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| Case Name: | Strike Australia Pty Ltd v Data Base Corporate Pty Ltd |
| Medium Neutral Citation: | [2019] NSWCA 205 |
| Hearing Date(s): | 31 July 2019 |
| Decision Date: | 21 August 2019 |
| Before: | Bell P at [1]; Basten JA at [37]; Ward JA at [68] |
| Decision: | Appeal dismissed with costs. |
| Catchwords: | CONTRACTS – Construction – Interpretation – determination of market rent by an expert valuer – construction of provision of sub-lease requiring the valuer to “have regard to” certain matters in determining the market rent for a sub-lease of premises located at King Street Wharf, Sydney – interpretation of requirement to “have regard to” “comparable premises in the vicinity of the Premises” – whether matters listed exhaustive – meaning of “have regard to”   VALUATION – expert determination – whether the trial judge erred in finding that the valuer did not have regard to market rents in the manner prescribed by the sub-lease – whether the trial judge erred in finding that the determination of market rent by the valuer was not binding on the appellant and the respondent as parties to the sub-lease – whether the valuer erroneously had regard to the physical configuration of the premises or tenant’s property – appeal dismissed with costs   VALUATION – nature of valuation – meaning of “acting as an expert and not as an arbitrator” |
| Legislation Cited: | Landlord and Tenant (Amendment) Act 1948-1961 (NSW), s 21(1) |
| Cases Cited: | AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd [2006] VSCA 173 AMP Henderson Global Investors Ltd v Valuer General [2004] NSWCA 264; 134 LGERA 426 Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99 Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd (2015) 90 NSWLR 367; [2015] NSWCA 275 Avon Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353; [1949] HCA 26 Bank of Queensland Ltd v Chartis Australia Insurance Ltd [2013] QCA 183 Boland v Yates Property Corp Pty Ltd [1999] HCA 64; 167 ALR 575 Brickworks Ltd v Minister for Public Works (1949) 29 LVR 67 Burger King Corp v Hungry Jack’s Pty Ltd (2001) 69 NSWLR 558; [2001] NSWCA 187 Challenger Property Asset Management Pty Ltd v Stonnington City Council (2011) 34 VR 445; [2011] VSC 184 Coplin v Al Maha Pty Ltd [2019] NSWCA 159 Data Base Corporate Pty Ltd v Strike Australia Pty Ltd [2019] NSWSC 271 Duffy v Minister for Planning [2003] WASCA 294; 129 LGERA 271 Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd (2017) 261 CLR 544; [2017] HCA 12 Electricity Commission of New South Wales t/as Pacific Power v Arrow (1994) 85 LGERA 418 Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7 Fitzgerald v Masters (1956) 95 CLR 420 Hodder Rook & Associates Pty Ltd v Genworth Financial Mortgage Insurance Pty Ltd [2011] NSWCA 279 Homburg Houtimport BV v Agrosin Private Ltd [2004] 1 AC 715 Karenlee Nominees Pty Ltd v Gollin & Co Ltd [1983] 1 VR 657 Kenny & Good Pty Ltd v MGICA (1999) 199 CLR 413; [1999] HCA 25 Lainson Holdings Pty Ltd v Duffy Kennedy Pty Ltd [2019] NSWSC 576 Legal & General Life of Australia Ltd v A Hudson Pty Ltd (1985) 1 NSWLR 314 Mainteck Services Pty Ltd v Stein Heurtey SA (2014) 89 NSWLR 633; [2014] NSWCA 184 Mercury Communications Ltd v Director-General of Telecommunications [1994] CLC 1125 Minister of State for the Navy v Rae (1945) 70 CLR 339; [1945] HCA 6 Muriniti; Newell v Lawcover Insurance Pty Ltd (No 2) [2018] NSWCA 311 National Australia Bank Ltd v Clowes [2013] NSWCA 179 Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd [2008] QCA 160 Owen v Woolworths Properties Ltd (1956) 96 CLR 154 Palacath Ltd v Flanagan [1985] 2 All ER 161 Perry v Wright [1908] 1 KB 441 R v Hunt; Ex parte Sean Investments Pty Ltd (1979) 180 CLR 322; [1979] HCA 32 R v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327; [1982] HCA 69 Rathborne v Abel [1965] ALR 545; 38 ALJR 293 Re Dawdy (1885) 15 QBD 426 Rinehart v Hancock Prospecting Pty Ltd [2019] HCA 13 River Bank Pty Ltd v Commonwealth (1974) 4 ALR 651 Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co [1901] AC 373 Sigiriya Capital Pty Ltd v Scanlon [2013] NSWCA 401; 97 ACSR 183 South Sydney Council v Royal Botanic Gardens [1999] NSWCA 478 Spencer v Commonwealth (1907) 5 CLR 418; [1907] HCA 82 Tempe Recreation (D500215 and D1000502) Reserve Trust v Sydney Water Corp (2014) 88 NSWLR 449; [2014] NSWCA 437 United Group Rail Services Ltd v Rail Corporation New South Wales (2009) 74 NSWLR 618; [2009] NSWCA 177 Vale v Sutherland (2009) 237 CLR 638; [2009] HCA 26 Valuer-General v Fivex Pty Ltd [2015] NSWCA 53; 206 LGERA 450 Valuer-General v Perilya Broken Hill Ltd [2013] NSWCA 265; 195 LGERA 416 Walker Corp Pty Ltd v Sydney Harbour Foreshore Authority [2009] NSWCA 178; 168 LGERA 1 Western Australian Planning Commission v Arcus Shopfitters Pty Ltd [2003] WASCA 295 |
| Texts Cited: | Alan A Hyam, The Law Affecting Valuation of Land in Australia (5th ed, 2014, Federation Press) JD Heydon, Heydon on Contract (2019, Lawbook Co) |
| Category: | Principal judgment |
| Parties: | Strike Australia Pty Ltd (Appellant) Data Base Corporate Pty Ltd (Respondent) |
| Representation: | Counsel: ATS Dawson SC with DJ Roche (Appellant) F Corsaro with P Newton (Respondent)   Solicitors: HWL Ebsworth Lawyers (Appellant) Mills Oakley (Respondent) |
| File Number(s): | 2019/122604 |
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| Decision under appeal: |  |
| Court or Tribunal: | Supreme Court of New South Wales |
| Jurisdiction: | Equity |
| Citation: | [2019] NSWSC 271 |
| Date of Decision: | 26 March 2019 |
| Before: | Darke J |
| File Number(s): | 2018/203488 |

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Headnote

[This headnote is not to be read as part of the decision]

Strike Australia Pty Ltd (Strike Australia) sub-leases from Data Base Corporate Pty Ltd (Data Base) premises at the King Street Wharf, Sydney (the Premises), from which Strike Australia operates a ten-pin bowling alley, bar and entertainment venue. The sub-lease was for a term of 10 years commencing mid-2007 and terminating mid-2017, with two options to renew (each for a further term of five years).

In February 2017, Strike Australia gave notice that it was exercising the first option to renew. A rent review was to occur at the commencement of the further term which, in the absence of agreement, was to be determined by an independent valuer in accordance with provisions set out in the first schedule to the sub-lease. The key provision to the first schedule of the sub-lease stated that the valuer must have regard to market rents for “comparable premises in the vicinity of the Premises”.

In determining the market rent, the valuer had regard to rents in the King Street Wharf complex, retail rents for basements in the Sydney CBD and identified four properties which he said provided “the best guide” to the market rent for the Premises. Relevantly, two of the properties were located at Macquarie Park (near North Ryde) and at Bondi Beach.

The primary judge held that the valuer had not carried out his determination of the market rent in accordance with the sub-lease as he did not have regard to the market rents in the manner prescribed by the sub-lease and erroneously included market rents for premises “not in the vicinity of the Premises”. The primary judge made a declaration that the determination of market rent was not binding upon the parties.

Strike Australia raised the following grounds of appeal:

1. that the primary judge had erred in finding that the valuer did not carry out his determination of the market rent in accordance with the mandatory considerations outlined in the first schedule to the sub-lease;
2. if ground 1 was not made out, that the primary judge had nevertheless erred in finding that the valuer erroneously considered market rents for premises “not in the vicinity of the Premises”; and
3. if grounds 1 and 2 were made good, that the primary judge also erred in finding that the determination of market rent by the valuer was not binding on Strike Australia and Data Base as parties to the sub-lease.

Held, dismissing the appeal (Basten and Ward JJA agreeing):

In relation to ground (1):

(i)   Under the sub-lease, the valuer was obliged to take into account comparable premises in the vicinity of the Premises only and not other premises that he or she might consider comparable elsewhere. The paragraph identified a specific category of properties to the implied exclusion of the properties that did not fall within that category. Ground 1 of the grounds of appeal was dismissed: at [52]ff (Basten JA); [135]ff (Ward JA).

Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7; Rinehart v Hancock Prospecting Pty Ltd [2019] HCA 13; Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd (2017) 261 CLR 544; [2017] HCA 12 referred to.

Per Bell P (dissenting)

(ii)   As a matter of construction, having regard to the natural meaning of the phrase “have regard to” and the context in which it appeared, including the fact that the sub-lease specified certain matters to be disregarded, and consistent with the nature of valuation and what it means to act as an expert, as the valuer was required to do, the sub-lease, although prescribing certain matters to which regard was required to be had, was not exhaustive as to the matters to which regard was permitted to be had. Further, it was not necessary to read into the sub-lease such a limitation. Accordingly, the valuer was permitted to have regard to comparable premises not in the vicinity of the Premises: [22]-[29].

Owen v Woolworths Properties Ltd (1956) 96 CLR 154; [1956] HCA 67; Rathborne v Abel (1964) 38 ALJR 293 considered.

In relation to ground (2):

(iii)   The primary judge was correct in determining that the other premises taken into account by the valuer were objectively outside the vicinity of the Premises. It was not open to the valuer, in the exercise of his discretion (such that it would not be open to review by the court) to determine the limits of “in the vicinity” in the sub-lease. While the valuer was required under the sub-lease to have regard to the written submissions of the parties that were provided to him, the valuer was also required to disregard anything in the submissions that was inconsistent with the mandatory requirements in the sub-lease. Ground 2 of the grounds of appeal, in the alternative, was dismissed: at [2] (Bell P); [44]ff (Basten JA); [158]ff (Ward JA).

AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd [2006] VSCA 173; Avon Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353; [1949] HCA 26 referred to.

