but for the purpose of demonstrating the disadvantages which he said accrued to the defendant by the failure of the parties to proceed to arbitration. I have mentioned them only to show that, in my opinion, the defendant has lost nothing that he would otherwise have been entitled to had Macvean in law been acting as an arbitrator.

One final matter must be referred to, and that is an argument put to me by Mr. Castan in reply. He submitted that even if it were correct that CL20(2) of the lease required arbitration in its strict sense, yet nevertheless both parties concurred in asking for something different, namely, the determination of a valuer, and that having got what they asked for, neither can complain and each must abide by the result. Mr. Castan pointed out that despite a valiant attempt by Mr. Emery to show that on the evidence, the defendant at all times thought he was getting arbitration and not valuation, it was plain that the defendant knew at all material times that such was not the case. This was not a case where the plaintiffs were represented by solicitors and the defendant was not--everything that was done with the active concurrence of the defendant's solicitors, and both solicitors actively participated in the appointment of Macvean. He argued that had the defendant really considered that it was entitled to have an arbitration in the strict sense of the term when the letter dated 26 August 1970 was received enclosing the submission forms for signature, that was the time for the defendant's solicitors to say that such an appointment was not in accordance with CL20(2), but instead, they obtained the defendant's signature to the submission and the defendant paid his share of the fee. The submission form contained a specification of what Macvean was to do, and that was the equivalent of a formal submission pursuant to the agreement to refer contained in CL20(2).

In my view, this argument is correct. It is plain that an arbitrator derives his authority from the agreement of the parties and that his powers and duties are those, and only those, that the parties have agreed to place upon him. Express and clear agreement between the parties will not only justify a departure from ordinary rules of procedure and the like, but will in general bind the arbitrator to act as the parties have agreed: see Russell on Arbitration, 18th ed., pp. 174-5, and Wright v Howson (1888) 4 TLR 386.

Here I find in the correspondence the clearest evidence of agreement to the course which was pursued, and I am in no doubt that the defendant and his solicitors were well aware of it. Any doubts concerning this must be set at rest when it is realized that on 16 November 1970 the defendant's solicitors wrote to Macvean stating that in September the lease and cheque for $90 were forwarded to him in relation to the determination of the rental, and asking him to let them have his determination as soon as possible.

In these circumstances, I think there was a clear waiver of the strict requirements of CL20(2), assuming (contrary to what I have decided) that they required an arbitration in the strict sense of the word: see Russell, 18th ed., p.226.

For these reasons, I think that there must be judgment for the plaintiffs with costs. However, at a very late stage the plaintiffs sought and obtained leave to amend their pleadings, which necessitated a delay of one hour and a consequential amendment of the defence, and I think it proper to reduce the amount of their taxed costs by $200 to compensate the defendant for this. There will be judgment for the plaintiffs on the claim and on the counter-claim.

I order and decree that the contract for a lease referred to in the statement of claim be specifically performed and carried into effect by the execution by the defendant of a lease to the effect of that forwarded by the plaintiffs' solicitors to the defendant's solicitors on 16 February 1971.

Order

Specific performance decreed.

Solicitors for plaintiffs: Peter Barker, Harty and Co

Solicitors for defendant: McIntyre and Carter.

ALEX CHERNOVA