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LEGAL & GENERAL LIFE OF AUSTRALIA LTD V A HUDSON PTY LTD+

Court of Appeal: Mahoney, Priestley and McHugh JJA
23 November 1984; 5 March 1985

Landlord and Tenant -- Rent -- Commercial lease -- Review by valuer -- Valuation -- "Current annual open market rental" -- Decision to be "final and binding" -- Condition of premises -- Relevant time for determining -- Whether valuation voidable for mistake.

Valuation of Land -- Speaking valuation -- Whether valuer acted on wrong basis -- Construction of valuer's decision -- Whether voidable for mistake.

A commercial lease containing a rental revision clause provided that, where the lessor and lessee were unable to agree, a qualified valuer acting as an expert should determine the "amount of the current annual open market rental value of the demised premises". The decision was to be "final and binding". A speaking valuation, that is one setting out the reasons for its conclusions, was prepared based upon a calculation of the floor space demised which included an area of a mezzanine floor removed by the lessee with the lessor's consent after the commencement of the lease. The lease made no reference to the lettable area of the building or to the removal of the mezzanine floor. The lessee obtained a declaration that the valuation was not binding upon the ground that the valuer had erred in valuing the premises as at the date of the commencement of the lease ([1984] 1 NSWLR 1). On appeal,

Held: The appeal be upheld:

(a) (By Mahoney and Priestley JJA) On the ground that the matter fell to be determined according to the construction of the terms of the valuation and as this did not disclose any evidence that the valuer had valued the premises in the condition in which they were at the commencement of the lease, the valuer could not be said to have erred. (321C, 322C, 323E)

(By Mahoney JA) In construing particular rent revision clauses to determine whether the revised rent is to be assessed by reference to the demised premises as they were at the commencement of the lease or as they are at the date of revision, the issue is to be determined by the language of the particular document; in the absence of some provision indicating a contrary intention "demised premises" should be taken to indicate the premises as they are when the valuer comes to make the valuation. (320E)

Ponsford v H M S Aerosols Ltd [1979] AC 63 at 63, followed.

(b) (By McHugh JA) because:

(i) whether a valuation is binding upon the parties depends upon the terms of the contract, express or implied; (335D)

(ii) where the contract provides that the decision of the valuer is "final and binding" on the parties, a mistake as to the process of valuation as distinct from a mistake of the kind which shows that the valuation is not in accordance with the contract, is not sufficient to avoid the valuation; (335F)

+ [EDITORIAL NOTE: Leave to appeal to the Privy Council has been granted.]

(1985) 1 NSWLR 314 at 315

(iii) there was nothing in the contract which would enable the valuation to be set aside on the simple ground that the valuer made a mistake. (336D)

CASES CITED

The following cases are cited in the judgments:
A Hudson Pty Ltd v Legal & General Life of Australia Ltd [1984] 1 NSWLR 1.
Arenson v Arenson [1973] Ch 346; reversed [1977] AC 405.
Baber v Kenwood Manufacturing Co Ltd [1978] 1 Lloyd's Rep 175.
Belchier v Reynolds (1754) 3 Keny 87; 96 ER 1318.
Campbell v Edwards [1976] 1 WLR 403; [1976] 1 All ER 785.
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337.
Collier v Mason (1858) 25 Beav 200; 53 ER 613.
Dawdy, Re (1885) 15 QBD 426.
Dean v Prince [1953] Ch 590; reversed [1954] Ch 409.
Deputy Federal Commissioner of Taxation v Gold Estates of Australia (1903) Ltd (1934) 51 CLR 509.
Email Ltd v Robert Bray (Langwarrin) Pty Ltd [1984] VR 16.
Emery v Wase (1801) 5 Ves Jun 846; 31 ER 889; affirmed (1803) 8 Ves Jun 505; 32 ER

451.
Frank H Wright (Constructions) Ltd v Frodoor Ltd [1967] 1 WLR 506; [1967] 1 All ER 433.
Joint Coal Board v Noone Pty Ltd (Yeldham J, 12 June 1984, unreported).
Jones v Jones [1971] 1 WLR 840; [1971] 2 All ER 676.
Karenlee Nominees Pty Ltd v Gollin & Co Ltd [1983] 1 VR 657.
Mayne Nickless Ltd v Solomon [1980] Qd R 171.
Newcastle City Council v Royal Newcastle Hospital (1959) 100 CLR 1.
Parken v Whitby (1823) Turn & R 366; 37 ER 1142.
Ponsford v H M S Aerosols Ltd [1979] AC 63.
Royal Sydney Gold Club v Federal Commissioner of Taxation (1957) 97 CLR 379.
Sutcliffe v Thackrah [1974] AC 727.
Weekes v Gallard (1869) 21 LT 655.

The following additional cases were cited in argument:
Allen v Belmore Property Co Pty Ltd (1965) 114 CLR 454.
Anderson v Darcy (1812) 18 Ves 447; 34 ER 386.
Belmore Property Co (Pty) Ltd v Allen (1950) 80 CLR 191.
Dinn v Blake (1875) LR 10 CP 388.
Gazey v Prescott (1965) 82 WN (Pt 1) (NSW) 448.
Laidlaw & Campbellford, Lake Ontario & Western Railway Co, Re (1914) 19 DLR 481.
McLachlan v Furness (1965) 82 WN (Pt 1) (NSW) 415.
Wamo Pty Ltd v Jewel Food Stores Pty Ltd (1983) NSW Conv R 55-117.
Zucchiatti v Ferrara [1976] 1 BPR 9199.

APPEAL

This was an appeal from a declaration by Waddell J (*A Hudson Pty Ltd v Legal & General Life of Australia Ltd* [1984] 1 NSWLR 1) that a valuation report was not binding upon a lessee because of an error made by the valuer.

P W Young QC and *H J Mater*, for the appellant.

J M N Rolfe QC and *D A Cowdroy*, for the respondent.

(1985) 1 NSWLR 314 at 316

Cur adv vult

5 March 1985

MAHONEY JA. On 2 April 1980, the defendant leased to the plaintiff certain commercial premises situated in The Kingsway, Miranda, near Sydney. The lease provided that the initial rental of $88,800 per annum should be subject to two yearly revisions which, in the event of disagreement, were to be made by a "qualified valuer ... acting as an expert and not as an arbitrator ...". Henderson & Horning Pty Ltd was appointed to make the revision. By a document dated 10 June 1982, it decided that the revised rent should be $141,200 per annum. The lessee did not accept that that decision was binding on it, and in this proceeding has sought a declaration that it is not.

On 14 December 1983, Waddell J made the declaration sought by the lessee: see *A Hudson Pty Ltd v Legal & General Life of Australia Ltd* [1984] 1 NSWLR 1. The lessor has appealed to this Court against his Honour's judgment.

The lessee's submissions are: that the valuation was affected by an error; that the result of that error was that the valuer's decision did not operate as a determination of the revised rent under the lease; and that therefore the lessee was not bound by it. In order to consider this submission, it is necessary to outline the basic facts.

The lease was granted consequent upon a deed dated 27 March 1980, made between the then owner of the land, the lessee and the three other parties to it. Under the terms of the deed, the landowner covenanted to grant the lessee a lease in terms which, at least relevantly, are those of the present lease. The lease and the deed were "subject to the approval of the Council of the Shire of Sutherland to" a development application there referred to. The development application related, as the court has been informed, to the removal of a mezzanine floor in the building on the subject land. The approval of the council was given as contemplated by the deed and the lease was granted accordingly. The land was subsequently transferred to the present lessor.