In relation to ground (3)

(iv)   The Court did not consider it necessary to determine ground (3) and grounds (1) and (2) had not been made good: at [163]ff Ward JA.

In relation to the respondent’s notice of contention

(v)   The valuer made clear that he had arrived at his determination on the basis that the “best guide” to market rent were the four identified comparable properties and that more weight should be placed on the permitted use and physical characteristics of the Premises. The notice of contention was dismissed: at [2] (Bell P); [183]ff (Ward JA).

Judgment

1. **BELL P**: I have had the benefit of reading in draft the reasons of Ward JA and the separate reasons of Basten JA.
2. I agree with Ward JA’s reasons for rejecting the second ground of appeal and also for dismissing the Notice of Contention. I disagree, however, with respect, with her Honour’s reasons for rejecting the first ground of appeal. I also disagree with Basten JA’s slightly different reasons for dismissing that ground.
3. What follows presupposes a familiarity with Ward JA’s reasons which set out the background to the dispute and the relevant contractual provisions. I also gratefully adopt her Honour’s account of the parties’ respective arguments in relation to the first ground of appeal.
4. The issue in relation to that ground turns upon the proper construction of cl 4 of the Sublease and, in particular, cl 4.5, and may be simply stated. It concerns whether or not certain matters which cl 4.5 mandates the Landlord to instruct the valuer to “*have regard to*” and to “*disregard*” circumscribe the valuation exercise such that a valuation which, in addition to having regard to the prescribed matters and disregarding the proscribed matters, also has regard to matters that are not prescribed but which are equally not proscribed is invalid. In short, is cl 4.5(c) on its proper construction “exhaustive” as to the matters to which the valuer may have regard?
5. Clauses 4.4 and 4.5 are in the following terms:

“4.4   If the Landlord and the Tenant cannot agree on a Market Rent within 14 days after the Tenant Notifies the Landlord in accordance with paragraph 4.3 the Landlord must on behalf of both the Landlord and the Tenant request the President for the time being of the API or the President’s nominee to appoint a Valuer to determine the Market Rent in accordance with paragraph 4.5.

4.5   In so doing, the Landlord must instruct the Valuer to:

(a)   determine the Market Rent within 21 days after the date the Valuer is appointed and to express the Market Rent as a net amount which does not include GST;

(b)   assume that the Premises are available for letting between a willing but not anxious Landlord and a willing but not anxious Tenant;

(c)   have regard to:

(i)   the terms and conditions of this Lease;

(ii)   market rents (excluding rents which have been escalated to a predetermined amount or in accordance with movements in a consumer price index or any other index) at the Market Review Date for comparable premises in the vicinity of the Premises let at their highest and best use including new lettings, lease renewals and rent reviews but must disregard the GST component of any such market rents which include GST;

(iii)   the Permitted Use;

(iv)   the period which will elapse between the Market Review Date and the next Review Date or, if there is no further Review Date, the end of the Term;

(v)   the unexpired portion of the Term as if it were the length of the Term;

(vi)   the value attached to the Premises attributable to the location, Appurtenances, Mechanical Services, other Services, facilities, amenity, adornment, landscaping, management and promotion of the Premises by the Landlord;

(vii)   the increase in value of the Premises following any works undertaken by the Landlord to the Premises at any time prior to the relevant Market Review Date; and

(viii)   any written submissions made by or on behalf of either or both of the parties.

(d)   disregard:

(i)   any deleterious condition of the Premises caused by the Tenant;

(ii)   the Tenant’s Property, so that the Premises are treated as cleared space inclusive of the Landlord’s Property, but otherwise serviced and useable;

(iii)   any subletting, licensing or sharing of possession of the Premises;

(iv)   any goodwill attributed to the Premises by reason of the use to which they are or have been put by the Tenant, its sub-tenants, licenses or their respective predecessors in title;

(v)   the effect or alleged effect of any incentives, periods of rent abatement or reimbursement, financial contributions (including any contribution toward the cost of fitting out premises) or other incentives provided to tenants (whether for a new letting or for sitting tenants);

(vi)   any exclusive licence to use areas, naming or signage rights which the Tenant may have in respect of the Premises;

(vii)   that the Premises may have more than one floor;

(viii)   the GST component of any market rents used for comparative purposes which are inclusive of GST; and

(ix)   the GST which the Landlord will charge to the Tenant under clause 3.4 and pay to the Australian Taxation Office under the GST Law,

(e)   act as an expert and not as an arbitrator; and

(f)   advise both the Landlord and Tenant in writing of the Valuer’s determination of the Market Rent and give reasons for the Valuer’s determination.”

1. The issue which I have sought to encapsulate at [4] above arises because, in reaching his determination as to the Market Rent, the valuer in the present case had regard to comparable market rents *outside the vicinity* of the Premises as well as within the vicinity within the meaning of cl 4.5(c)(ii).
2. Whether this invalidated the entire valuation turns upon whether the expression “have regard to” means, on the proper construction of the Sublease, “*only* have regard to”. In my opinion, it does not.
3. Before turning to consider the meaning of the phrase “have regard to” as used in cl 4.5(c), it is desirable first to note a number of general features of valuation and its essential nature as well as what it means to act as an expert and not an arbitrator, as these considerations do, for reasons that I shall explain, have some (albeit not determinative) bearing upon the construction exercise.

The nature of valuation and acting as an expert

1. The High Court has, on numerous occasions, recognised that the valuation of land (which I take to include the determination of market rent) is an art and not a science: see, eg, *River Bank Pty Ltd v Commonwealth* (1974) 4 ALR 651 at 653 per Stephen J; *Boland v Yates Property Corp Pty Ltd* [1999] HCA 64; 167 ALR 575 at [12] per Gleeson CJ and [277] per Callinan J (***Boland v Yates***); *Vale v Sutherland* (2009) 237 CLR 638; [2009] HCA 26 at [21] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ. As Callinan J stated in *Boland v Yates*:

“It should also be firmly kept in mind that valuation practice, like legal practice, cannot be an exact science. Both require the exercise of judgments and the forming of opinions, often on matters in respect of which certitude is impossible and uncertainty highly likely.”

1. Similar statements have also been made by this Court: see, eg, *Electricity Commission of New South Wales t/as Pacific Power v Arrow* (1994) 85 LGERA 418 at 419 per Kirby P; *AMP Henderson Global Investors Ltd v Valuer General* [2004] NSWCA 264; 134 LGERA 426 at [56] per Tobias JA; *Walker Corp Pty Ltd v Sydney Harbour Foreshore Authority* [2009] NSWCA 178; 168 LGERA 1 at [99] per Basten JA; *Hodder Rook & Associates Pty Ltd v Genworth Financial Mortgage Insurance Pty Ltd* [2011] NSWCA 279 at [12] per Young JA; *Valuer-General v Perilya Broken Hill Ltd* [2013] NSWCA 265; 195 LGERA 416 at [35] per Leeming JA; *Valuer-General v Fivex Pty Ltd* [2015] NSWCA 53; 206 LGERA 450 at [55] per Leeming JA. (See also *Karenlee Nominees Pty Ltd v Gollin & Co Ltd* [1983] 1 VR 657 at 669 per Lush, Murphy and Jenkinson JJ.)
2. In both *Duffy v Minister for Planning* [2003] WASCA 294; 129 LGERA 271 at [33] and *Western Australian Planning Commission v Arcus Shopfitters Pty Ltd* [2003] WASCA 295 at [71], McLure J (as she then was) likened the valuation exercise to the exercise of judicial discretion. As her Honour observed in the latter case, “[t]here is significant scope for legitimate variations in approach and method and it is inappropriate to formulate rigid rules as to what is required”.
3. One consequence of valuation being an art and not a science is that it will involve subjective judgment and the steps in reasoning will not always be able to be articulated fully. In *Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co* [1901] AC 373, the Privy Council said at 391 as follows:

“It is quite true that in all valuations, judicial or other, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others. Everyone who has gone through the process is aware of this lack of demonstrative proof in his own mind, and knows that every expert witness called before him has had his own set of conjectures, of more or less weight according to his experience and personal sagacity. In such an inquiry as the present, relating to subjects abounding with uncertainties and on which there is little experience, there is more than ordinary room for such guesswork; and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at.”

1. This passage has been frequently cited with approval including in *Spencer v Commonwealth* (1907) 5 CLR 418; [1907] HCA 82 at 442–443 (**Spencer**).
2. In *Challenger Property Asset Management Pty Ltd v Stonnington City Council* (2011) 34 VR 445; [2011] VSC 184 at [24], Croft J stated that:

“It is clear from the authorities that, depending on the particular circumstances, different methods of valuation may be appropriate. The courts have not adopted a prescriptive position with respect to valuation methodology and care should be taken to ensure that no single process of reasoning is elevated into a statement ofprinciple.*The valuer’s task is then, within the context of the facts and circumstances relating to the relevant property, to apply the most appropriate method of valuation according to his or her expertise and experience.* Valuation practice is principally an art, rather than a science and is an art that continues to evolve.” (Footnote omitted; emphasis added)

1. In *The Law Affecting Valuation of Land in Australia* (5th ed, 2014, Federation Press) at 107, Mr Hyam observes that “[i]n arriving at an opinion as to value it is important that the valuer have regard to all material relevant to value”. In *Brickworks Ltd v Minister for Public Works* (1949) 29 LVR 67 (**Brickworks**), Sugerman J (as he then was) stated at 87 that in undertaking the valuation exercise, it was “necessary to approach the question by as many routes as are open and to seek guidance from as many sources of information as are available”. Guidance may also, of course, be supplied by the parties in the context of a valuation or rent determination pursuant to a contract or, in a relevant case, by the legislature (as to which, see *Owen v Woolworths Properties Ltd* (1956) 96 CLR 154 [1956] HCA 67 (**Owen**); *Rathborne v Abel* (1964) 38 ALJR 293 (**Rathborne**)). In *Brickworks*, Sugerman J cited the decision of Sir Owen Dixon, sitting at first instance in *Minister of State for the Navy v Rae* (1945) 70 CLR 339 at 344; [1945] HCA 6 where it was said, in the context of assessing compensation for the taking of a piece of property that it was:

“… necessary, or at all events wise, to pursue as many means of estimation as are open, to compare them, and then, as an exercise of judgment, to fix what, upon considerations this process suggests, appears to be a fair compensation.”

