NEW SOUTH WALES COURT OF APPEAL

CITATION: Kanivah Holdings Pty Limited v Holdsworth Properties Pty Limited & Ors [2002] NSWCA 180

FILE NUMBER(S):
40433/01

HEARING DATE(S): 2 April 2002

JUDGMENT DATE: 21/06/2002

PARTIES:
Kanivah Holdings Pty Limited (Appellant)
Holdsworth Properties Pty Limited (First Respondent)
Egan National Valuers (NSW) Pty Limited (Second Respondent)
Keith Norris (Third Respondent)

JUDGMENT OF: Beazley JA Stein JA Giles JA

LOWER COURT JURISDICTION: Supreme Court - Equity Division

LOWER COURT FILE NUMBER(S): ED 50129/99

LOWER COURT JUDICIAL OFFICER: Palmer J

COUNSEL:
D E Grieve QC/M R Gracie (Appellant)
B W Walker SC/S Ivantsoff (First Respondent)
C E Adamson (Second and Third Respondent)

SOLICITORS:
Emerys Law Firm (Appellant)
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Philips Fox (Second and Third Respondents)

CATCHWORDS:
LANDLORD AND TENANT - determination of rent under review clause of lease - whether determination of valuer was in accordance with the lease - negligence - D

LEGISLATION CITED:
N/A

DECISION:
Appeal dismissed with costs

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40433/01

ED 50129/99

BEAZLEY JA
STEIN JA
GILES JA

Friday, 21 June 2002

KANIVAH HOLDINGS PTY LIMITED v HOLDSWORTH PROPERTIES PTY LIMITED & ORS

Facts

This is an appeal from a judgment of Palmer J of 21 May 2001. His Honour dismissed a summons brought by the appellant, Kanivah Holdings Pty Limited, against the respondents, Holdsworth Properties Pty Limited (Holdsworth), Egan National Valuers (NSW) Limited (Egans), and Keith Norris. The case concerned the determination of rent under a review clause in a lease for premises at Burwood.

The lease was assigned to the appellant on 1 April 1997. The first respondent, Holdsworth, acquired the subject land from the original lessor, the State Rail Authority, on 8 May 1997. The Lease provides for periodic rent reviews to be determined either by agreement between the Lessor and the Lessee or, if they fail to agree, by a valuer in accordance with provisions set out in the lease.

Holdsworth and Kanivah failed to agree on the current market rental under the lease and approached Mr Norris, a director of Egans and a licensed valuer. He undertook the determination of the current market rental for the land and furnished his determination to the parties on 24 September 1999.

Kanivah was dissatisfied with Mr Norris' determination and brought proceedings seeking a declaration that his determination was not made in accordance with the lease and, therefore, was of no effect. In the alternative, Kanivah claimed damages against Egans and Norris for negligence.

Palmer J was persuaded that the court was entitled to go behind the face of Mr Norris' determination and could have regard to extrinsic evidence in order to decide whether the determination had been conducted in accordance with the lease. His Honour held that Mr Norris carried out his determination having regard to the terms of the Lease and had given sufficient reasons for his determination. Palmer J also concluded that Kanivah failed in all of its attacks on Mr Norris' determination and rejected the contention that Mr Norris was negligent in the manner in which he made his valuation.

On appeal

Kanivah submits that his Honour erred in his approach to the issue of the valuation methodology employed by Mr Norris to reach his determination. The appellant contends that the valuer failed to determine the nature and extent of the retail and commercial development. Further, the valuer erred in determining the net lettable areas. Kanivah also submits that Norris failed to make an adjustment to comparable sales which he took into account.

Held (per Stein, Beazley, Giles JJA in agreement)

1) The decision of the valuer is final and binding. The valuation stands even if made negligently. A mistake by the valuer will only matter if it shows that the valuation was not made in accordance with the contract. A failure to take account of relevant matters (or the converse) is not a vitiating mistake.

2) Palmer J was correct in finding that there is no vitiating error in the determination of Mr Norris. Once Norris had found the highest and best use as a retail/commercial site, he was not obliged to carry out a detailed feasibility study. He was not required to envisage with precision what building could be constructed on the site on an economically viable basis.