The land is subject to the provisions of the *Real Property Act* 1900. The lease was granted by a form of lease apparently approved in accordance with that Act. The form provided that the lessor "hereby leases to the lessee" "the demised premises set out in item 2 of the reference schedule ... subject to the provisions and covenants set out or referred to in schedule 1 hereto ...". "The demised premises" as so set out, were "the land described in item 1 hereto together with the building erected thereon (hereinafter called 'the

building')". The land described in item 1 was vol 9221, fol 226. The term "demised premises" was defined in the lease to mean and include "the demised premises described in item 2 of the reference schedule".

The lease was for a period from 31 March 1980 to 30 March 1990, with an option for a further term of ten years. The rent was to be initially $88,800 "subject to the revisions provided for and the other amounts payable pursuant to the provisions of the annexure hereto".

The first schedule to the lease provided that:

> "The rent payable by the lessee to the lessor pursuant to this lease shall be calculated and paid in the manner following:
>
> **A. MINIMUM RENT**
>
> The lessee will during the term pay to the lessor without demand from the lessor and without any deduction whatsoever a rent (hereinafter
>
> *(1985) 1 NSWLR 314 at 317*
>
> called 'minimum rent') in each year of the term of an amount equal to the amount specified in item 9 of the reference schedule such rent to be paid in advance by regular and consecutive monthly payments of an amount equal to the amount specified in item 9 of the reference schedule each on the first day of each month in each year during the term (except the first and last payments which if necessary will be proportionate) the first being payable on the date of commencement of the term PROVIDED ALWAYS that:
>
> (1) During the term the minimum rent shall be reviewed on the basis that the lessor shall be entitled by serving upon the lessee notice in writing to that effect during a review period (hereinafter defined) to require the minimum rent payable hereunder to be revised and, subject to subcl (4) of this clause, as and from the end of that review period the revised rent, calculated and determined in accordance with the provisions of subcl (2) of this clause, shall be the minimum rent hereby reserved. 'Review period' means each period of twelve (12) months immediately preceding the expiration of each period of two (2) years commencing on the date of commencement of the term or where the lease has been granted pursuant to an option contained in a previous lease, commencing on the day immediately following the expiration of the last review period under such previous lease.
>
> (2) The revised rent shall be the greater of:
>
> (a) the minimum rent payable during the relevant review period; and
> (b) the current annual open market rental value of the demised premises based on a lease between a willing lessor and a willing lessee granted with vacant possession and taking no account of

any goodwill attributable to the demised premises by reason of any trade or business carried on therein by the lessee and in all other respects (except as to rent payable) on the terms covenants and conditions of this lease.

(3) If the lessor and the lessee are unable to agree on the amount of the current annual open market rental value of the demised premises as aforesaid before the expiration of three (3) months immediately after the date of service of such notice as aforesaid then and in every such case the question shall be referred for the decision of a qualified valuer to be agreed upon by the lessor and the lessee or (in the event of failure so to agree) of a qualified valuer selected by the lessee from a panel nominated by the lessor of three (3) qualified valuers carrying on practice in New South Wales or if no valuer is selected by the lessee within fourteen (14) days after the panel has been nominated by the lessor or if no such valuer can be obtained who is willing to carry out the said valuation a qualified valuer appointed by the president or other the principal officer for the time being of the Australian Institute of Valuers (or should such institute then have ceased to exist of such body or association as then serves substantially the same objects as such institute) acting as an expert and not as an arbitrator and the decision of such qualified valuer (including any decision as to the costs of such determination) shall accordingly be final and binding on the parties to this lease.

(4) Should the amount of the revised rent as aforesaid not be ascertained before the end of the relevant review period the lessee shall

(1985) 1 NSWLR 314 at 318

pending ascertainment thereof continue to pay minimum rent at the rate applicable prior to completion of the review but subject to the revision thereof and upon the revised rent being ascertained any necessary adjustment of rent calculated from the expiration of the relevant review period shall be paid forthwith by the lessee to the lessor.

(5) If the lessor shall fail to exercise its right to require the minimum rent payable hereunder to be revised within a review period then such right may be exercised at any time prior to the next review period and in every such case the provisions of this subclause shall be interpreted in all respects as if the end of the relevant review period had fallen on the date of the notice from the lessor to the lessee under subcl A(1) hereof (as modified by this subcl A(5)). No succeeding review period shall be postponed by reason of the operation of this subclause in relation to any preceding review period.

(6) Notwithstanding the provisions of cl A(3) the lessor and the lessee may at any time agree in writing as to the amount of the minimum rent for any rent period.

B. PAYMENT OF RENT

All rent payable hereunder shall be paid to the lessor or otherwise as it shall from time to time in writing direct."

The words of the first schedule which are most directly relevant to the issues raised by the parties are those contained in par A(3) which, in relation to the amount of the current annual open market rental value of the demised premises, provide that:

> "... the question shall be referred for the decision of a qualified valuer to be agreed ... acting as an expert and not as an arbitrator and the decision of such qualified valuer ... shall accordingly be final and binding on the parties to this lease."

The valuer gave a "valuation report" dated 10 June 1982. It was addressed to Mr R Hudson of the lessee company. It was a long document, the immediately relevant parts of which were as follows:

> "The purpose of this determination is to assess a 'revised rent' as provided by the lease for a period of two (2) years commencing 31 March 1982. 'Revised Rent' is defined ... as being the greater of: ...
>
> ***Lease***
>
> We have been provided with a copy of Lease Registered No R905648, the pertinent details of which are set out below. A copy of the lease is annexed to this report.
>
> Pertinent details are:

Demised Premises: The land comprised in certificate of title, vol 9221, fol 226 together with the building erected thereon.

...

Development Consent"

(The document then sets forth matters relevant to the requirement of the development consent upon the application to which I have referred and the conditions of it. It points out that the consent required the provision of four marked parking bays and, for the reasons there set forth, indicates that "in calculating the rentable area of the lower ground floor we have deducted an area of 317.83 square metres, being the area required to accommodate vehicle access and the four parking bays as required by the last development consent". The parties did not suggest that anything turned on this portion of the valuation.)

"Building

As the construction details of the building are well known to both lessor and lessee we do not propose a lengthy and detailed description ....

It is mainly two storey, with an attached single storey section toward the rear on the southern side ....

The ground floor comprises an attractive showroom with ....

We note that an area of about 314.4 square metres of the floor (refer to annexed sketches) has been removed by the lessee with the lessors consent. This area has been included in the rentable area of this floor for the purpose of this assessment ....

Lettable area

The copy of lease supplied to us does not specify the lettable area of the demised premises ....

We measured the building and determined the following lettable areas:

Ground Floor		1219.00 square metres (13,100 square feet)
Lower Ground Floor	(including access and parking)	1339.73 square metres (14,420 square feet)
(excluding access and parking)	1021.90 square metres (11,000 square feet)	

As a check against these calculations we have inspected copies of plans prepared by Stuart Whitelaw -- architect for the purpose of proposed alterations to the premises when the present tenancy commenced. Building area calculations shown on these plans indicate gross building areas of:

Ground Floor	1292.0 square metres (13,907 square feet)
Lower Ground Floor	1410.0 square metres (15,177 square feet)

For the purpose of this assessment we have adopted our measured areas.

Outgoings

...

Assessment

In determining the market rental value we have had regard to the rents being achieved for other larger premises and have concluded that

> 'the current annual open market rental value of the demised premises' as at 31 March 1982, was ONE HUNDRED AND FORTY ONE THOUSAND AND TWO HUNDRED DOLLARS ($141,200) per annum calculated as:

Ground Floor	13,100 square feet @ $7.00	$91,700	pa
Lower Ground Floor	11,000 square feet @ $4.50	$49,500	pa
$141,200	pa		

> Equivalent to an average rate of $5.86 per square foot per annum for an area of 24,100 square feet."