1. That all relevant factors should be taken into account is consistent with the following statement of McHugh J in *Kenny & Good Pty Ltd v MGICA* (1999) 199 CLR 413; [1999] HCA 25 regarding the knowledge that is attributed to the hypothetical parties to the hypothetical sale of land:

“[49]   Value is determined by forming an opinion as to what a willing purchaser will pay and a not unwilling vendor will receive for the property. In determining that value, there must be attributed to the parties a *knowledge of all matters that affect its value*. Those matters will include the predicted impact of future events as well as the experience of the past and the rates of return on other investments …

[50]   The market for the property is, therefore, assumed to be an efficient market in which buyers and sellers have access to *all currently available information that affects the property*.” (Footnotes omitted; emphasis added)

1. His Honour referred to the following observation of Isaacs J in *Spencer* at 441:

“We must further suppose both to be perfectly acquainted with the land, and cognizant of *all circumstances* which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property.” (Emphasis added)

1. McHugh JA, when a judge of this Court, had explained in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 336 the meaning of the phrase “acting as an expert and not as an arbitrator”. It will be recalled that, in the present case, the valuer appointed under cl 4 is to act “as an expert and not as an arbitrator”: cl 4.5(e). McHugh JA (as he then was) said as follows:

“… 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*.” (Emphasis added)

1. In *Re Dawdy* (1885) 15 QBD 426, to which McHugh JA referred, Lord Esher MR observed at 430 that:

“… if a man is, on account of his skill in such matters, appointed to make a valuation, in such a manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge, and his skill, he is not acting judicially; he is using the skill of a valuer, not of a judge. In the same way, if two persons are appointed for a similar purpose, they are not arbitrators, but only valuers. They have to determine the matter by using solely their own eyes, and knowledge, and skill.”

1. Similarly, in *Palacath Ltd v Flanagan* [1985] 2 All ER 161, Mars-Jones J said at 166:

“In the instant case the defendant was specifically enjoined in cl 8 of the second schedule to act as an expert, and was not to be limited or fettered in any way by the statement of reasons or valuations submitted by the parties, but was entitled to rely on his own judgment and opinion. In the light of those express provisions it is impossible for me to hold that the parties intended that the defendant should act as an arbitrator or quasi-arbitrator in determining the revised rent. I am satisfied that the provisions of cl 8 were not intended to set up a judicial or quasi-judicial machinery for the resolution of this dispute or difference about the amount of the revised rent. Its object was to enable the defendant to inform himself of the matters which the parties considered were relevant to the issue. He was not obliged to make any finding or findings accepting or rejecting the opposing contentions. Nor, indeed, as I see it was he obliged to accept as valid and binding on him matters on which the parties were agreed. He was not appointed to adjudicate on the cases put forward on behalf of the landlord and the tenant. He was appointed *to give his own independent judgment as an expert*, after reading the representations and valuations of the parties (if any) and giving them such weight as he thought proper (if any).” (Emphasis added)

1. See also *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2008] QCA 160 at [78] ff per Muir JA. In that case, Atkinson J (although dissenting in the result) summarised at [118] the characteristics of expert determination, as distinct from arbitration, as follows:

“•   Whilst there may be a dispute in existence rather than just a determination to avoid a dispute, there but will ordinarily be a dispute of a kind which can be determined in an informal way by reference to the specific technical knowledge or learning of the expert: *Capricorn Inks v Lawter International* at 15, 28; *Zeke Services v Traffic Technologies* at [24].

…

•   The appointee is directed to make an appraisal in money terms of property value or loss or damage or the like by the use of some special knowledge or skill possessed by him or her: *In Re an Arbitration Between Dawdy and Hartcup* (1885) 15 QBD 426 at 430; *Capricorn Inks v Lawter International* at 28.

…

•   It has the advantage of being expeditious and economical. This is so because an expert determination is informal and experts apply their own store of knowledge and expertise to their observation of the facts, which are of a kind with which they are familiar: *Zeke Services v Traffic Technologies* at [27]; *Straits Exploration v Murchison United* (2005) 31 WAR 187 at 192.

…

•   Experts, unlike arbitrators, can undertake their own investigations, without disclosing them to the parties and generally can determine the question before them according to their own experience without being constrained by the contentions of competing parties: *AGE Ltd v Kwik Save Stores Ltd* at 148,151.

•   Experts are entitled to act solely on their own expert opinion: *Palacath Ltd v Flanagan* at 166.”

1. In light of the matters that fall for determination in the present case, five key general points may be derived from this overview of cases concerning valuation and what it means to act as an expert and not an arbitrator:
2. valuation is a field of specialised expertise which involves subjective judgments and evaluative choice;
3. (i)    prima facie, all relevant information, that is to say matters or considerations affecting value, should be taken into account in a valuation exercise;
4. (ii)    “experts” draw upon their own knowledge, skills and observations;
5. (iii)    given the broad and quasi-discretionary nature of valuation, valuers may be given some guidance by contractual parties or the legislature as the case may be as to what to have regard to and what to disregard in what may be a wide ranging exercise; but
6. the ultimate exercise is a valuation (or rent determination) in respect of which the valuer is an expert and is to apply his or her expertise.

Analysis

1. My reasons for finding that cl 4.5(c) of the Sublease was not exhaustive as to the matters to which regard was to be had are as follows:
2. if cl 4.5(c) were exhaustive, that would necessarily exclude all other matters and cl 4.5(d) which specifies matters to be “disregard[ed]” would be redundant. One should not attribute to the drafters of the Sublease an intention to draw the contract to include such redundancy;
3. such a consequence is contrary to a fundamental principle of contractual construction, recently described as the “primary rule” (JD Heydon, *Heydon on Contract* (2019, Lawbook Co) at [8.560] (**Heydon**)), namely that “the words of every clause [of a contract] must if possible be construed so as to render them all harmonious one with another”: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*(1973) 129 CLR 99at 109 per Gibbs J (as he then was); [1973] HCA 36 (**Australasian Performing Right Association**). This well-known statement of principle has been routinely applied in this Court: *Burger King Corp v Hungry Jack’s Pty Ltd* (2001) 69 NSWLR 558; [2001] NSWCA 187 at [108]; *Sigiriya Capital Pty Ltd v Scanlon* [2013] NSWCA 401; 97 ACSR 183 at [30]; *Tempe Recreation (D500215 and D1000502) Reserve Trust v Sydney Water Corp* (2014) 88 NSWLR 449; [2014] NSWCA 437 at [54]; *Muriniti; Newell v Lawcover Insurance Pty Ltd (No 2)* [2018] NSWCA 311 at [42]; *Coplin v Al Maha Pty Ltd* [2019] NSWCA 159 at [73]. As the cases collected in fn 205 of Chapter 8 of *Heydon* illustrate, it is a principle that has been established and applied for over 200 years;
4. consistent with the principle articulated in *Australasian Performing Right Association*, a whole clause of a contract that would otherwise be redundant if cl 4.5(c) were exhaustive should not be dismissed on the basis that the parties were simply spelling out that certain matters should be disregarded through “abundance of caution”. Resort to such an “explanation”, necessarily speculative in nature, is apt to rob the “primary rule” of construction of much of its work;
5. as a striking illustration of this more general point, cl 4.5(c)(ii), whilst directing the valuer to have regard to comparable market rents in the vicinity of the Premises, also directs the valuer to “disregard the GST component of any such market rents which include GST”. On the majority’s construction, this would render redundant cl 4.5(d)(viii) which provides that the valuer is to disregard “the GST component of any market rents used for comparative purposes which are inclusive of GST”. As Basten JA points out at [57], the respondent accepted that this was the consequence of its construction;
6. it is also significant that cl 4.5(d)(viii) refers to “any market rents used for comparative purposes”. This clause is not symmetrical with cl 4.5(c)(ii). The indefinite pronoun “any” suggests that the comparative market rents here being referred to are not confined to those comparative rents for properties “in the vicinity” of the Premises, and is a strong textual indication that it was open to the valuer, in addition to drawing on market rents in the vicinity of the Premises, to discharge the valuation assignment by reference to such wider considerations (if any) that he or she considered relevant. The purpose of cl 4.5(d)(viii) was to ensure that, if the valuer did this, he or she disregarded the GST on such rents;
7. even without cl 4.5(d) and the implications it has for the proper construction of cl 4.5(c), “have regard to” when used in collocation with a list of matters to be taken into account has been construed as an expression which is mandatory but not exhaustive: *Owen* at 160 per Dixon CJ, Williams, Fullagar, Kitto and Taylor JJ. This is consistent with the natural meaning of the phrase. As Kitto J said in *Rathborne* at 301, the provision (in that case, s 21(1) of the *Landlord and Tenant (Amendment) Act 1948-1961* (NSW) (**Landlord and Tenant Act**) “that the listed matters are to be regarded does not imply that nothing else may be regarded”. The phrase “have regard to” is a “guide but not a fetter”: *Rathborne* at 295, citing *Perry v Wright* [1908] 1 KB 441 at 458 per Fletcher Moulton LJ. *Owen* and *Rathborne* are considered more fully at [24]-[28] below;
8. contrary to the majority’s construction, the construction I favour does not need a word or words (in this case “*only* have regard to*”*)to be read into cl 4.5 because the phrase “have regard to” is not, on its natural meaning, exclusive or exhaustive;
9. just as a term will not be implied into a contract except where, inter alia, it is necessary to do so, a word or words should not be read into a contract except where it is *necessary* to do so (for example, to avoid an absurdity or to correct a clear mistake or inconsistency) and not otherwise: *National Australia Bank Ltd v Clowes* [[2013] NSWCA 179](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2013/179.html) at [[34]](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2013/179.html#para34)-[[38]](http://www.austlii.edu.au/au/cases/nsw/NSWCA/2013/179.html#para38);*Bank of Queensland Ltd v Chartis Australia Insurance Ltd* [[2013] QCA 183](http://www.austlii.edu.au/au/cases/qld/QCA/2013/183.html) at [[36]](http://www.austlii.edu.au/au/cases/qld/QCA/2013/183.html#para36); *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633; [2014] NSWCA 184 at [116]-[120]; *Heydon* at [8.650]-[8.670]. In *Homburg Houtimport BV v Agrosin Private Ltd* [[2004] 1 AC 715](http://classic.austlii.edu.au/cgi-bin/LawCite?cit=%5b2004%5d%201%20AC%20715) at [[23]](http://www.bailii.org/uk/cases/UKEAT/2003/0273_03_1012.html#para23), Lord Bingham said:

“I take it to be clear in principle that the court should not interpolate words into a written instrument, of whatever nature, unless it is clear both that the words have been omitted and what those omitted words were.”