3) The valuer did make adjustments to the comparable sales. Further, the two sales were comparable and not averaged.

4) The expert did not fail to follow the usual valuation principles in the State.

5) Mr Norris gave sufficient reasons to satisfy the requirement of the lease.

6) There is no evidence to support a finding of negligence by Mr Norris.

Orders

Appeal dismissed with costs.

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40433/01
ED 50129/99

BEAZLEY JA
STEIN JA
GILES JA

Friday, 21 June 2002

KANIVAH HOLDINGS PTY LIMITED v HOLDSWORTH PROPERTIES PTY LIMITED & ORS

Judgment

1 **BEAZLEY JA:** I agree with Stein JA.

2 **STEIN JA**:

Introduction

3 This is an appeal from a judgment of Palmer J delivered in the Equity Division on 21 May 2001. His Honour dismissed a summons brought by the appellant, Kanivah Holdings Pty Limited, against the respondents, Holdsworth Properties Pty Ltd, Egan National Valuers (NSW) Pty Limited (Egans) and Keith Norris. The case concerned the determination of the rental review for leased premises at Railway Parade, Burwood. The lease is for a term of 80 years commencing on 1 January 1992 and terminating on 31 December 2071. It was assigned to the appellant on 1 April 1997. The first respondent, Holdsworth, acquired the subject land from the original lessor, the State Rail Authority, on 8 May 1997.

4 The lease provides for periodic rental reviews which require the determination of the current market rental in accordance with the lease. The third respondent, Mr Norris, is a valuer and was appointed by the appellant and Holdsworth to determine the current market rental as at 1 January 1999. The second respondent, Egans, carried on a business of real estate valuers and was approached by the parties. Mr Norris is a director of Egans and a licensed valuer. Mr Norris furnished his determination to the parties on 24 September 1999.

5 The lease provides that a valuer, in determining current market rental, acts as an expert and not as an arbitrator. His determination is to be final and binding on the parties.

6 The appellant, being dissatisfied with Mr Norris' determination, brought proceedings seeking a declaration that his determination was not made in accordance with the lease and, accordingly, was of no effect. In the alternative, Kanivah claimed damages against Egans and Norris for negligence.

The lease

7 The lease provides that the current market rental should be determined as at 1 January 1996 and as at the date of each successive third anniversary of such date, cl 1(c)(i). Clause 1(c)(ii) C(iv) provides that in the event of a dispute as to the current market rental for rent reviews it 'shall be determined by a valuer appointed as hereinafter provided. The determination of the valuer of the current market rental shall be final and binding …' on the parties.

8 Clause 1(f) provides that the valuer appointed must be a full member of the Australian Institute of Valuers and Land Economists of not less than 10 years standing. He shall 'act as an expert in making his determination of the current market rental and not as an arbitrator'. While the valuer is to take account of the parties' written submissions, he is 'not [to] be fettered by such submissions and shall determine the current market rental in accordance with his own judgment and opinion'.

9 Clause 1(f)(iii) provides that the valuer shall conclude his determination within two months and provide the parties 'with sufficient written reasons for his determination'.

10 Clause 1(d) contains the definition of 'current market rental' and provides as follows:

> FOR the purposes of this Lease 'current market rental' shall mean the best annual rental that can at the review date reasonably be obtained for the demised premises having regard to:
>
> (i) the maximum annual rental that might then reasonably be obtained were the demised premises available to be leased by a willing landlord to a willing tenant with vacant possession;
>
> (ii) on the terms and conditions contained in this Lease;
>
> (iii) the position of the demised premises;
>
> (iv) the highest and best use to which the demised premises may be put; and
>
> (v) the usual valuation principles in the state of New South Wales, to the extent to which those principles are not inconsistent with the criteria set out in this sub clause 1(d).
>
> AND not having regard to:
>
> (iii) any building structure or other improvement erected on the demised premises by or on behalf of the Lessee after the commencement of the term of this Lease at the expense of the Lessee;
>
> (iv) the value of any goodwill attributable to the Lessee's business and the value of tenant's fixtures and fittings on the demised premises; and
>
> (v) any deleterious condition of the demised premises if such condition results from any breach of any provision of this Lease by the lessee but otherwise assuming that all covenants on the part of the Lessee contained in his Lease have been fully performed and observed.