The only error which, it was suggested, the valuer made is that said to be contained in the portion of the valuation which I have italicised. It is agreed

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that the area of about 314.4 square metres there referred to is the area of the mezzanine floor as it existed at the date of the grant of the lease. The mezzanine floor had, prior to the date upon which the re-assessment was to be made, but after the commencement of the lease, been demolished and was no longer in existence. It had been demolished to "allow lengths of timber to be held in the vertical position within the premises" so as to suit the requirements of the lessee's business. The lessee's submission was that, as the floor in question no longer existed, it should not have been included as "rentable area" for the purposes of the assessment of the revised rent. The submission was twofold: that it should be inferred that the valuer assessed the current annual open market rental value of the premises upon the basis that it was required to assess that rental value by reference to the premises as they were at the commencement of the lease and not as they were on 31 March 1982, and that that was an incorrect basis; and, alternatively, that (if it valued the premises as they were as at 31 March 1982) it was wrong to include as part of the rentable area by reference to which the rent was to be assessed the area of a mezzanine floor no longer existing.

If this second submission was indeed a submission made for the lessee, I do not think that it should be accepted. The valuer assessed the rental value of the demised premises by first determining what was the "rentable area" or "lettable areas" in the premises and then applying to the areas so determined particular rates per square foot which presumably it thought would be payable by the potential lessee. It would, in my opinion, have been open to a valuer so proceeding to conclude that the potential lessee would see as practicable the restoration of the mezzanine floor area and would therefore be prepared to pay a total rental calculated upon the assumption that the lessee would be able to have the use of the restored area. There would be no error in principle if the valuer had proceeded on that basis, given of course

that the facts provided support for its reasoning.

The lessee's first submission raises more difficult problems and I shall therefore consider whether the valuer made the mistake which the lessee suggests.

The lessor, in answer to this submission, submitted that there was no such error because, if the valuer did proceed on the basis suggested by the lessee, it was not wrong in doing so and that it was required so to do by the terms of the lease. I do not think that that is the correct construction of the lease. As the cases show: see *Ponsford v H M S Aerosols Ltd* [1979] AC 63, and the cases there referred to; questions have arisen in the context of particular rent revision clauses as to whether the revised rent is to be assessed by reference to the demised premises as they were at the commencement of the lease or as they are at the date of the revision. In any problem of construction, the issue is to be determined by the language of the particular document. But, absent some provision indicating a contrary intention, I would see "demised premises" as indicating the demised premises as they are when the valuer comes to make the valuation. I would, with respect, agree with what was said by Lord Wilberforce in the *Ponsford* case (at 73). I do not see in the present lease a sufficient indication that a different meaning is to be given to the term.

Alternatively, the lessor submitted that there was no such error because the valuer assessed the rental value of the demised premises as they were at the

(1985) 1 NSWLR 314 at 321

date of the valuation and not as they were at the date of the lease. Neither party tendered evidence to show what the valuer in fact did: the person who prepared the document for the valuer was not asked why it was that the area of the former mezzanine floor was included as part of the rentable area for the purpose of calculating the ruling open market rental value. (It is agreed that the valuation, when it refers to "Ground Floor" includes the relevant portion of what was the mezzanine floor. The lower ground floor referred to has no significance for this purpose.) And no effort was made to establish, by evidence from this gentleman or otherwise, whether the area of the mezzanine floor was included in the rentable area because he acted on the basis that the then current rental value had to be assessed by reference to the premises as they were when the lease was granted. Whether some or all of such evidence would have been admissible it is therefore not necessary to consider. The matter falls to be determined according to the construction of, and the inferences to be drawn from, the terms of the valuation.

I am not satisfied that the valuer included the area of the mezzanine floor in the rentable area to which it referred because it believed its function was to assess the rent payable in respect of the premises in the condition in which they were when the lease was granted. The valuation does not say that the valuer approached the matter on that basis. That basis would have been an artificial basis and, I think, it would have been expected of a valuer proceeding on such a basis that it so indicate. The fact that it did not do so is, I think, of some significance.

There is, in addition, some indication in the valuation itself that the valuer was assessing the rental value of the premises in their then current state. Thus, the valuation indicates that "in assessing the rental value of the premises", the valuer has taken into account the fact, as the valuer saw it, that the Council "would consent to an application for a change of use" from the use for retail sale of hardware and timber without requiring the provision of the particular parking spaces referred to in the valuation. The valuer was, I think, looking to the potential use of the demised premises at the time of the valuation and assessing the rental value by reference to it.

But these matters are, of course, far from conclusive. The learned trial judge came to a contrary conclusion. He said (at 6):

> "... They were not entitled to value the premises in the condition in which they were at the commencement of the lease. This is what the valuation does and, in my opinion, a mistake was made in doing so. In effect, the valuers valued premises which were not the demised premises on the relevant date."

It was submitted that the learned judge was justified in so concluding because, as it was submitted, of the fact that the valuer included in "the rentable area" of the ground floor "for the purpose of this assessment" what had been the area of the mezzanine floor at the date of the lease. The submission suggested, I think, that it was to be inferred from the fact that the area was so included that the valuer saw itself as assessing the rental value of the demised premises at the date of the lease.

Such an inference is open but I do not think that it should be drawn. I think that the reason why the valuer included the area in "the rentable area" for the purposes of his calculations was that he saw it -- or thought the potential lessee would see it -- as an area which, by restoring the mezzanine

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floor, would be available for letting or use by that lessee. I recognize that, if

the valuer approached the matter so, he might have been expected to take into account the cost to the potential lessee of restoring the mezzanine floor. But the evidence does not show whether the cost of restoration would be significant, or at least significant in the context of such other alterations as a new lessee would expect to make to adapt the premises for his purposes: it is possible that the valuer saw fit to ignore this as being too small a matter to be given a place in his calculations.

In the end, I do not think that it should be inferred from the fact that the valuer included this area that it did so because it had adopted the artificial basis of valuation to which the lessee referred. I am not satisfied that the valuer made a mistake of the kind suggested by the plaintiff.

It is therefore not necessary for me to express any concluded view on whether, had there been such a mistake, it would have rendered the assessment ineffective.

In my opinion, therefore, the appeal should be upheld with costs. The plaintiff's proceeding should be dismissed with costs.

PRIESTLEY JA. In 1982 Legal & General Life of Australia Ltd was the landlord and A Hudson Pty Ltd was the tenant of commercial premises at Miranda. The landlord wrote to the tenant saying "we are coming up to rent review time" and suggesting a rent for the premises for the two year period from 5 May 1982. The tenant did not agree with the suggested rent and elected to exercise its option under par A(3) of the first schedule in the lease to have "the question ... referred for the decision of a qualified valuer". The landlord and tenant then agreed upon a qualified valuer. The question which par A(3) required the valuer to decide was "the amount of the current annual open market rental value of the demised premises". That rental was for present purposes defined in par A(2)(b) as being:

> "The current annual open market rental value of the demised premises based on a lease between a willing lessor and a willing lessee granted with vacant possession and taking no account of any goodwill attributable to the demised premises by reason of any trade or business carried on therein by the lessee and in all other respects (except as to rent payable) on the terms covenants and conditions of this lease."