This passage was referred to by Allsop P (as his Honour then was) in *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) 74 NSWLR 618; [2009] NSWCA 177 at [86]. Citing *Fitzgerald v Masters* (1956) 95 CLR 420 at 426-427; [[1956] HCA 53](http://www.austlii.edu.au/au/cases/cth/HCA/1956/53.html), his Honour said at [86] “[t]here is no doubt that in the process of construction of a document words ‘may … be supplied, omitted or corrected ... where it is clearly necessary in order to avoid absurdity or inconsistency’”;

1. it is not necessary, still less “clearly necessary”, to read into cl 4.5(c) the word “only”, as the majority’s construction requires. The Sublease and cl 4.5 are more than capable of functioning without reading in such a limitation. On my preferred construction, cl 4.5 *prescribes* certain matters that the valuer must “have regard to” and *proscribes* certain matters that are to be “disregard[ed]” but does not prevent a valuer from roaming more widely in his or her valuation so long as that wider inquiry does not entail having regard to matters that are required by cl 4.5(d) to be disregarded.
2. there is nothing capricious, unreasonable, inconvenient or unjust about this construction. It is consistent with the nature of valuation by an expert (see [9]− [22] above and (xii) below). It led to a rational, reasoned valuation in the instant case. That it is one that one party did not like is not to the point;
3. my preferred construction also does not require there to be read into cl 4.5(c) a further subparagraph authorising the valuer to have regard to “such other matters as he or she might think fit” or words to that effect, as such words would only be necessary if cl 4.5(c) were otherwise exhaustive which, for the reasons given both above and below, it is not;
4. the nature of valuation as an art and not a science (see [9]-[17] above), and a field of specialised expertise as confirmed by cl 4.5(e) requiring the valuer to act as an expert and not an arbitrator (see [18]-[21] above) is such that one would not lightly attribute to the parties an intention to constrain the independently chosen and qualified valuer from taking into account such matters as he or she considered relevant to the valuation exercise (provided they were not on the proscribed list of matters set out in cl 4.5(d)). Put slightly differently, in my opinion, it accords with commercial common sense that the parties should be taken to have intended an independently appointed expert valuer to have regard to *all relevant information* bearing on the valuation question except insofar as he or she was expressly directed not to have regard to certain listed matters;
5. in this context, the matters referred to in cl 4.5(c) reflect particular matters which the parties sought to *ensure* the valuer would “have regard to” in his or her undertaking but it does not follow that the parties intended to constrain the valuer to considering these matters. It follows that I am unable to agree with Ward JA’s statement at [141] that the construction for which the appellant contends and which I favour “gives no meaningful operation to [the] limitation” in cl 4.5(c)(ii). The subclause operates to *ensure* that, whatever other properties to which regard *may* *be had* for comparative purposes, those in the vicinity of the Premises *had to be* taken into account;
6. that the parties did not intend to constrain the valuer in the deployment of his or her expertise is also confirmed by cl 4.5(c)(viii) directing the valuer to have regard to “any written submissions made by or on behalf of either or both of the parties”. On the construction favoured by the majority, the valuer would, on the one hand, be required to have regard to matters the parties considered relevant, as contained in their submissions, but, on the other hand, could not have regard to any matters which he or she considered relevant, drawing on the valuer’s qualifications and expertise, if those matters were not prescribed in cl 4.5(c)(i)-(vii) or referred to in the parties’ written submissions. That is an unlikely outcome. Any answer to this argument to the effect that cl 4.5(c)(viii) should to be read down (with words of limitation read into it) so as to refer to “any written submissions made by or on behalf of either or both of the parties *on the matters listed in (i)-(vii) above*” is not warranted by the language and syntax of cl 4.5(c) and is contrary to the principle of contractual construction that I have noted in (viii) above;
7. the majority’s construction also raises an issue about cl 4.5(b) which requires the Landlord to instruct the valuer to make an assumption as to the availability of the premises for letting between a willing but not anxious Landlord and a willing but not anxious Tenant (see [5] above). Does the fact that the valuer was to be instructed to make *this* assumption mean that he or she was to make no other assumptions, for example, as to economic conditions, interest rates, market stability, levels of tourism etc? And, if cl 4.5(b) was not intended to constrain the valuer as to the assumptions that could be made in the valuer’s expert judgment and experience, why should the parties be taken to have intended to constrain the valuer in cl 4.5(c) as to the matters he or she could take into account?
8. Although fully recognising that the meaning of the phrase “have regard to” may of course differ between contract and statute, I am fortified in my analysis of cl 4.5 because of the support it receives from two decisions of the High Court in *Owen* and *Rathborne* to which I have already referred at [23(vi)] above. Both of those cases involved rent determinations under the Landlord and Tenant Act. Section 20(1) required the Fair Rents Board to determine the fair rent of prescribed premises. Section 21(1) set out some ten factors that, subject to s 20 of the Act, the Fair Rent Board “shall have regard to” in determining the fair rent.
9. In *Owen*, an issue was whether or not a stipendiary magistrate had erred in not having regard to a party’s being relieved of federal land tax as a relevant matter in a rent determination because land tax was not one of the matters that s 21(1) of the Landlord and Tenant Actsaid could be had regard to when determining rent. The High Court rejected this argument, stating at 160:

“This appears to mean that because s.21(1) does not mention land tax, although it does mention rates, land tax could not have been considered as an outgoing and consequently its cessation could not be taken into account in comparing the increased outgoings of 1954 with those of 1939 in order to arrive at a fair rent for 1954. The fallacy of this argument is two-fold. In the first place, s.21(1) is not an exhaustive statement of outgoings to be considered in arriving at a fair net return to the landlord.”

1. In*Rathborne*, which also involved a rent determination exercise pursuant to s 21(1) of the Landlord and Tenant Act, the Court held that a particular matter to which the Fair Rents Board was required by s 21(1) to have regard did not preclude it from having regard to matters not specified in s 21(1). In particular, it was held that the fact that the Board was required to have regard to the capital value of the premises at a prescribed date did not prevent it from having regard to the capital value of the premises at other dates, including the date of rent determination, even though this was neither expressly authorised nor expressly permitted by the statutory provision. Kitto J said at 301:

“It is important to observe at the outset four points about s. 21(1). First, it is ‘in determining the fair rent’ that the board is required to have regard to the matters mentioned. The determination of the fair rent is recognized as the board’s essential pre-occupation, and a duty to have regard to the specified matters is prescribed only as a means to that end. In the next place, the whole of s. 21(1) is expressed to be subject to s. 20: not subject only to sub-s. (2) of that section but to sub-s. (1) as well. The overall command remains, to determine the fair rent. In the third place, plainly the provision that the listed matters are to be regarded does not imply that nothing else may be regarded does not imply that nothing else may be regarded. So this Court said *Owen v. Woolworths Properties Ltd.* (1956), 96 C.L.R. 154 at p. 160; and indeed to hold otherwise would be to alter and not to construe the words of parliament. Finally, to require that regard be had to a particular matter in making a discretionary judgment is not to require that the matter shall be allowed an actual influence upon the ultimate result. The matter is to be considered for such bearing as it may have upon the question to be decided, and it is to be allowed such weight (if any) as the tribunal thinks it ought to be given; but if the tribunal thinks it ought to have no weight, then no weight is required to be given to it: cf. *Beresford v Ward,* [1961] V.R. 632, at p. 634.”

1. So too in the present case by analogy with the facts and reasoning in *Rathborne*, just because the valuer was required to have regard to comparable market rents in the vicinity of the Premises did not mean that he or she could not look farther afield if considered relevant and appropriate. The specialised nature of the Premises, limited by the Permitted Use (as a ten-pin bowling alley, bar and ancillary facilities (including electronic and pinball machines)) supplied a reason why the valuer was entitled so to roam, just as there was a logical reason for taking into account the capital value of premises at a time other than that prescribed in the statute in *Rathborne*: see at 301 per Kitto J. Clause 4.5(c)(ii) simply *ensured* that comparable premises *in the vicinity* of the Premises were in fact taken into account.
2. In many respects, there is a stronger basis for holding that cl 4.5(c) of the Sublease was not intended to be exhaustive in its enumeration of the matters to which regard was to be had than in the case of s 21(1) of the Landlord and Tenant Act considered in *Owen* and *Rathborne*. This isbecause that Act, unlike cl 4.5, did not contain the equivalent of cl 4.5(d) and spell out matters that were to be disregarded. As I have noted at [23(i)-(iii)] above], there was no need to spell out matters “to be disregarded” if what was to be had regard to was stated exhaustively in cl 4.5(c).
3. I would add to these authorities the fact that, in an administrative law context, where the phrase “have regard to” is often found, it does not necessarily exclude a decision maker from having regard to matters not expressly detailed in the statute, as cases such as *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329 and 334; [1979] HCA 32 and *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 338; [1982] HCA 69 illustrate.

Other arguments

1. It remains (to the extent that they have not already been covered in [23] above) to address some of the points which have led Ward JA and Basten JA to a different interpretation of cl 4.5 to that which I favour.
2. Both of their Honours put emphasis on the expression “on the basis of the instructions contained in paragraph 4.5” in the definition of Market Rent and the phrase “in accordance with paragraph 4.5” in cll 4.4 and 4.6 of the Sublease. These references do not, in my opinion, advance the matter one way or the other. The expressions “on the basis of” and “in accordance with” do not bear on the meaning of cl 4.5 itself. That is something that needs to be ascertained independently before it can be said whether or not a valuation has been made “on the basis of” or “in accordance with” that clause.
3. Their Honours also make reference to the definition of valuer, that is, a “person who is both a practising real estate agent and a full member of the API of not less than 7 years standing and active and experienced in the valuation of premises similar to the Premises in the central business district (CBD) and fringe CBD of Sydney”. Again, with respect, I do not consider that this reference advances the argument significantly one way or the other. Given that cl 4.5(c) makes it mandatory for the valuer to have regard to comparable properties in the vicinity of the Premises, that the valuer is required to have experience in the valuation of premises in the CBD and fringe CBD is not surprising. It is by no means inconsistent with a valuer, so qualified, also having regard to other comparable premises outside the immediate vicinity. The requirement that the valuer have no less than seven years’ standing as a full member of the API would, in my view, be more than likely to qualify him or her to consider comparable properties outside the immediate vicinity of the CBD.
4. In [53] of his decision, Basten JA states that:

“… a provision such as par (c)(ii), which identifies a specific category of properties to which regard is to be had, may be understood as an implied exclusion of properties which do not fall within that category. In other words, par (c) may be exhaustive with respect to the matters it addresses, but without excluding other permissible considerations. In that sense it is non-exhaustive in a general sense, but exhaustive as to the identified particulars.”