11 It is the submission of Mr Grieve QC, on behalf of the appellant, that Mr Norris failed to have regard in particular to the matters set out in subclause (iv) and (v) above, where first appearing. That is, the highest and best use to which the premises may be put and the usual valuation principles in New South Wales. Further, he submitted that the valuer failed to give sufficient written reasons for his determination contrary to cl 1(f)(iii).

The expert's determination

12 As I have said, Mr Norris provided his written determination to the parties on 24 September 1999. He noted that he had read the submissions of the parties' valuers, inspected the subject land and also the properties relied on as comparable sales. He stated that he had spoken to the valuers to enable them to address their written submissions and to clarify various matters. The valuer added that he had also made his own inquiries and investigations.

13 After setting forth the land details and the immediate neighbourhood, Mr Norris noted two development approvals relating to the site, one in 1996 for a residential/commercial development and another in 1999 for a commercial office/retail development (the deferred development consent).

14 Mr Norris noted that none of the valuers were able to provide him with direct current market rents for similar sites, nor had he been able to find any. He noted the methods used by the three valuers, that of a set percentage rental return. Further, he noted that in such cases the market value of the land is generally arrived at by valuing it according to its 'highest and best use'. Mr Norris considered that an appropriate ground rental return was 8% to be applied to the highest and best use land value.

15 In dealing with the highest and best use of the land Mr Norris contrasted the approach of the valuers for the parties. The lessor's valuers submitted that the highest and best use was for ground floor retail/commercial with a high-rise residential tower.

16 The lessee's valuer argued that residential development was not feasible. Mr Norris accepted this argument and said that he concluded that the highest and best use of the land was as a retail/commercial site.

17 This finding of the highest and best use is not challenged by the appellant on the appeal. Indeed, the appellant agrees with it. However, Mr Grieve submits that the valuer erred in taking the next step. It is submitted that the valuer had to work out what kind of building could be constructed on the site and on an economically viable basis. This, it is contended, he failed to do.

18 Under the heading 'Commercial Site Value' the valuer made the following determination:

> In considering the value of the subject site for commercial/retail development I have considered comparable sales evidence and a land residual exercise having regard to the existing commercial Development Approval.
>
> I consider commercial site sales evidence at Parramatta to be the most comparable evidence available.
>
> After adjusting the above evidence for shape, size, location and timing I consider that the subject commercial site indicates a value of $320 per square metre NLA.
>
> I note further that the site has been subject to the following sales:
>
> Lessor's Interest Purchased from SRA
> on the 18th May, 1997 for $2,110,000
>
> Lessee's Interest Purchased
> on the 1st April, 1997 for $2,021,370
>
> Total Consideration for Lessor's/Lessee's Interests $4,131,370
>
> Having regard to the deducted rate per square metre of NLA, I have concluded the market value of the land on a commercial redevelopment basis, at the relevant date to be (rounded) **$4,350,000.**
>
> Application of my concluded ground rental rate of 8% results in the following calculation:

$4,350,000	x 8%	$348,000

The decision of Palmer J

19 Palmer J was persuaded that the court was entitled to go behind the face of Mr Norris' determination and have regard to extrinsic evidence in order to decide whether the determination had been conducted in accordance with the lease. In this regard, it may be noted that Mr Norris himself gave evidence. Neither party disputes his Honour's admission of extrinsic evidence.

20 His Honour noted the appellant's argument that cl 1(d)(iv) did not permit merely a generic determination of the highest and best use, and that this was only the first step. According to the appellant, what was then required was the determination, with precision, of what the appellant could actually and economically construct to produce the maximum lettable area at the highest possible rent. This would involve detailed feasibility studies. Because Mr Norris did not undertake this second step, his determination was vitiated. His Honour rejected the submission saying:

> Clause 1(d)(iv), in my opinion, requires the valuer to do not more than "(to have) regard to the highest and best use". It does not require him to determine what that use is as a matter of objective fact. All that he is required to do is to form an opinion of the generic highest and best use to which the Land may be put, and then to take that use into account, amongst other factors, in making his determination. That is exactly what Mr Norris' determination shows that he did.