One of the terms and conditions of the lease was:

> "4.1 The lessee will not use or permit to be used the demised premises for any purpose other than that specified in item 10 of the reference schedule and will not permit or suffer the use of the same for any residential purpose whether temporary or permanent nor permit or suffer any storage space forming part of the demised premises to be used for any purpose other than storage."

The qualified valuer, at the conclusion of a five page document stated the conclusion:

> "... that 'the current annual open market rental value of the demised premises' as at 31 March 1982 was $141,200 per annum calculated as:

Ground floor 13,100 square feet @ $7		$91,700	pa
Lower ground floor 11,000 square feet @ $4.50		$49,500	pa
	$141,200	pa."	

(1985) 1 NSWLR 314 at 323

The tenant sought a declaration in the Equity Division of the Supreme Court that the valuation did not validly determine the amount of the current annual open market rental value of the demised premises and that the tenant was not legally bound to pay rent to the landlord in the amount arrived at by the valuer.

Waddell J made the declarations sought by the tenant on the footing that the valuation was not one in conformity with the contract ([1984] 1 NSWLR 1). In his view some of the statements in the text of the valuer's document preceding the answer to the question asked pursuant to the lease showed that the valuer had not answered the right question, viz the current annual open market rental value of the demised premises within the meaning of par A(2)(b) of the first schedule to the lease. In Waddell J's opinion the valuation valued the premises in the condition in which they were at the commencement of the lease and not as they existed at the time of the valuation. He reached this conclusion because (i) at the date of the commencement of the lease the premises contained a mezzanine floor, (ii) some time before the valuation, by agreement with the landlord, the mezzanine floor had been removed, (iii) nevertheless the 13,100 square feet which the valuer took as one of the factors in calculating the rent for the ground floor of the premises contained an area of about 314.4 square metres representing the area of the mezzanine floor, (iv) the actual area of the ground floor at the time of the valuation was 13,000 square feet less 314.4

square metres. (The parties before us agreed that this was deductible from the valuation document itself and that 314.4 square metres at $7 a square foot was approximately $23,000.) It was the correctness of his Honour's reasoning which was the subject of debate before us.

If I thought that the valuation document showed that the valuer had determined the market rental value of the premises in their physical state at the commencement of the lease then I would be disposed to agree with Waddell J that the rental value arrived at was not that described in par A(2)(b) of the first schedule of the lease, and I would then agree with the declarations made by him. However, I do not think that the valuation document shows that the rental value arrived at by the valuation was arrived at on such a basis. The valuation document makes it clear that it was attempting to arrive at the rental value as defined in par A(2)(b) of the first schedule. It seems to me that the best reading of the valuation document is that it shows that in arriving at the rental value as defined there was taken into account the fact that the lessee, if it chose, had available 13,100 square feet of usable space on the ground floor of the premises. There is nothing in the valuation document (nor, if it is relevant, elsewhere in the evidence) to show that the $7 per square foot used as the basis of calculating the rental value of the ground floor did not in itself take account of the fact that the 13,100 square feet used in the ground floor calculation was as to approximately three quarters an area immediately available and as to the other quarter potentially available. Therefore, as far as the court knows, it is just as likely as not that the valuer took the actual position of the ground floor into account, in adopting the $7 figure.

The position is that the valuation document in its conclusion expresses itself as answering in terms of par A(2)(b) of the first schedule to the lease

(1985) 1 NSWLR 314 at 324

"the question" which was referred to the decision of the valuer pursuant to par A(3) of that schedule. Parts of the text preceding the answer to the question raise some doubt whether the valuer was addressing precisely the right question. These doubts arise from a consideration of the valuation document alone. There was not in this case, as there was for example in *Joint Coal Board v Noone Pty Ltd* (Yeldham J, 12 June 1984, unreported), evidence before the court from the valuer explaining the valuation. A doubt additional to that debated before Waddell J and this Court that arises on a consideration of the valuation document is whether proper account was taken of the effect of the concluding words of the definition of rental and condition 4.1 of the lease (both set out above).

The material raising those doubts can, to my mind, be read equally as consistently with the view that the valuer was addressing precisely the question defined by the first schedule as with the view that a similar but wrong question was being answered. On the first view, the contract between the parties would have been fulfilled and the rental value assessed by the valuer would, in accordance with the agreement between the parties be binding on the tenant. On the second view the opposite result would follow.

It was the tenant who sought the declarations against the landlord that the rental as valued was not binding upon the tenant pursuant to the agreement in the lease. As the party initiating the proceedings and seeking declarations in its favour which could only be made upon positive propositions being established the tenant bore the onus of proving those propositions on the balance of probabilities; in summary that required the tenant to show that the valuation did not comply with the agreement in the lease. On the view I take the tenant has not shown on the balance of probabilities that the new rental was not binding on it. The landlord has not sought declarations. It simply asks for the tenant's proceedings to be dismissed. For it to obtain declarations that the valuation was in accordance with the lease, it also would bear the burden of the civil onus of proof. Put another way, if the tenant had not brought the proceedings for a declaration but had refused to pay the higher rental while continuing to tender what would be the correct rental if the rental valued by the valuer were not binding on it, any step which the landlord thereafter took to enforce its rights on the basis that the valuer's rental was binding on the tenant would, so far as I can see, require the landlord to establish that the valuer's rental was binding under the lease. That is, in any attempt to enforce its rights the landlord would bear the onus of showing that the valuer's rental valuation was in accordance with the agreement in the lease. Further, if the landlord were seeking to enforce what it claims is its right under the lease on the material before the court in the present case then in light of the view I have already stated, that that material is equally consistent with the valuer having answered the right question as having answered one slightly different and not that agreed upon, I am inclined to think the landlord would fail.

In these circumstances I do not think the tenant's proceedings should be so dealt with as to permit the landlord to assert, in any proceedings it may hereafter take against the tenant raising the question what rent was binding upon the tenant from 31 March 1982, that the present proceedings create any estoppel against the tenant in regard to the rental assessed by the valuer.

My conclusion therefore is that the court should in the exercise of its

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discretion refrain from making any declarations in these proceedings, and should dismiss them with costs. The formal orders would be that the appeal is upheld, declarations and orders below set aside, and in lieu thereof the tenant's proceedings dismissed. The tenant should bear the landlord's costs of the proceedings both at first instance and on appeal.

MCHUGH JA. The appellant (the lessor) appeals against a declaration made by Waddell J ([1984] 1 NSWLR 1) that a "valuation report of Henderson and Horning Pty Ltd dated 10 June 1982 relating to premises at 573 The Kingsway, Miranda does not validly determine the amount of the current annual open market rental value of the said premises". On 2 April 1980 the respondent (the lessee) and the appellant's predecessor in title (the owner) entered into a lease of the premises at Miranda. The premises consist of land and a building with a ground and lower ground floor from which the lessee conducts a timber and hardware retail business. Under the lease, which is for a term of ten years with an option for another term of ten years, the rent can be reviewed every two years. The "revised rent" is ascertained by determining the greater of the existing rent and "the current annual open market rental of the demised premises based on a lease between a willing lessor and a willing lessee granted with vacant possession". But no account is to be taken of any goodwill attributable to the demised premises by reason of any trade or business carried on by the lessee in making the determination. In all other respects (except as to rent payable) the hypothetical lease is to be "on the terms covenants and conditions of this lease". If the parties are unable to agree on the amount of the "current annual open market rental value of the demised premises as aforesaid ... the question shall be referred for the decision of a qualified valuer ... acting as an expert and not as an arbitrator". The decision of the valuer is to be "final and binding on the parties to (the) lease". In April 1982 the parties were unable to agree on the minimum rent which should apply for the two years commencing on 31 March 1982. The question of the "current annual open market rental value of the demised premises as aforesaid" was then referred to a valuer, Henderson & Horning Pty Ltd. In June 1982 the valuer assessed the rent of the premises at $141,200 per annum.