1. With the greatest of respect, this qualified form of *expressio unius* reasoning is unappealing insofar as it appears to treat cl 4.5(c) as exhaustive (at least as regards the subject matter of cl 4.5(c)(ii)), but not entirely so.
2. The subtlety of this construction is not one I would attribute to commercial parties in agreeing how an independently appointed valuer was to be instructed in circumstances where the parties had failed to reach agreement as to rent for the premises going forward. The argument recalls the reasoning of the Full Court of the Supreme Court in *Rathborne* which was rejected in the High Court and, in particular, the following observation by Kitto J at 301 of that decision:

“The judgment of the Supreme Court puts the argument in favour of the implication in its most succinct form by invoking the maxim *expressio unius est exclusio alterius*. It has been said that perhaps few so-called rules of interpretation have been more frequently misapplied and stretched beyond their due limits: per Wills J. in *Colquhoun v. Brooks* (1887), 19 Q.B.D. 400, at p. 406. The care needed before applying it is obviously great where the *expressio unius* is in one item of a non-exhaustive list of matters to be regarded …”

Conclusion

1. For all of the above reasons, I would make the following orders:
2. Allow the appeal with costs.
3. Set aside orders 1 and 2 of the orders of the primary judge.
4. In lieu thereof, order that:
5. the Summons be dismissed; and
6. the respondent pay the appellant’s costs of the proceedings below.
7. **BASTEN JA**: The parties to this appeal are the lessor and lessee (under a sublease) of premises at King Street Wharf, Sydney (“the Premises”). The sublease was entered into on 20 March 2007 ran for 10 years, commencing on 24 August 2007, with two five year options to renew.
8. On 9 February 2017 the lessee (the appellant) gave notice that it was exercising the first option to renew. A rent review was to occur at the commencement of the further term which, in the absence of agreement, was to be determined by an independent valuer in accordance with provisions set out in the first schedule to the sublease.
9. There being no agreement, a valuer was nominated in July 2017. The valuation was completed on 24 August 2017. However, the lessor did not accept that the valuation had been undertaken in accordance with the requirements of the sublease and commenced proceedings in the Supreme Court seeking a declaration to that effect.
10. The relevant provisions of the sublease are set out by Ward JA. The key provision was cl 4.5(c)(ii) of the first schedule to the sublease, which required that the valuer “have regard to … market rents … for comparable premises in the vicinity of the Premises …”. The premises were in the shape of a battle axe, with the larger area being below ground level.
11. The valuer had regard to rents in the King Street Wharf complex, retail rents for basements in the Sydney CBD and identified four properties which he said provided “the best guide” to the market rent for the premises. One of those properties was on the opposite side of Darling Harbour, another was in Dixon Street, Haymarket, but there were also two which were remote from King Street Wharf, one being at Macquarie Park (near North Ryde) and the other being at Bondi Beach. The lessor contended, at least in relation to Macquarie Park and Bondi Beach, that the properties did not qualify for consideration because they were not “in the vicinity of” the Premises; accordingly, the valuer had not undertaken the valuation task in accordance with cl 4.5(c)(ii) of the sublease. It sought a declaration that the valuation was not binding upon the parties.
12. The dispute was heard in the Equity Division on 11 and 12 March 2019; the trial judge, Darke J, delivered judgment on 26 March 2019 upholding the lessor’s claims and making the declaration sought.[[1]](#footnote-1) The lessee appealed from that judgment.
13. Subject to one qualification of limited significance, in my view the clear and concise reasons of the trial judge disposed of the case correctly on the issues raised before him. Although there have been further arguments which were not presented, or not presented in the same terms, to the trial judge, in my view the judgment and orders below should be upheld. Nevertheless, because the further submissions must be addressed, it is necessary to revisit the underlying reasons for the judge’s conclusions.

Who decides the meaning of “in the vicinity of”?

1. The qualification noted above in relation to the reasoning of the trial judge concerned one aspect of the manner in which the lessee argued its case before him. Because a similar argument was presented in this Court, it is necessary to address the issue. It concerns the question whether determining if a property was “in the vicinity of” the Premises was for the valuer, or whether it was a question which could be addressed as a matter of fact by the Court.
2. The judge stated:

“[35]   It is clear in my opinion (and I did not understand counsel for the defendant [lessee] to submit to the contrary), that premises in Macquarie Park or Bondi Beach are not ‘in the vicinity of the Premises’ within the meaning of paragraph 4.5(c)(ii).”

Rather, the argument for the lessee, which was repeated in this Court, was that the identification of comparable rents depended upon consideration by the valuer of what properties could be described as truly comparable, with the consequence that, if the structure and formation of the Premises were unusual (as they were) that might have consequences for the meaning of premises “in the vicinity”.

1. The judge rejected that submission stating:

“[37]   As I have sought to explain, questions whether particular premises are ‘in the vicinity of the Premises’ within the meaning of paragraph 4.5(c)(ii) are not ones the parties have left to the appointed valuer; the valuer is not empowered to determine those questions, even erroneously. Errors in that regard are not beyond review by the Court.”

1. Earlier, the trial judge had stated:

“[23]   The authorities referred to at [15]-[20] above indicate that it is relevant to consider the extent to which the contract contemplates that erroneous decisions of the expert are nonetheless immune from review; or, put another way, it is relevant to consider the extent to which matters are left to the expert in the sense that the expert is empowered to make even wrong decisions. In that context, it has been said that it is easier to suppose that parties to a contract contemplate that an error in the exercise of a judgment, opinion or discretion is beyond review, than is the case with an error which involves objective facts or a mere mechanical arithmetical exercise.”

1. In many cases, this analysis will be appropriate and sufficient; in other cases, a binary approach may be inappropriate. In the present case, there is much to be said for the lessee’s view that the parties *did* expect that a valuer would determine whether comparable premises were in fact in the vicinity of the leased premises, allowing a reasonable margin for differing views. It is highly unlikely that the parties intended that the availability of a property for consideration would depend upon a judgment of the court, rather than the valuer.
2. Nevertheless, the valuer does not exercise an unfettered discretion in making that choice. Where the valuer gives reasons (as he was required to do under the sublease) it may be apparent that the valuer has misconstrued the contract. Alternatively, by reference to the material before the valuer “[i]f the result appears to be unreasonable on the supposition that he addressed himself to the right question … then it may be a proper inference that it is a false supposition.”[[2]](#footnote-2) In other words, though it was a matter for the valuer to determine the geographical limits of the concept of properties “in the vicinity of the Premises”, if, on a proper construction of the contract, it was not open for any valuer acting reasonably to conclude that properties at Macquarie Park or Bondi Beach were “in the vicinity of the Premises” then one may infer a misconstruction of the contract.
3. In fact the valuer gave reasons which indicated why he read down par (c)(ii). However, those reasons cannot affect the proper construction of the contract, which is a matter for the Court.
4. This limited qualification with respect to the reasons of the trial judge noted above has no consequence for the result in the present case; the judge was correct to conclude as a matter of fact that the properties at Macquarie Park and Bondi Beach could not properly be considered as being in the vicinity of the Premises at King Street Wharf. Such a conclusion was not reasonably open under the terms of the sublease.

Was the list of considerations exhaustive?

1. On the basis that two of the four properties considered as the best guide to market rent were not in the vicinity of King Street Wharf, the case must turn upon a different question, namely whether the factors listed in cl 4.5(c) were mandatory but non-exhaustive, or were mandatory *and* exhaustive. (Clearly they were mandatory.)
2. Again, the statement of the issue in binary form may conceal the real effect of the contractual provision. Thus, cl 4.5(c) does not expressly state that it provides an exclusive list, as would have been clear had it commenced as a requirement to “have regard *only* to …”. On the other hand, it did not expressly state that it was a non-exhaustive list, as it might have done by including at the end a statement that the valuer “may have regard to any other matters he or she considers relevant”. Nevertheless, a provision such as par (c)(ii), which identifies a specific category of properties to which regard is to be had, may be understood as an implied exclusion of properties which do not fall within that category. In other words, par (c) may be exhaustive with respect to the matters it addresses, but without excluding other permissible considerations. In that sense it is non-exhaustive in a general sense, but exhaustive as to the identified particulars.
3. It appears that that was how the trial judge understood the arguments presented by the lessor before him. Thus he stated:

“[38]   Further, as noted earlier, paragraph 4.5(c)(ii) contains a detailed prescription of the nature of the rents to which the valuer must have regard in determining the Market Rent. The provision, which is an instruction to the appointed valuer, should be read as one which identifies the permissible boundaries of the types of rents to which the valuer is to have regard. If it were interpreted otherwise, the evident intention to place limits upon the types of rents to which the valuer must have regard would be undermined. That is to say, paragraph 4.5(c)(ii) requires regard to be had to a particular class of rents, namely, certain market rents at the Market Review Date for comparable premises in the vicinity of the Premises. If the valuer makes a mistake about the meaning of the expression ‘in the vicinity of the Premises’, and thereby has regard to a different, wider class of rents, it is open to the Court to intervene. In those circumstances, the valuer has not had regard to rents as stipulated by paragraph 4.5(c)(ii), but has instead had regard to rents of a different nature. It is not sufficient that the rents taken into account include some rents that fall within paragraph 4.5(c)(ii). This is because the class of rents considered is not that which the contract requires.”