21 Next, his Honour dealt with a contention that the valuer committed a vitiating error by taking account of the deferred development consent which related to the land. It was said that he relied upon a net lettable area of 13,549.7m² which was erroneous in that he took into account an area of 531m² owned by the council. Further, it was contended that the valuer was in error of his projected rentals to be received from all 369 car spaces when 78 of them were required for free public parking.

22 Palmer J observed that these claimed errors did not appear on the face of the determination although extrinsic evidence was relied on. His Honour held that:

> In my view, all of these criticisms are ill-founded. If Mr Norris had arrived at his rent determination solely on the basis of a land residual exercise producing a certain net lettable area, the criticisms might have had some relevance, although even then if there was error it would have been error in working out a calculation rather than error in failing to address the correct question required by the Lease. However, it is clear from Mr Norris' determination that Mr Norris did not found his decision upon the results of a land residual exercise. He came to his conclusion using comparable commercial site sales at Parramatta.

23 His Honour also noted that Mr Norris' evidence supported this finding, particularly his evidence that in making his determination he relied on comparable sales rather than on a land residual exercise because of the many variables and uncertainties involved in the latter.

24 The judge then turned to the attack made by the appellant on the valuer regarding the claimed failure to have regard to usual valuation principles in the State. Palmer J noted that the contention came down to Mr Norris using comparable sales of commercial sites but not making adjustments having regard to the subject site. His Honour however accepted Mr Norris' evidence that he did make adjustments. His Honour was satisfied that in the use which the valuer made of comparable sales, proper regard was had to valuation principles.

25 Palmer J then turned to the submission regarding insufficient reasons. It was suggested to him that very full reasons were required. However, his Honour concluded:

> In my view, the requirement of Clause 1(f) for "sufficient reasons" obliged Mr Norris to disclose what he did and why only to the extent necessary to enable the parties, with the assistance of their experts, to see whether he had complied with the requirements of Clause 1(d) by having regard to the matters to which he was obliged to have regard, and by disregarding the matters which he was obliged to disregard. If it was apparent from the face of the determination that Mr Norris had addressed himself to the right questions, as the contract required, the parties would know that the process and calculations by which he produced his answers could not in law found a claim of vitiating error. On the other hand, if it was apparent from the face of Mr Norris' determination that he had not addressed himself to the right questions, as the contract required, then the parties would know that the determination would be of no effect regardless of what process and calculations had been used. This was all the contractual requirement to give sufficient reasons was intended to achieve.

26 His Honour found that Mr Norris' reasons in his written determination were 'entirely sufficient' for their purpose.

27 The other issue before his Honour was whether the valuer, and Egans as his employer, were negligent. Palmer J noted that this claim was only half-heartedly pressed. His Honour found that the appellant had not established that the valuer was negligent.

The appeal

28 Lengthy grounds of appeal were filed. However, at the hearing of the appeal they were trimmed, sensibly in my view, to confine them to a failure to have regard to clause 1(d)(iv) and (v) of the lease, that is paragraphs 1.2(c) and (d) of the pleading.

29 The first of the claimed errors was a failure to determine the nature and extent of the retail and commercial development. Secondly, the valuer erred in determining the net lettable area. Further, he failed to make an adjustment to comparable sales and took an average of two comparable sales. These were submitted to be contrary to usual valuation principles in the State.

30 The appellant also pursued its claim of a breach of clause 1(f) in that insufficient reasons were alleged to have been given by the valuer in his written determination.

31 The appellant also pressed its alternative claim in negligence. In this regard, it should be recorded that there is no dispute that the second respondent, Egans, is vicariously liable for the third respondent, Norris.

32 The written submissions of the appellant were lengthy and again, it is fair to say that Mr Grieve, who did not draft the submissions, usefully limited the oral argument on the appeal. The central issue raised by him was the issue of compliance by the valuer with subparagraphs (iv) and (v) and with a failure to give sufficient written reasons. With regard to (iv) Mr Grieve did not dispute the highest and best use found by the valuer, rather Mr Norris' failure to take the next step to take account of the economic viability of the hypothetical development.