His Honour's reasons:

Waddell J held (at 6) that the lease obliged the valuer to value the premises in the condition in which they were on 31 March 1982. His Honour held that

the valuer, however, had assessed the rent having regard to the condition of the premises at the commencement of the lease. The report of the valuer noted that an area of about 314.4 square metres of the ground floor (the void) had been removed by the tenant with the owner's consent. It stated that this "area had been included in the rentable area of the floor for the purpose of this assessment". His Honour held that it was a mistake to include this area as part of the rentable area. He said that the mistake was not merely one of calculation or of the principles of valuation. In his view the mistake was of a kind which meant that the valuation was not in conformity with the terms of the lease.

Questions in the appeal:

The questions in the appeal are whether the valuer did err in making its

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valuation and, if it did, whether it was an error of a kind which invalidates the assessment of the current annual open market rental value of the premises?

The material facts:

Before entering into the lease, the lessee had informed the owner that the premises were not suitable for its requirements and that it would not accept a lease until the premises were altered to suit those requirements. The lessee wanted a portion of the ground flooring removed "to allow lengths of timber to be held in the vertical position within the premises". I assume that they were to be stacked on the lower ground floor. In January 1980 the owner submitted a development application to the local council. The application sought a change of use of the premises from that of a "retail store" to that of "hardware and timber retailing". Approval of the development application was given on 17 March 1980. One of the conditions of the approval was that the development had to be carried out in accordance with a site plan which had been submitted with the application. We were told that the plan provided for the alteration of the ground floor by removing 314.4 square metres of flooring. A building permit was issued on 20 March.

The first deed:

On 27 March the lessee and the owner entered into a deed. Clause 1 provided that the owner would grant or procure the grant of a lease "of the demised premises for the term and at the rent and upon and subject to the covenants terms and conditions contained in the annexed lease". The annexed lease was in the same form as the lease executed by the parties on

2 April. Clause 4 made the lease and the deed subject to the approval of the council of the development application. Clause 9 provided that, if the approval was given unconditionally or subject to conditions of a minor nature acceptable to the parties, the lease would commence on 31 March 1980. If approval was not given in a manner acceptable to both parties, the liability of the parties under the deed would determine.

The lease:

The lease was signed on 2 April 1980, to take effect from 31 March 1980. The lease defines the "demised premises" as the land described in a certificate of title together with the building erected thereon. The initial rent payable was $88,800 per annum. The permitted use of the premises is that of "builder's and handyman's supply store". Clause 4.1 provides that the lessee will not use or permit the demised premises to be used for any purpose other than the permitted use. Clause 5.1 provides that the lessee will during the whole of the term maintain, replace, repair and keep the demised premises in good and substantial repair and condition having regard to their condition at the commencement of the lease. But this covenant does not impose on the lessee any obligation in respect of any "structural maintenance replacement or repair". If, however, the structural work is rendered necessary by any neglect or default of the lessee or by its use or occupancy of the premises, the general covenant to repair applies. Clause 5.8 provides that the lessee will not make any alteration or addition to the structure or exterior of the demised premises without the prior written consent of the lessor which consent shall not be unreasonably withheld. Upon the expiration or sooner determination

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of the lease the lessee covenants to deliver up "the demised premises ... in good and substantial repair and condition (having regard to the age of what is being surrendered or yielded up) in all respects and as nearly as possible in the same condition as at the commencement of the term or in the event of any part thereof being replaced or renewed during the term as nearly as possible in the same condition as at the date of such replacement or renewal": cl 11.4.

The second deed:

On 5 May 1980 a deed was entered into between the owner, the lessee and the lessor. The deed recited that the lessee was causing certain building works to be carried out in accordance with the conditions attached to the development consent and building permit. Another recital stated that the owner had agreed to pay to the lessee $19,000 by way of costs for carrying out the building works. Clause 1 provided that the purchase price of the land and buildings, payable by the appellant, was reduced by $19,000 in

consideration of the appellant agreeing to pay to the lessee that sum for the carrying out of the work specified in condition 9 of the building permit. Condition 9 provided for the lining of the underside of the timber floor with material to prevent the spread of fire.

Trading activities:

After the alterations to the premises, including the removal of 314.4 square metres of the ground floor, were carried out, trading activities by the lessee commenced on 23 May 1980. They have continued to the present time.

The valuation report:

The valuation report was dated 10 June 1982 and consisted of five closely typed pages. The first part of the report stated that the purpose of the determination was to assess a revised rent for a period of two years commencing 31 March 1982. The definition of "revised rent" was then set out. Then, under the heading "Lease" were contained what are described as "the pertinent details" of the lease. Reference was made to the permitted use of the premises as a "builder's and handyman's supply store" and to the provisions of the lease concerning maintenance and repair. The report then discussed the development consent. It stated that inquiries had been made of a planning officer at the council. They indicated that "upon application for a change of use of the premises council would almost certainly not require additional parking bays to be provided in accordance with its Published Car Parking Policy". The report then went on to say:

> "Therefore, in assessing the rental value of the premises we have concluded that council would consent to an application for a change of use without any requirement for the provision of additional car parking. In calculating the rentable area of the lower ground floor we have deducted an area of 317.83 square metres, being the area required to accommodate vehicle access and the four parking bays as required by the last development consent."

The report described the building and stated:

> "We note that an area of about 314.4 square metres of the floor (refer to annexed sketches) has been removed by the lessee with the lessor's consent. This area has been included in the rentable area of this floor for the purpose of this assessment."

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There then followed a statement that the lease did not specify "the lettable area of the demised premises" and that inquiries of the lessor had not indicated any record of any agreement as to the lettable area to be adopted for the purpose of the calculation of rent.

The report concluded:

> "In determining the market rental value we have had regard to the rents being achieved for other larger premises and have concluded that 'the current annual open market rental value of the demised premises' as at 31 March 1982 was ONE HUNDRED AND FORTY ONE THOUSAND AND TWO HUNDRED DOLLARS ($141,200) per annum calculated as ...."

The rent for the 314.4 square metres was assessed at the same rate as the rest of the area of the ground floor. The rate for the ground floor was $7 per square foot; the rate for the lower ground floor was $4.50 per square foot.

Two things clearly appear from the above summary of the valuation report. First, the assessment of the rental value proceeded on the basis that the council would consent to an application for a change of use without any requirement for the provision of additional car parking. This was in my view an incorrect approach to the question of assessment. The revised rent review clause stated that the "terms covenants and conditions" of the hypothetical lease were to be the same as "this lease" except as to the rent payable. The permitted use under the lease was that of "builder's and handyman's supply store". By cl 4.1 the lessee covenanted not to use or permit the demised premises to be used for any purpose other than the permitted use. Accordingly, the valuation has proceeded upon an incorrect basis. The valuer has determined the market rental value by looking at the rent which could be obtained for the premises in the open market generally. This seems clear not only from the statement that, in assessing the rent, the council would consent to a change of use without any variation of the parking conditions but also from the statement that in determining the market rental value, the valuer had had regard to the rents "being achieved for other larger premises". The lessee, however, has not relied on this point. A court seldom knows the reasons which motivate a party into not relying on a point. Perhaps the mistake is of no practical significance. The rent may be the same even when assessed on the basis of the use specified in the lease. At all events the lessee does not rely upon the point. So I disregard it.