1. That reasoning provides a correct analysis of the operation of par (c)(ii).

Otiose language

1. An additional argument, not made before the trial judge, turned on the requirement under cl 4.5(d)(viii) to disregard the GST component of “any market rents used for comparative purposes”. If par (c)(ii) was exhaustive, the reference must have been to the market rents for comparable premises in the vicinity of the Premises, as described in par (c)(ii). However, that provision contained its own requirement to “disregard the GST component of any such market rents”. If that were all that par (d)(viii) referred to, it would be entirely otiose. Because one would not usually read a contract in a manner which rendered a provision (or part thereof) otiose, in the sense that it merely repeated another provision, it should be inferred, the lessee submitted, that par (c)(ii) was not exhaustive of the comparable premises to which the valuer could have regard. Paragraph (d)(viii) should thus be read as referring to the market rents for comparable premises other than those referred to in par (c)(ii).
2. The lessor accepted that if par (c)(ii) provided an exhaustive statement of the comparable properties, the market rents for which could be considered, then par (d)(viii) was indeed otiose. However, accepting that to be the case, that would not be a sufficient basis, the lessor contended, for concluding that there were indeed other comparable premises to which, as a matter of implication, the subclause could apply.
3. The respective arguments must be evaluated in the context of the sublease as a whole. It is not necessary to set out the many cases which have expressed reservations or qualifications as to the limitation on the operation of a general principle that no part of a contract should be treated as inoperative or redundant.[[3]](#footnote-3) There are a number of indicators in the sublease that the description of comparable premises in par (c)(ii) was meant to be exhaustive. First, the fact that par (c)(ii) contains a proviso, which is mirrored by one of the factors in par (d) required to be disregarded, is readily understood as repetition as a matter caution.[[4]](#footnote-4) The factor to be disregarded could have been included in either provision: it is by no means obvious that the mere fact of double inclusion gives a different meaning to the contract as a whole. Indeed, it is not unique in that respect; the provisions set out below demonstrate frequent repetition.
4. Secondly, the specific features of the sublease include the following matters. Thus, cl 1.1 includes the following definition of “Market Rent”:

“**Market Rent** means the current open market rent which a willing Landlord will accept from a willing Tenant for the Premises, assuming the Premises have been maintained in good and substantial repair, order and condition as required under this Lease, determined on the basis of the instructions contained in paragraph 4.5 of the first schedule.”

1. This definition is significant for two reasons. Substantively, it identifies how the market rent is to be determined, namely “on the basis of” the instructions contained in cl 4.5; it would be inconsistent with that basis of determination to permit reference to comparable premises not identified in cl 4.5. Secondly, there is a significant overlap, if not precise repetition, between the description of rent as the amount “which a willing Landlord will accept from a willing Tenant” and the assumption in par 4.5(b) that the premises are available for letting “between a willing but not anxious Landlord and a willing but not anxious Tenant”.
2. The second provision, cl 4.4, requires that a valuer is to be appointed “to determine the Market Rent in accordance with paragraph 4.5.” This language involves both consistency and repetition, and is strictly redundant. Substantively, it again requires determination in accordance with cl 4.5.
3. Precisely the same language is to be found in cl 4.6, which provides as follows:

“4.6   If the Valuer does not make a determination of the Market Rent in accordance clause 4.5 then the Landlord must, on behalf of both the Landlord and the Tenant, request the President for the time being of the API or the President's nominee to appoint a Valuer to determine the Market Rent in accordance with the provisions of clause 4.5.”

1. There is both consistency and repetition with arguable redundancy. The substantive effect again denies some alternative unexpressed basis for a determination of market rent.
2. Finally, cl 4.7 provides that the determination of the market rent “under this paragraph 4 is final and binding on both parties.”
3. It may thus be seen from the surrounding provisions that the parties intended the market rent to be determined by reference to the terms of cl 4 and not otherwise. Further, the drafter was not averse to repetition and arguable redundancy. The latter consideration suggests that little weight should be given to the fact of repetition as between pars (c)(ii) and (d)(viii), where the result is to maintain consistency. It was not surprising that the disregard of GST was contained both as a proviso to the reference to market rents in the mandatory considerations and in the statement of factors which were generally to be disregarded. Indeed, on one view both provisions were entirely otiose because cl 4.5(a) required the valuer to identify market rent “as a net amount which does not include GST”. The use of rents for comparable premises which failed to disregard a component of GST would, by reference only to par (a), be patently erroneous. Accordingly, the element of redundancy gives rise to no implication that specific information not identified in cl 4 was available to the valuer.
4. Finally, the definition of “valuer” in cl 1.1 provides support for the conclusion that par (c)(ii) was intended to provide a constraint on the scope of inquiry as to comparable premises. The definition read as follows:

“**Valuer** means a person who is both a practising real estate agent and a full member of the API of not less than 7 years standing and active and experienced in the valuation of premises similar to the Premises in the central business district (CBD) and fringe CBD of Sydney.”

It is not necessary to rely upon this definition to construe the phrase “in the vicinity of the Premises”; it is, however, a further indication that the area of consideration of comparable premises was to be limited in the way identified in par (c)(ii).

Conclusion

1. For these reasons, and for the further reasons of Ward JA, the appeal should be dismissed. The appellant must pay the respondent’s costs in this Court.
2. **WARD JA**: This matter involves a dispute arising out of a rental determination by a valuer (Mr David Anderson), appointed as an expert, in respect of premises at King Street Wharf, Sydney (the Premises) which are used primarily for ten-pin bowling. The Premises are irregular in shape, with a total lettable area of 1,388.1m2, and, apart from a narrow street frontage, are almost entirely underground (hence the inclusion of basement properties in those used as comparable premises for the purposes of the impugned valuation). They are located within the Darling Harbour recreation area, which it does not appear to be disputed is an established entertainment and recreation precinct attracting large numbers of domestic and international visitors. The Premises are approved for a place of public entertainment, trading from 8am to 2am seven days a week, and are licensed to serve alcohol.
3. The sub-lessor of the Premises, Data Base Corporate Pty Ltd (Data Base), sought and obtained a declaration that the impugned rental determination was not carried out in accordance with the provisions of the sub-lease (*Data Base Corporate Pty Ltd v Strike Australia Pty Ltd* [2019] NSWSC 271). The sub-lessee, Strike Australia Pty Ltd (Strike Australia) appeals from that decision and seeks orders for the dismissal of Data Base’s summons. Strike Australia points out (and Data Base accepts) that if the judgment is not set aside then a fresh determination of market rent must be undertaken. Strike Australia contends, but Data Base disputes, that in that event this would be “by a valuation process so limited that an appropriate market rent cannot be achieved”. In that regard, Data Base points out that, when setting out his approach to the appropriate method of assessment and the elements of par 4.5(c)(ii) of the First Schedule to the sub-lease (which I extract below), the valuer himself contemplated that examples in the “King Street Wharf, Barangaroo, Cockle Bay and Darling Harbour precincts” could have been chosen (insofar as the valuer commented that, had the added descriptor of “immediate” been chosen, he would have been more inclined to select examples in those precincts); and submits that (consistent with the findings of the primary judge) a newly appointed valuer will be required to select comparable premises in the surrounding area that is near to or close to the Premises (which it is accepted may require the making by the valuer of adjustments “to bring the selected premises in line with the Premises”, a task accepted as falling within the appropriate valuation process). Thus, Data Base does not accept that a market rent could not be achieved on a fresh valuation.
4. Data Base has filed a notice of contention seeking to uphold the primary judge’s decision on an alternative ground (see below) but otherwise not challenging that decision.
5. There was no dispute between the parties as to the principles applicable to a challenge in respect of an expert determination such as that brought in the proceedings below (see *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd* (2015) 90 NSWLR 367; [2015] NSWCA 275 (*AVL v Belvino*)); *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173 (*AGL Victoria v SPI Networks*).
6. Nor, as I understand it, is there any dispute as to the applicable principles of construction of commercial contracts such as the sub-lease (see *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 (*Woodside*)).
7. For the following reasons, I am of the opinion that the appeal should be dismissed with costs. It is not therefore strictly necessary to consider the notice of contention. Had it been necessary to determine the issue raised thereby I would have concluded that the notice of contention should be dismissed. Costs should follow the event.

Background

1. As adverted to above, Strike Australia sub-leases from Data Base premises at the King Street Wharf (the Premises), from which Strike Australia operates a ten-pin bowling alley, bar and entertainment venue. I will set out shortly the relevant provisions of that sub-lease. The sub-lease was for a term of 10 years commencing on 24 August 2007 and terminating on 23 August 2017, with two options to renew (each for a further term of five years).
2. In February 2017, Strike Australia exercised the first of the options to renew the sub-lease. Clause 11.2(a)(ii) of the sub-lease permits the rent payable at the commencement of the renewed five year term to be reviewed in accordance with the procedure set out under paragraph 4 of the First Schedule to the sub-lease, which provides for a review to “Market Rent” (as defined – see below). Pursuant to cl 11.2(a)(ii), Data Base issued a “market review notice” to Strike Australia, nominating an annual rent of $1,080,000 calculated at a rate of $800 per square metre. (At that time, the existing annual rent payable under the sub-lease was approximately $647,376 calculated at a rate of $466 per square metre – a consequence of the operation of fixed increases from the starting rent under the sub-lease.)
3. On 5 May 2017, Strike Australia notified Data Base that it did not accept the proposed new rental rate. This triggered the process for the appointment by the President of the Australian Property Institute (API) of an independent valuer to determine the Market Rent in accordance with the terms of the First Schedule to the sub-lease. Under the sub-lease, the valuer was to be both a practising real estate agent and a full member of the API of not less than seven years standing and “active and experienced in the valuation of premises similar to the Premises in the central business district (CBD) and fringe CBD of Sydney”.
4. In August 2017, Mr Anderson was appointed as the expert valuer to determine the Market Rent “in accordance with paragraph 4.5” of the First Schedule to the sub-lease. As contemplated by the sub-lease, both parties provided written submissions to Mr Anderson. Data Base provided a report dated 21 August 2017, prepared by Urbis Valuations Pty Ltd, and a report dated 29 August 2018, prepared by Gordon Property Advisory Services. Strike Australia provided two reports, dated 24 August 2017 and 30 August 2017 respectively, prepared by Intelligent Property Solutions Pty Ltd (IPS).
5. On or about 5 October 2017, Mr Anderson issued a rental determination, determining the Market Rent as at 24 August 2017 to be $720,000 per annum ($518.69/m2 gross) excluding GST.
6. Data Base challenged that determination. On 2 July 2018, Data Base commenced proceedings by way of summons seeking declaratory relief that the rental determination was not carried out in accordance with the provisions of the sub-lease.
7. On 26 March 2019, the primary judge declared that the rental determination was not binding on the parties, setting aside the determination in essence on the basis that the valuer had failed to perform the task required under the sub-lease (having had regard to properties that were not “in the vicinity” of the Premises). Accordingly, the valuation process must now be undertaken again.