33 It was urged upon the court that the valuer failed to test his selected highest and best use by assessing its economic viability. Further, the valuer fell into this error by his reliance upon the deferred development consent because it was pre-conditioned on the need of the developer to finalise a lease with the council over portion of the site. It was submitted that the valuer failed to take account of the fact that this would cost a premium in the order of $1.5 million or an annual rental of $135,000. This material was said to be contained in a letter from Arthur Andersen to the Council dated 28 May 1999, of which the valuer was unaware, although the appellant was but did not provide it to the valuer. The appellant also submitted that the valuer failed to take account of a condition of the deferred development consent which, it claimed, meant that the car parking spaces had to be provided free of charge during business hours.

34 Mr Grieve also submitted that the valuer failed to have proper regard to the usual valuation principles in New South Wales because he failed to make necessary adjustments to the supposed comparable sales. Secondly, he simply took an average of the comparables.

The respondents' case

35 On behalf of the first respondent Mr Walker SC submitted that the valuer either made no mistake or no mistake of the kind discussed in *Legal and General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, per McHugh JA at 335. He submitted that a failure to carry out a development study or full feasibility study did not constitute the status of a mistake of the kind which meant that the exercise required by the lease had been departed from.

36 As to cl 1(d)(iv), Mr Walker noted that it is now accepted that the valuer made the correct choice of highest and best use as retail/commercial. Counsel contended that once this is accepted, the complaint is limited to *how* the valuation was arrived at, not that what the contract required to be done was *not* done.

37 Turning to cl 1(d)(v) counsel for Holdsworth submitted that the valuer made appropriate adjustments (see his report) and reliance is placed upon his Honour's finding of fact that the valuer did have regard to appropriate adjustments. Mr Walker noted that it was not submitted by the appellant that the comparables were inappropriate.

38 Mr Walker submitted that it cannot be said that the valuer failed to value the correct premises. The valuer was aware of the conditions of the deferred development consent and of the need to obtain a lease of the council's land. He well knew that the property did not include the council land.

39 As to the Arthur Andersen material (which was not available to the valuer) Mr Walker submitted that when it is properly understood, it is speaking of $1.5 million solely in the context of advising the Council for the purposes of negotiation. The material was, of course, of a highly confidential value. If the valuer had made inquiries of the council, it is by no means clear what he would have been told or what, if anything, he would have made of any response.

40 In any event, the valuer did not simply adopt the deferred development consent, but utilised it as 'indicative' or as a 'guide' to floor space ratio. Essentially, he determined the valuation upon the comparable sales, see for example, Black AB 86 T. To the extent that the valuer utilised a land residual exercise, he did so as a 'check' only on the result of using comparables. In examining the land residual exercise, the valuer produced a number of options and spreadsheets but said that he found them to be generally unhelpful. Indeed, he found the land residual exercise itself to be unhelpful.

41 Mr Walker also submitted that there is no valuation principle in the State that can be accepted as a doctrine of economic viability. A valuer has to use his or her skill and expertise to select a highest and best use of land but does not have to carry out an economic viability study to reach a conclusion.

42 As to the submission that the valuer breached principle in averaging the two comparables, counsel says that the point was not taken below. However, in any event, he submits that there was no breach of valuation principle because what is important is the degree of comparability, see *McCathie v Federal Commissioner of Taxation* (1944) 69 CLR 1 at 15. The valuer did not adopt a simple arithmetic exercise because he made adjustments. There was nothing to indicate that he failed to take account of the degrees of comparability of the two comparable sales.

43 The appellant further submitted that the valuer's written reasons were sufficient for the purpose for which they were required under the lease.

44 Counsel for the remaining respondents adopted Mr Walker's submissions and made additional submissions on the evidence regarding feasibility and also on negligence.

Consideration

45 It is well to start with an often quoted statement of principle. In *Legal & General Life of Australia v A Hudson Pty Limited* McHugh JA stated:

> It will be difficult, and usually impossible, however, to imply a term that a valuation can be set aside on the ground of the valuer's mistake or because the valuation is unreasonable. The terms of the contract usually provide, as the lease in the present case does, that the decision of the valuer is "final and binding on the parties". By referring the decision to a valuer, the parties agree to accept his honest and impartial decision as to the appropriate amount of the valuation. They rely on his skill and judgment and agree to be found by his decision.