Counsel for the lessee submitted that the valuation was erroneous because the 314.4 square metres of floor space included in the lettable area "did not,

and never was intended to, comprise part of the premises leased". Consequently, so it was submitted, the current annual open market rental was to be for the premises as they existed, with the consent of the lessor, at the date of the valuation. It was an error to assess the rent on the basis that the flooring was restored.

The critical question is what is meant by "the current annual open market rental value of the demised premises based on a lease ... on the terms covenants and conditions of this lease"? In determining the meaning of that phrase the purpose which the rent revision clause serves must be kept in mind. From the lessor's point of view the rent revision clause enables the rent to be adjusted to keep pace with the inevitable inflationary trends in the community while otherwise leaving the lease intact. From the lessee's point of view the clause ensures that the rent is assessed on the basis that the

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notional lease of the premises has the same terms and conditions as the lessee enjoys. This includes the use of the premises. This means, I think, that the premises must be considered in the permitted state in which they are at the date which is the basis of the rent review. The rent to be ascertained is that payable by a willing lessor and a willing lessee for a lease on the same terms and conditions as this lease. Underlying the notion of a willing lessor and willing lessee are the assumptions that neither is willing to disregard those business considerations which are in his favour and that they are each equipped with knowledge of the relevant circumstances. The question then is what the lessee would offer, and the lessor would accept, as rent for the grant of that lease of those premises: *Deputy Federal Commissioner of Taxation v Gold Estates of Australia (1903) Ltd* (1934) 51 CLR 509 at 515. Whatever else a willing lessee might be prepared to do, only a person with a special use for the void could possibly be prepared to pay something like the same price per foot for the area of the void as he would for the existing flooring on the ground floor. An ordinary lessee would not be prepared to do so because obtaining the use of the void would be dependent upon (a) obtaining the consent of the lessor and the council and (b) reinstating the flooring at his own expense. Further he would not be able to use the area until the consents were obtained and the work done. Moreover, I do not think that it was within the contemplation of the parties to the lease that the reinstatement of the flooring was assessable as part of the lettable area. The terms of cl 4.1 ensure that the rent is assessed on the basis that the use of the premises remains the same. It would defeat the basic purpose and terms of the rent review clause, as well as cl 4.1, if the valuer could assess the rent on a basis inconsistent with the use and condition of the premises as the lessee is permitted to use them. Once the premises were put in their current state, the prior written consent of

the lessor is required to make any addition or alteration to the premises: cl 5.8.

Rent review clauses are now commonplace. Many of them simply require the determination of the market rental of the premises. In that class of case the potential, physical and commercial use of the premises is no doubt a legitimate factor to weigh in the valuation process: cf *Royal Sydney Golf Club v Federal Commissioner of Taxation* (1957) 97 CLR 379 at 385. When a rent review clause is in the form of the present clause, however, the potential physical and commercial use of the premises seems to me to be irrelevant. What the present review clause seeks to do is to achieve a current open market rental value for the lease of the premises which this lessee has. In carrying out that exercise it would be quite wrong, in my opinion, to take into account that the area of the land or the size or structure of the building would enable additional flooring to be utilized with the lessor's consent. The rent which a hypothetical lessee would pay cannot be divorced from the present condition of the premises. This is particularly so when the parties to the lease, before its execution, agree that part of the premises are to be removed and, subject to agreement, are to remain in that condition throughout the term of the lease. On that hypothesis the assessment of the rent on the basis of a reinstatement of the premises is to fail to assess it on the "terms covenants and conditions of this lease". The point is reinforced by the provisions of cl 5.8 which provide that no alteration of the premises can be made except with the written consent of the lessor. True it is that the consent

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cannot be unreasonably withheld. Nevertheless the parties are unlikely to have intended that part of the valuer's function was to investigate whether or not it would be unreasonable for the hypothetical lessor to refuse consent to a particular alteration desired by a hypothetical lessee. Associated with this consideration is the further point that the consent of the council would be required to make a substantial alteration to the premises.

The initial rent was assessed on the understanding that the premises would be used with 314.4 square metres of the ground floor removed. In the absence of evidence that the initial rent was based on that flooring being present, I do not think it would be proper to assess the revised rent on the basis that the floor area was reinstated.

But it is not easy to determine whether the valuer did assess the rent on the basis that the flooring was reinstated. It is at least a possible view that he simply saw no reason to distinguish between that part of the ground floor area which was removed and that which remained. If that was what the

valuer did, I do not think that he failed to assess the rent on the basis of a lease with the same "terms covenants and conditions of this lease". To make no distinction between the area which was removed and the area which remained may or may not be an erroneous application of the principles of valuation. But nothing in the present lease prevents it from being done. Consideration by the valuer of the other uses to which the premises could be put supports in a general way the notion that he thought the flooring would or might be reinstated. But nothing else in his report really supports the reinstatement theory. Moreover, the valuer at no stage mentions rent on the basis of flooring. He uses the term "lettable area". I think that the proper conclusion is that he assessed the rent on the area which this lessee used. The evidence shows that the flooring was removed so that timber could be stacked vertically. Presumably the timber is stacked on the lower ground floor and comes up above the ground floor level. So that in the special circumstances of this case the lessee does use the removed area: cf *Council of the City of Newcastle v Royal Newcastle Hospital* (1959) 100 CLR 1 (PC). The conclusion that the valuer assessed the rent on the basis of the area which the lessee used is also supported to some extent by the omission of the car parking space (317.83 square metres) from "the lettable area of the demised premises". The conclusion also accords with the standard approach to rental valuation in New South Wales. The Chief Valuer (NSW) of the Australian Taxation Office has recently pointed out that "(N)et rentable area is the standard basis adopted for rental valuations": "City Rental Valuations and Rental Reviews" *The Valuer* (1984) vol XXVIII 270 at 276. I do not think, therefore, that the valuer proceeded on a reinstatement basis.

Nor do I think, as Waddell J held, that the valuer thought that he had to value the premises in the condition in which they were at the commencement of the lease. Rather, I think that he valued the premises as at 31 March 1982. But he valued them on the basis that the area of the void was part of the area used by the lessee.

I think, however, that the valuer was mistaken in assessing the area of the void at the same rate ($7 per square foot) as the rest of the ground floor. Moreover, the value per square foot of the void was $2.50 more than the value per square foot of the lower ground floor. I do not think that any ordinary lessee would be prepared to pay the same rate for the void as he

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would for the rest of the ground floor area. Nor is it likely that a lessee, who could make special use of the void, would be prepared to pay the same rate. Quite apart from any other consideration, there is at least an arguable liability to restore the flooring at the termination of the lease: cl 11.4. I think,

therefore, that the valuer erred in principle in determining the rent of the demised premises.

The next question is whether the mistake is one which invalidates the valuation? The mistake is one made in the course of valuation. But it is not a mistake as to the identity of the thing to be valued. The error is the same in principle as one where a valuer has erroneously taken into account as comparable rents, rents which are not in fact comparable. The mistake, however, is not one which involved the valuer departing from the question which was referred to him. Despite his mistake, he assessed "the current annual open market rental value of the demised premises ... on the terms covenants and conditions of this lease". The mistake is not comparable to the mistake which I think occurred when the valuer considered other uses of the premises. In that case the valuer did not answer the question which was referred him because his assessment was not based "on the terms covenants and conditions of this lease". But the lessee has not relied on this mistake, if it be a mistake. The only mistake relied upon, therefore, is one which involves a mistake as to the process of valuation. The question is whether a mistake of that class is sufficient to avoid a valuation?