Sub-lease provisions

1. Since 2006, Data Base has held a lease over the Premises. On 20 March 2007, Data Base granted a sub-lease to Strike KSW Pty Ltd. On 1 April 2016, Strike KSW transferred the sub-lease to Strike Australia. On 9 February 2017, Strike exercised the option to renew the sub-lease.
2. Clause 1.1 of the sub-lease defines “[p]ermitted [u]se” to mean “the use of the Premises specified in Item 13 and such other use as the Landlord may in its absolute discretion approve by Notice”. Item 13 specifies the permitted use as “[t]en pin bowling, bar, ancillary facilitates (including electronic and pinball machines games). In accordance with the development approval” [sic]. In about 2016, with Data Base’s approval. Strike Australia added karaoke facilities.
3. As adverted to above, cl 11.2(a)(ii) of the sub-lease provides that, when a new sub-lease is granted, the rent can be reviewed in accordance with par 4 of the First Schedule to the sub-lease. Pursuant to par 4.7 of the First Schedule, such a determination is final and binding on both parties.
4. Relevantly, pars 4.4- 4.7 of the First Schedule to the sub-lease provide as follows:

4.4   If the Landlord and the Tenant cannot agree on a Market Rent within 14 days after the Tenant Notifies the Landlord in accordance with paragraph 4.3 the Landlord must on behalf of both the Landlord and the Tenant request the President for the time being of the API or the President’s nominee to appoint a Valuer to determine the Market Rent in accordance with paragraph 4.5.

4.5   In so doing, the Landlord must instruct the Valuer to:

(a)   determine the Market Rent within 21 days after the date the Valuer is appointed and to express the Market Rent as a net amount which does not include GST;

(b)   assume that the Premises are available for letting between a willing but not anxious Landlord and a willing but not anxious Tenant;

(c)   have regard to:

(i)   the terms and conditions of this Lease;

(ii)   market rents (excluding rents which have been escalated to a predetermined amount or in accordance with movements in a consumer price index or any other index) at the Market Review Date for comparable premises in the vicinity of the Premises let at their highest and best use including new lettings, lease renewals and rent reviews but must disregard the GST component of any such market rents which include GST;

(iii)   the Permitted Use;

(iv)   the period which will elapse between the Market Review Date and the next Review Date or, if there is no further Review Date, the end of the Term;

(v)   the unexpired portion of the Term as if it were the length of the Term;

(vi)   the value attached to the Premises attributable to the location, Appurtenances, Mechanical Services, other Services, facilities, amenity, adornment, landscaping, management and promotion of the Premises by the Landlord;

(vii)   the increase in value of the Premises following any works undertaken by the Landlord to the Premises at any time prior to the relevant Market Review Date; and

(viii)   any written submissions made by or on behalf of either or both of the parties;

(d)   disregard:

(i)   any deleterious condition of the Premises caused by the Tenant;

(ii)   the Tenant’s Property, so that the Premises are treated as cleared space inclusive of the Landlord’s Property, but otherwise serviced and useable;

(iii)   any subletting, licensing or sharing of possession of the Premises;

(iv)   any goodwill attributed to the Premises by reason of the use to which they are or have been put by the Tenant, its sub-tenants, licenses or their respective predecessors in title;

(v)   the effect or alleged effect of any incentives, periods of rent abatement or reimbursement, financial contributions (including any contribution toward the cost of fitting out premises) or other incentives provided to tenants (whether for a new letting or for sitting tenants);

(vi)   any exclusive licence to use areas, naming or signage rights which the Tenant may have in respect of the Premises;

(vii)   that the Premises may have more than one floor;

(viii)   the GST component of any market rents used for comparative purposes which are inclusive of GST; and

(ix)   the GST which the Landlord will charge to the Tenant under clause 3.4 and pay to the Australian Taxation Office under the GST Law,

(e)   act as an expert and not as an arbitrator; and

(f)   advise both the Landlord and the Tenant in writing of the Valuer’s determination of the Market Rent and give reasons for the Valuer’s determination.

4.6   If the Valuer does not make a determination of the Market Rent in accordance with clause 4.5 then the Landlord must, on behalf of both the Landlord and the Tenant, request the President for the time being of the API or the President’s nominee to appoint a Valuer to determine the Market Rent in accordance with the provisions of clause 4.5.

4.7   The determination of the Market Rent under this paragraph 4 is final and binding on both parties. Subject only to paragraph 7, on and from the relevant Market Review Date, the Market Rent, as determine by the Valuer and advised to the parties, will be the Rent.

1. “Market Rent” is defined in the sub-lease as “the current open market rent which a willing Landlord will accept from a willing Tenant for the Premises, assuming the Premises have been maintained in good and substantial repair, order and condition as required under this Lease, determined on the basis of the instructions contained in paragraph 4.5 of the first schedule”.
2. It is also relevant here to note (as adverted to earlier) that the attributes of the valuer to be appointed included that the valuer be a practising real estate agent and “active and experienced” in the valuation of premises similar to the Premises in the CBD and fringe CBD of Sydney.

Valuer’s Determination

1. Mr Anderson had regard to three categories of properties: (i) bars and restaurants in the King Street Wharf complex; (ii) basement level retail rents in the CBD; and (iii) bowling alley rents in Sydney. At [6.5] of the determination, Mr Anderson stated that he has “had regard to the rental examples put forward in the parties’ submissions and a range of leasing transactions including, but not limited to, [the examples there summarised], which assist in ascribing market rent to the subject at the relevant date”].
2. Mr Anderson considered that the difference between neighbouring premises at King Street Wharf and Cockle Bay and the Premises in question (bearing in mind the permitted use of the Premises), meant that it was appropriate to consider other properties so as to ensure a consideration of comparable properties. Mr Anderson stated that he “placed more weight on the available rental evidence in relation to the permitted use and physical characteristics of the premises, rather than the location”.
3. Mr Anderson noted that there was a broad range of rentals for each of these three types of properties: for bars and restaurants in the King Street Wharf precinct, the range was $1,169/m2 to $1,635/m2 pa gross and the area ranged from approximately 340m2 to 885m2; for basement premises (which included seven basement properties throughout the CBD as well as a property in Chippendale and a Woolworths supermarket at Bondi Beach), the range was $350/m2 to $696/m2 pa gross for 300m2 to 2,031m2; and for bowling alleys (one in Darling Harbour, another in Macquarie Park and another in Hornsby), the range was $203/m2 to $314/m2 pa gross and the area ranged from approximately 1,590m2 to 2,749m2.
4. At [6.6] of his determination, Mr Anderson summarised these properties and rent ranges and said that the “broad range reflects the location, size and standard of accommodation of each of the examples analysed with the evidence of most assistance in relation to the subject being the well located basement premises in Sydney CBD retail precincts and the broader rent cost for bowling alley use”.
5. Mr Anderson then identified four examples which he considered provided the “best guide” to market rent for the Premises at the relevant date, those being: a bowling alley in Darling Harbour; a bowling alley in Macquarie Park; a basement property in Haymarket; and the Woolworths Supermarket at Bondi Beach ([6.6]). Not all of those properties had been referred to in the respective parties’ submissions to the valuer.
6. Mr Anderson considered the current rent for the Premises of $646,376 to be, is “within an acceptable range of current market rents, with regard to the analysed rents above”. He concluded that the market rent as at the relevant date was $720,000 pa or $518.69m2 pa gross “[b]ased on current market conditions”.

Primary judgment

1. The primary judge noted (at [25]) that par 4.5(c)(ii) of the First Schedule identified the nature of the market rents to which the valuer “must have regard” in determining the Market Rent and that the provision was “quite detailed in its prescription”; in particular, that “the market rents must be at the Market Review Date, for comparable premises in the vicinity of the Premises, let at their highest and best use”.
2. His Honour contrasted (at [26]-[27]) aspects of the process of selection of market rents falling within the scope of par 4.5(c)(ii) that required the valuer to exercise some discretion, judgment or opinion (such as the designation of premises as “comparable”) and those that did not call for judgments of a type that valuers make when applying their specialised knowledge (giving as an example, the geographic ambit of the expression “in the vicinity of the Premises”, though acknowledging that different valuers might reach different conclusions as to that aspect).
3. His Honour considered (at [30]) that the parties to the sub-lease should not be presumed to have intended that questions as to whether particular premises are “in the vicinity of the Premises” were to be left to the appointed valuer, in the sense that the valuer was empowered to determine those questions even erroneously (citing *Mercury Communications Ltd v Director-General of Telecommunications* [1994] CLC 1125 at 1140, as cited in *AVL v Belvino* at [78]); and concluded that an error in the inclusion (for the purposes of par 4.5(c)(ii)) of market rents for premises not in the vicinity of the Premises was not immune from review by the Court (at [31]). Relevantly, his Honour considered that the expression “in the vicinity of the Premises” evidently introduced an important limitation upon the range of comparable premises for the purposes of par 4.5(c)(ii) (at [31]).
4. His Honour noted that Mr Anderson had had regard not only to rents for premises located in and near the King Street Wharf area but also to rents for premises located outside that area (or the Darling Harbour area) and outside the CBD (noting the reference in Mr Anderson’s report to premises in Bondi Beach, Chippendale, Macquarie Park and Hornsby) (at [33]).
5. At [35], his Honour said:

It is clear in my opinion (and I did not understand counsel for the defendant to submit to the contrary), that premises in Macquarie Park or Bondi Beach are not “in the vicinity of the Premises” within the meaning of paragraph 4.5(c)(ii). Even without the adjective “immediate”, the ordinary meaning of “in the vicinity of the Premises” suggests a surrounding area that is near to or close to the Premises. The context in which the expression appears does not indicate that a different meaning was intended. Accordingly, it appears that in forming his opinion of Market Rent, Mr Anderson has had regard to rents for premises that are not in the vicinity of the Premises as well as to rents for premises that are in the vicinity of the Premises.