46 And:

> … as between the parties to the main agreement the valuation can stand even though it was made negligently. While mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or the certificate of valuation, nevertheless, the mistake may be of a kind which shows that the valuation is not in accordance with the contract. A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties. But a valuation which is the result of the mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract.

47 McHugh JA found that the mistake made by the valuer was not of the relevant kind. The rent review clause made the decision of the valuer final and binding on the parties to the lease. The lease did not suggest that it would not be final and binding if it was the result of error or mistake or was unreasonable. The decision would still bind the parties.

48 As Mason P observed in *Holt v Cox* (1997) 23 ACSR 590 at 595 the reasoning of McHugh JA has been frequently followed with approval.

49 Mason P said:

> A close reading of McHugh JA's judgment in *Legal & General* indicates that his Honour was not propounding the view that a valuation will stand regardless of error. Rather he was making the point that mistake is not itself a ground of vitiation: see also *Wamo Pty Ltd v Jewel Food Stores Pty Ltd* (1983) ANZ Conv R 50. A valuation may contain factual error or embody consideration of matters which should not have been taken into account, but it does not follow that the result is outside that which the contract contemplated would be within the realm of determination by the valuer. As McHugh JA makes plain, "in each case the critical question must always be: Was the valuation made in accordance with the terms of [the] contract? *If it is,* it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value" (emphasis added).

50 As McHugh JA observed in *Hudson*, by providing that the decision of the valuer be final and binding, the parties agree to accept the valuer's honest and impartial valuation. They rely on his skill and judgment. The valuation stands even if made negligently. A mistake by the valuer will only matter if it shows that the valuation was not made in accordance with the contract. His Honour made the point that *even* if a valuation proceeded on the basis of error, or was a gross under or over value, it matters not. Further, a failure to take account of relevant matters (or the converse) is not a vitiating mistake.

51 In my opinion, Palmer J's decision was correct. There is no vitiating error to be found. Once Mr Norris had found the highest and best use as a retail/commercial site, he was not obliged to carry out a detailed feasibility study. He did not have to envisage with precision what building could be constructed on the site on an economically viable basis. The appellant's submission to this effect must be rejected.

52 In any event, it appears from a reading of the valuer's determination that he determined the current market rental having regard to the comparable sales evidence. This was within the valuer's discretion and judgment. The valuer said in his evidence that he adopted a comparable sales technique by using two commercial sites at Parramatta. His Honour accepted this evidence.

53 The use that the valuer made of a land residual exercise was no more than a check. Again, Mr Norris' evidence made this clear. In particular, when he examined a number of such options, he found them to be unhelpful. Indeed, he said that he found the whole land residual exercise unhelpful. The determination itself and the valuer's evidence, accepted by the trial judge, make it plain that the valuer made his determination on the basis of comparable sales evidence.

54 While I do not see that the valuer made any mistake with regard to the conditions of the deferred development consent, regarding car parking and including the need for the developer to obtain a lease from the council (and the associated evidence), even if they occurred they cannot be vitiating mistakes. At the highest they are errors in methodology which are not vitiating errors.

55 It is also apparent that the valuer's use of the deferred development consent was as a guide or check only. The determination was, as I have already stated, based on comparable sales evidence.

56 In relation to the comparable sales used, it is clear that the valuer made adjustments and his evidence confirmed this. He was not shaken in cross-examination and his Honour accepted the evidence.

57 In utilising the two comparable sales, there was no evidence to suggest that they were not comparable or that there was any error in measuring their degree of comparability.

58 This case is a far cry from *McCathie* where five properties were averaged. As compared to the present case it is easy to see the vice of the averaging referred to by Williams J at page 15.

59 I am unable to see how the expert failed to follow the usual valuation principles in the State. In this regard, I accept the submission on behalf of the first respondent that there is no valuation principle or doctrine of economic feasibility. No issue is taken that the valuer could not conclude that the highest and best use of the land was as he found. Once that is accepted, the valuer is not obliged to work out precisely what could be constructed on the land and proceed to viability studies and the like.