The law concerning the court's power to refuse to enforce a valuation, made for two or more parties, has undergone considerable change, not to mention uncertainty, in recent years. It provides an example of how a statement of a principle once divorced from its original setting can be used to achieve a purpose which is quite opposed to that which the originator of the principle intended. It also provides an example of the fallacy that the judicature system fused the principles of law and equity. In the exercise of its jurisdiction to decree specific performance, the Court of Chancery developed the principle that an agreement to sell at someone else's valuation was not enforceable in equity if the valuation was the result of fraud, mistake, or collusion. The court left the unsuccessful plaintiff to his remedy at law. In recent years, however, courts have sought to use this equitable defence to a suit for specific performance to deny the right to enforce the valuation even at law.

As long ago as 1754 the Court of Chancery stated that if parties put their confidence in the skill and judgment of a valuer they must abide by it unless it plainly appear "that he had been guilty of some gross fraud or partiality": *Belchier v Reynolds* (1754) 3 Keny 87 at 91; 96 ER 1318 at 1319.

In *Emery v Wase* (1801) 5 Ves Jun 846; 31 ER 889, the plaintiff brought a bill for specific performance of a contract for the sale of land "at the

valuation of John Bishton". The defendants, who included married women, set up by way of defence, inter alia, that the estate was undervalued. The Master of the Rolls said (at 848; 890):

> "This is a monstrous power, but such as persons have a right to give; and they must submit to the consequences, unless fraud or gross mistake is made out."

After looking at all the evidence the Master of the Rolls said (at 848; 891):

> "Under these circumstances I am not bound to decree a specific

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> performance; and the more so because the Plaintiff has his remedy by action at law against Mr *Wase* and those, who were competent to make the agreement; and may recover damages ...."

The case went on appeal and is reported in (1803) 8 Ves Jun 505; 32 ER 451. The Lord Chancellor, Lord Eldon, said (at 517; 455):

> "I admit, if persons will enter into such an agreement to purchase at the valuation of another person, they must in ordinary cases be bound by that valuation: they must be taken to be judges of the discretion and skill of the person entrusted .... If damages could be recovered in such a case, it does not follow, that the Court is in all cases bound specifically to perform the agreement to abide by the valuation ...."

His Lordship refused to reverse the decree saying (at 519; 456):

> "... upon the whole there is reasonable doubt enough, whether the valuation was made upon such a principle, that it ought to bind married women, to make it not unfit, that this Plaintiff should seek the benefit of his contract at law."

In *Parken v Whitby* (1823) Turn & R 366; 37 ER 1142, the Master of the Rolls, Sir Thomas Plumer, affirmed the right of a Court of Equity to refuse specific performance if it thought that the price fixed by a valuer was erroneous.

In the much cited case of *Collier v Mason* (1858) 25 Beav 200; 53 ER 613, the parties agreed to the sale of a house and property at a price to be fixed by

a named person. Specific performance of the agreement was resisted on the ground that the price fixed was a gross undervalue of the property. The Master of the Rolls, Sir John Romilly, said (at 204; 614):

> "... Here the referee has fixed the price, which is said to be evidence of miscarriage, but this Court, upon the principle laid down by Lord Eldon, must act on that valuation, unless there be proof of some mistake, or some improper motive, I do not say a fraudulent one; as if the valuer had valued something not included, or had valued it on a wholly erroneous principle, or had desired to injure one of the parties of the contract; or ... if the price were so excessive or so small as only to be explainable by reference to some such cause; in any one of these cases the Court would refuse to act on the valuation."

The court, of course, was the Court of Chancery. Both *Emery v Wase* and *Parken v Whitby* were relied upon by counsel for the defendant who submitted that the suit should be dismissed and the plaintiff left to his remedy at law. His Lordship said that, although the valuation was very high and perhaps exorbitant, he could not say it amounted to evidence of fraud mistake or miscarriage. So he decreed specific performance.

In *Weekes v Gallard* (1869) 21 LT 655 Lord Romilly MR took the view that it was the duty of the courts to enforce specific performance of agreements to be bound by the valuations of other persons. He said that the "only defence to such a suit would be fraud or collusion" (at 655). No mention was made of mistake.

The law seemed reasonably settled until the decision of Harman J in *Dean v Prince* [1953] Ch 590. The articles of association of a company provided that in some circumstances shares in it were to be purchased at a price to be certified by an auditor as a fair value. The auditor stated that his valuation of a parcel of shares (which were a controlling interest in the company) was on

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the basis of the break up value of the assets. Harman J held that as the auditor had given his reasons he could examine them. His Lordship said that the auditor had based himself "on an entirely wrong basis and has chosen to explain that basis" (at 593, 594). Harman J made a declaration that the valuation was not binding upon the plaintiff. The Court of Appeal ([1954] Ch 409) reversed his decision and held that the auditor had made no error. Although no appeal was brought against that part of the judgment which held that the valuation was challengeable, both Denning LJ and Wynn-Parry J discussed the question. Denning LJ said (at 427) that "... if the

courts are satisfied that the valuation was made under a mistake, they will hold it not to be binding on the parties". After referring to cases concerned with the personal liability of a valuer, his Lordship said (at 427):

> "... But those cases have no application when we are considering the validity of the valuation itself. It can be impeached not only for fraud but also for mistake or miscarriage. That was made clear by Sir John Romilly, MR in *Collier v Mason* 25 Beav 200, 204. For instance, if the expert added up his figures wrongly; or took something into account which he ought not to have taken into account, or conversely: or interpreted the agreement wrongly; or proceeded on some erroneous principle. In all these cases the court will interfere. Even if the court cannot point to the actual error, nevertheless, if the figure itself is so extravagantly large or so inadequately small that the only conclusion is that he must have gone wrong somewhere, then the court will interfere in much the same way as the Court of Appeal will interfere with an award of damages if it is a wholly erroneous estimate."

Wynn-Parry J also expressed the view (at 430) that the principles which the court should apply to the case were those laid down by Sir John Romilly MR in *Collier v Mason*. Neither Denning LJ nor Wynn-Parry J appeared to see any difference between an action at law and an action seeking equitable relief.

Nothing in the previous case law, however, had decided that a court could set aside a valuation on the ground of mistake. In some cases the Court of Chancery had refused to decree specific performance of the agreement. But in each of them the plaintiff was left to his remedy at law.

Since the decision in *Dean v Prince* [1953] Ch 590 and [1954] Ch 409 the course of authority has fluctuated considerably.

In *Dean v Prince* Harman J had expressed the view (at 594) that if the valuers had chosen to keep silent as to their methods of valuation no "court would have obliged them to explain their reasons". The distinction between cases where the valuation exposes the course of reasoning and those where they do not has subsequently proved influential. In *Frank H Wright (Constructions) Ltd v Frodoor Ltd* [1967] 1 WLR 506; [1967] 1 All ER 433, Roskill J examined a contract where the sale of a business was to be at a price "certified by accountants acting as experts and not arbitrators". His Lordship (at 525, 526; 454), relying on the judgment of Harman J in *Dean v Prince* said that as the accountants had set out their reasons it was open to the defendants, if they could, to seek to upset the certificate. His Lordship applied

what Denning LJ and Wynn-Parry J had said in the same case. But he came to the conclusion that, before the court would set aside a certificate for error,

the error must materially affect the ultimate result. On the evidence he refused to interfere.

In *Jones v Jones* [1971] 1 WLR 840; [1971] 2 All ER 676, the terms of an agreement required shares to be valued on a "going concern" basis. Ungoed-Thomas J held that a valuation, which valued the shares on a break up basis, should be set aside. His Lordship thought that, where a valuation was made on a specified principle the only question is whether in all the circumstances that principle is wrong or not. The correct ground of the decision, in my opinion, however, was that the valuation was not in accordance with the contract.