60 As to the submission concerning the sufficiency of reasons of the valuer, I can see no error in his Honour's approach. In my opinion, the valuer's reasons were quite sufficient for the purposes for which they were required by the lease.

61 The reasons the valuer gave were sufficient to enable the parties to see whether clause 1(d) had been complied with in the valuation exercise. Detailed reasons, such as to be provided by a judicial officer or arbitrator, are not required. This valuer was appointed to act as an expert and not as an arbitrator. Gillard J discussed the standard of reasons usually required of a valuer in *The Commonwealth v Wawbe Pty Limited* (Unreported, Supreme Court of Victoria, 25 September 1998). I agree with his Honour's observations. The form of the particular clause in this lease requiring 'sufficient reasons' does not detract from the force of what Gillard J said.

62 In any event, even a judge does not have to detail every factor seen as relevant or irrelevant or itemise every fact taken into account. Judicial reasons are not required to be elaborate. Rather they need to be such as indicate to the parties why and on what basis the decision was made. Step by step reasons to a conclusion are not required.

63 In my view, Mr Norris gave sufficient reasons to satisfy the requirement of the lease.

64 Accordingly it is unnecessary to deal with the contention of the first respondent.

Negligence

65 That leaves only the appellant's submission concerning negligence. I can see no negligence by the valuer in carrying out his valuation under the lease. He did not breach his duty of care to the appellant in making the determination. This is particularly so given the findings that the valuer was not in breach of his obligations under the lease. Further, as I have said, the valuer was not required to carry out a hypothetical development study or the like. Nor did he breach valuation principles in making his rental determination.

66 There was no one figure appropriate for the current market rental. The valuers for the parties disagreed. Mr Norris made his own judgment and used his own skill and expertise. That was what he was employed to do. Since valuers might well differ as to the result, it is difficult to see how Mr Norris' determination could be said to be the product of negligence. On its face it was a rational determination. No error was established in the manner in which he carried out the valuation which can be said to be in breach of his duty of care to the appellant

67 I can understand why his Honour said that the submission on negligence was only 'half-heartedly pressed by Kanivah' and that the submissions were perfunctory. I agree with Palmer J that there was no evidence which would support a finding of negligence by Mr Norris.

68 The appeal should be dismissed with costs.

69 **GILES JA:** I have had the advantage of reading the reasons of Stein JA in draft. I agree with them, and with the order his Honour proposes.

70 It is necessary to emphasise, lest others misguidedly pursue the same course as the appellant, the reasoning of McHugh JA in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314.

71 McHugh JA states the question whether the valuation complies with the terms of the contract. Lying behind the question is that a valuer may make a mistake or arrive at an unreasonable valuation, the valuation remaining binding on the parties to the contract.

72 Ordinarily in providing for a valuation the contract will be taken to mean a valuation according to usual valuation principles, but a valuation not so made may still comply with the terms of the contract. If the contract says that the valuer is to value Blackacre, provided the valuer does so he complies with the contract, even though he does so negligently. The reasoning places what the contract says shall be done at a level of generality permitting mistake or an unreasonable value.

73 When the contract goes further and says (as here) that the valuer is to have regard to the highest and best use of the land and to usual valuation principles, the reasoning is the same. No doubt the parties expect that the valuer will correctly assess the highest and best use and correctly apply usual valuation principles. But they do not contract that he must do so in order that the valuation be binding upon them. They contract that the valuer shall have regard to the highest and best use and usual valuation principles, and the valuer can be mistaken in the regard he has.

74 There is good reason for an expert valuation clause to operate in this way. There is not necessarily one correct valuation answer, and there is certainly likely to be room for dispute. This is what the parties to the contract seek to avoid, agreeing to rely on the honest and impartial decision of the valuer but also agreeing that they will be bound even if the valuer makes a mistake in doing what the contract says shall be done.

75 The reasoning of McHugh JA must be appreciated, as much as the statement of the question. The appellant focussed on the question, submitting that failure to arrive at the correct highest and best use and error in applying valuation principles vitiated the valuation. With the proper focus on the reasoning it can be seen that, even if there were the mistakes for which the appellant contended, they were not such that the valuation should be set aside.

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