In *Arenson v Arenson* [1973] Ch 346 at 362 Lord Denning MR departed from the views which he had expressed in *Dean v Prince*. His Lordship said (at 362):

> "... Whenever two persons agree together to refer a matter to a third person for decision, and further agree that his decision is to be final and binding upon them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it. They cannot reopen it for mistake or error on his part or for any reason other than for fraud or collusion."

His Lordship went on to say (at 363) that even if he makes a mistake in his calculations or makes the valuation on what one or other considers to be a wrong basis the parties to the agreement are bound to accept it at least when the valuation was "not a speaking valuation". Lord Denning MR was not sure, however, whether Harman J was correct in saying that, if a valuer gives reasons, a court could inquire into their correctness. The remarks of Lord Denning were made obiter. In *Campbell v Edwards* [1976] 1 WLR 403; [1976] 1 All ER 785, the Court of Appeal again had to consider a claim that a valuation was not binding. The court held that the valuation bound the parties even though there was strong evidence to indicate that the valuation represented a gross under-value. Once again Lord Denning expressed the view (at 407; 788) that, even if the valuer had made a mistake, the parties were bound by it. Somewhat enigmatically his Lordship said that, if a valuer gave a speaking valuation and it could be shown on the face of his reasons or calculations that they were wrong, the valuation might be upset.
Geoffrey Lane LJ accepted the statement of the law in Lord Denning MR's

judgment in *Arenson v Arenson* as correct. The decision and reasoning in *Campbell v Edwards* was followed by the Court of Appeal in *Baber v Kenwood Manufacturing Co Ltd* [1978] 1 Lloyd's Rep 175.

In *Mayne Nickless Ltd v Solomon* [1980] Qd R 171 at 179, Sheahan J, giving the judgment of the Full Court of Queensland, said that he was strongly inclined to the view that a valuation, whether speaking or non-speaking, made by a valuer chosen by the parties was not impeachable for error or mistake.

In *Karenlee Nominees Pty Ltd v Gollin & Co Ltd* [1983] 1 VR 657 the Full Court of Victoria pointed out that a valuation is not mistaken within the meaning of what Sir John Romilly MR had said in *Collier v Mason* simply because the valuation is open to serious criticism. The trial judge had held that a valuation was invalid because of nine errors. One of the errors related to the use of comparable sales; five of the errors concerned whether the valuer had given too much or too little weight to particular factors; another

error alleged that the analysis by the valuer of comparable sales was insupportable; and the remaining two errors concerned matters of detail. The Full Court upheld the valuation saying that the "mistake" to which Sir John Romilly MR was referring was a mistake of a kind which would enable a defendant to resist a suit for specific performance of a contract. Their Honours said (at 671): "... Usually this is a bona fide mistake by the defendant as to the subject matter or terms or effect of the contract ...."

In *Email Ltd v Robert Bray (Langwarrin) Pty Ltd* [1984] VR 16 the Full Court of Victoria again held that a valuation could not be attacked upon the ground that relevant matters had been disregarded or irrelevant matters considered. The court was of the opinion that the parties were bound by the valuation "unless the assessment is vitiated by fraud, collusion or mistake" (at 21).

This review of the authorities shows that this branch of law has been subject to much difference of opinion over the last thirty years. Moreover, much of the discussion appears to have proceeded upon the assumption that at least the general proposition espoused by Sir John Romilly MR, in *Collier v Mason* can be applied to both legal and equitable remedies. With respect, I think that this is a mistake. Only one decision (*Jones v Jones*), however, has resulted in a valuation being set aside by the application of what I regard as a wrong principle. The preferable course, in my opinion, is to restate the law on the matter in accord with what I believe is its correct basis.

In my opinion the question whether a valuation is *binding* upon the parties depends in the first instance upon the terms of the contract, express or implied. This was pointed out by Sir David Cairns in the Court of Appeal in *Baber v Kenwood Manufacturing Co Ltd* (at 181). A valuation obtained by fraud or collusion can usually be disregarded even in an action at law. For in a case of fraud or collusion the correct conclusion to be drawn will almost certainly be that there has been no valuation in accordance with the terms of the contract. As Sir David Cairns pointed out, it is easy to imply a term that a valuation must be made honestly and impartially. 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 bound by his decision. It is now settled that an action for damages for negligence will lie against a valuer to whom the parties have referred the question of valuation if one of them suffers loss as the result of his negligent valuation: *Sutcliffe v Thackrah* [1974] AC 727; *Arenson v Arenson* [1977] AC 405. But 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

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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.

Furthermore, when a party seeks the assistance of equitable remedies to enforce an agreement to abide by the valuation of a third party, mistake, fraud or collusion can be a defence to the action in certain circumstances:

Collier v Mason; *Weekes v Gallard*. But those equitable defences are not available when the plaintiff seeks a common law remedy. To hold otherwise is to become a victim of "the fusion fallacy" which Messrs Meagher QC, Gummow and Lehane so roundly condemn: *Equity, Doctrines and Remedies*, 2nd ed (1984) at 44-58. Of course, defences of fraud, collusion or mistake may be available when a common law remedy is sought. But that is because the express or implied terms of the contract permit them. The defences of which Sir John Romilly MR spoke in *Collier v Mason* were equitable defences to an equitable remedy. They are not available in a common law action.

Is the mistake in the present case of a kind which enables the court to set aside the valuation? In my opinion it is not of the relevant kind. There is nothing in the contract which would enable the valuation to be set aside on the simple ground that the valuer made a mistake. Nor do I think it possible to imply a term to that effect: *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337. The rent review clause makes the decision of the valuer "final and binding on the parties to this lease". Nothing in the lease suggests that it was not to be final and binding if it was the result of error or mistake or was unreasonable. The decision -- whatever it is -- is to bind the parties. It is true that the valuer is "acting as an expert and not as an arbitrator". But those words which have been commonly used in agreements since the *Common Law Procedure Act* 1854 serve the purpose of excluding the provisions of the *Arbitration Act* 1902. They avoid the necessity for the valuer to hear evidence and the parties and to determine judicially between them. They enable him to rely on his own investigations, skill and judgment: *Re Dawdy* (1885) 15 QBD 426 at 429, 430. Indeed they reinforce the view that the parties, as between themselves, rely on the honest and impartial skill and judgment of the valuer.

Waddell J held, however, that the mistake was of a kind which showed that the valuer had not determined the question referred to him. His Honour thought (at 10) that there was a "misapprehension as to what ... was to be valued". This was because the learned judge thought that the valuer had valued the premises in the condition in which they were on 31 March 1980. I have already indicated that I do not think that this is correct.

There is also nothing in the nature of the mistake which indicates a departure from the terms of the contract. The mistake was one made in the process of valuation. But it was not a departure from the terms of the contract.

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Further, although the suit was started in the Equity Division, the claim of the lessee is that it is not bound by the valuation either at law or in equity. A suit of that kind does not attract the operation of the doctrine to which Sir John Romilly MR referred in *Collier v Mason*. Moreover, on the facts I do not think that the equitable defences would be applicable even if this was somehow a suit for specific performance.

In my opinion the appeal should be allowed. The respondent should pay the costs here and below.

Appeal allowed.

Judgment of Waddell J set aside.

Summons dismissed with costs.

Solicitors for the appellant: *Moore & Bevins*.

Solicitors for the respondent: *John I Einfeld & Co*.

J H A JACOBS,
Barrister.

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