1. His Honour concluded that, in so doing, Mr Anderson had not carried out his determination of the Market Rent in accordance with par 4.5 of the First Schedule to the sub-lease (at [36]). (It is this conclusion that is the subject of the first ground of appeal.)
2. At [38]ff, his Honour said:

38.   Further, as noted earlier, paragraph 4.5(c)(ii) contains a detailed prescription of the nature of the rents to which the valuer must have regard in determining the Market Rent. The provision, which is an instruction to the appointed valuer, should be read as one which identifies the permissible boundaries of the types of rents to which the valuer is to have regard. If it were interpreted otherwise, the evident intention to place limits upon the types of rents to which the valuer must have regard would be undermined. That is to say, paragraph 4.5(c)(ii) requires regard to be had to a particular class of rents, namely, certain market rents at the Market Review Date for comparable premises in the vicinity of the Premises. If the valuer makes a mistake about the meaning of the expression “in the vicinity of the Premises”, and thereby has regard to a different, wider class of rents, it is open to the Court to intervene. In those circumstances, the valuer has not had regard to rents as stipulated by paragraph 4.5(c)(ii), but has instead had regard to rents of a different nature. It is not sufficient that the rents taken into account include some rents that fall within paragraph 4.5(c)(ii). This is because the class of rents considered is not that which the contract requires.

39.   Neither is it an answer that the Macquarie Park premises was referred to in a submission made to Mr Anderson by the defendant. The Bondi Beach, Chippendale and Hornsby premises were not the subject of any submission made to Mr Anderson. In any case, I do not think that the fact that a submission refers to premises that are not in the vicinity of the Premises within the meaning of paragraph 4.5(c)(ii) allows the valuer to have regard to rents for those premises. Whilst paragraph 4.5(c)(viii) requires the valuer to have regard to submissions made by the parties, the content of a submission cannot itself alter what is required by other parts of paragraph 4.5, including paragraph 4.5(c)(ii).

40.   The approach taken by Mr Anderson was not in accordance with the requirements of paragraph 4.5 of the First Schedule. He did not have regard to market rents in the manner prescribed by paragraph 4.5(c)(ii). This occurred as a result of his erroneous inclusion of rents for premises that are not “in the vicinity of the Premises” within the meaning of paragraph 4.5(c)(ii).

1. The conclusion at [40] is the subject of the second ground of appeal.
2. As to the complaint made by Data Base as to the valuer’s determination having regard to par 4.5(d)(ii) of the First Schedule, this was addressed by the primary judge from [41] of the reasons:

41.   The second complaint made by the plaintiffs about Mr Anderson’s determination is that, contrary to the requirements of paragraph 4.5(d)(ii) of the First Schedule, he failed to disregard the Tenant’s Property. The plaintiff submitted that this occurred because Mr Anderson took into account a so-called “zoned” approach to rental, which is itself based upon the manner in which the tenant has actually configured the premises, and otherwise had regard to the physical characteristics of the premises.

42.   Tenant’s Property is defined in the sub-lease to mean:

…anything installed in, on or for or placed in or on or any improvement or alteration made to the Premises by or for the Tenant and owned or leased by it, including the Tenant’s fixtures, fittings, partitions, security system, signs, notices, equipment, wiring, cabling and furnishings.

43.   The provenance of the “zoned” approach to rental is the submission dated 21 August 2017 made by Intelligent Property Solutions Pty Ltd on behalf of the defendant. The submission itself took the form of a rental valuation of the current market rent of the premises. The premises, including the improvements, are described in detail at pages 12 to 20. Figure 6 on page 20 depicts the “Subject Configuration and Layout”, and shows four areas, namely, Licensed Area, Main Retail Front Area, Bar Area, and Entertainment, Bowling & BOH [Back-of-House]. On page 22 it is stated:

We have ignored any value that attributes [sic] to the Lessee’s fit-out or goodwill.

…

49.   Mr Anderson’s Market rental assessment is contained in Section 6.6 of his report … Mr Anderson stated there that in forming his opinion of value he had regard to rental evidence, including the examples detailed in Section 6.5. There is no reference to the “zoned” approach in Section 6.6.

50.   Reading Mr Anderson’s determination as a whole, I am unable to accept the plaintiff’s submission that he effectively adopted the “zoned” approach such that he failed to disregard the Tenant’s Property, contrary to paragraph 4.5(d)(ii). I do not think that Mr Anderson did any more than express a view that the approach taken by Intelligent Property Solutions was in the circumstances a suitable one for them to take. This view was expressed in the context of Mr Anderson’s consideration of the submissions made to him. Mr Anderson was required by paragraph 4.5(c)(viii) to have regard to the submissions. In the final paragraph of Section 6.3, Mr Anderson stated that he had regard to the submissions but placed more weight on the rental evidence “in relation to the permitted use and physical characteristics of the premises rather than the location”. I do not think that the reference to physical characteristics should be read, in that context, as a reference to the Tenant’s Property. Moreover, Sections 6.4 to 6.6 of Mr Anderson’s report, which essentially explain his approach to the assessment of Market Rent, cannot be fairly read as an adoption of the “zoned” approach for the purpose of that assessment. For these reasons, the plaintiff has not shown that Mr Anderson acted in a manner contrary to paragraph 4.5(d)(ii) of the First Schedule.

1. The finding on this issue is the subject of Data Base’s notice of contention.
2. In conclusion, his Honour held (at [53]) that:

The plaintiff has established that Mr Anderson’s determination of the Market Rent was not carried out in accordance with paragraph 4.5 of the First Schedule to the sub-lease. The erroneous inclusion of rents for premises that are not “in the vicinity of the Premises” within the meaning of paragraph 4.5(c)(ii) meant that Mr Anderson did not have regard to market rents in the manner prescribed by paragraph 4.5(c)(ii). Accordingly, it is open to the Court to intervene, and declare that the determination of the Market Rent is not binding upon the parties to the sub-lease. A declaration to that effect will be made. In these circumstances, paragraph 4.6 of the First Schedule operates so that the plaintiff is required to make another request for a valuer to be appointed to determine the Market Rent in accordance with paragraph 4.5.

Grounds of Appeal/Grounds of Contention

1. Strike Australia appeals on the following grounds:

1.   The primary Judge erred in finding (at [36]) that Mr Anderson did not carry out his determination of the Market Rent in accordance with paragraph 4.5 of the First Schedule to the sub-lease.

2.   The primary judge erred in finding (at [40]) that Mr Anderson:

a.   did not have regard to market rents in the manner prescribed by paragraph 4.5(c)(ii) of the sub-lease; and

b.   erroneously included market rents for premises “not in the vicinity of the Premises” within the meaning of paragraph 4.5(c)(ii) of the sublease.

3.   The primary Judge erred in finding that the determination of Market Rent by Mr Anderson was not binding on the appellant and the respondent as parties to the sub-lease.

1. Data Base, in its notice of contention filed 22 May 2019, contends that the decision of the primary judge should be affirmed on the following ground:

1.   In breach of clause 4.5(d)(ii) of the Sub Lease between the parties, when determining the market rent of the subject premises, the valuer failed to disregard “*the Tenant’s Property, so that the Premises are treated as cleared space inclusive of the Landlord’s property, but otherwise serviced and useable*”.

Ground 1 of Notice of Appeal

Legal principles

1. As noted above, there was no dispute as to the relevant legal principles. In *AVL v Belvino*, Bathurst CJ (with whom Beazley P and McColl JA agreed) stated (at [74]-[75]):

The parties accepted that the question depended upon whether the determination was made in accordance with the contract: *Legal & General Life* at 336. As Nettle JA pointed out in *AGL Victoria* at [44], in one sense, this test is conclusionary. The question of whether the determination is open to review rather depends on whether or not the expert has carried out the task which he or she was contractually required to undertake: *AGL Victoria* at [51]; *Holt v Cox* (1997) 23 ACSR 590 at 596-597; *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] HCA 38; 244 CLR 305 at [26]-[27]. If the expert in fact carried out that task, the fact that he made errors or took irrelevant matters into account would not render the determination challenge-able.

On the other hand, if the expert had not performed the task contractually conferred on him or her, but rather performed some different task, or carried out his or her task in a way not within the contractual contemplation of the parties, objectively ascertained, then the determination will be liable to be set aside.

1. The position was summarised in *Lainson* *Holdings Pty Ltd v Duffy Kennedy Pty Ltd* [2019] NSWSC 576 by Hammerschlag J (at [39]) thus:

As the authorities on the subject make clear, the parties will be bound if the Expert did what the Contract, on its proper construction, required him to do, irrespective of the result. Conversely, the Determination will not be binding if the Expert went outside the ambit of what the Contract required him to do: see, for example: *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314; *Holt v Cox* (1997) 23 ACSR 590; *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173; *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd* (2015) 90 NSWLR 367.

1. In A*GL Victoria Pty Ltd v SPI Networks,* Nettle JA (as his Honour then was) drew (at [53]-[54]) a distinction between errors in the exercise of a judgment, opinion or discretion, and errors involving a mere mechanical or arithmetic exercise, as follows:

Therein lies the distinction drawn in some of the authorities, and observed by the judge in this case, between an error in the exercise of a judgment, opinion or discretion entrusted to an expert, and an error which involves objective facts or a mere mechanical or arithmetical exercise. Subject to the contract in question, it is easier to suppose that parties to a contract contemplate that an error of the former kind be beyond the realm of review than it is to think that they intend to be fixed with errors of objective fact or in processes of mechanical calculation.

… The question in each case is what the parties should be presumed to have intended, and that is to be determined objectively from the terms of the contract, bearing in mind the context in which it was created.

[footnotes omitted]

Appellant’s submissions on ground 1

1. Strike Australia contends that the primary judge erred in finding that Mr Anderson had not carried out his determination of the Market Rent in accordance with par 4.5(c)(ii) of the First Schedule to the sub-lease. It contends that his Honour misconstrued the clause as circumscribing the limit of premises to which the valuer could have regard (i.e., as treating this as exhaustive). Emphasis is placed on the fact that par 4.5(c)(ii) states that the valuer must have regard to market rents for comparable premises in the vicinity but does not state that these are the “only” market rents which can be considered by the valuer.
2. Reference is made in this regard to the observation by this Court in *South Sydney Council v Royal Botanic Gardens* [1999] NSWCA 478 (*South Sydney Council v Royal Botanic Gardens*) at [18] (Spigelman CJ (Beazley and Fitzgerald JJA agreeing) that:

The formulation “have regard to” or “may have regard to” often appears in statutes or contracts. The words themselves do not indicate one way or another whether the facts and matters which follow are intended to be exhaustive or merely indicative. That issue can only be decided by considering the total context in which the formulation appears including both the whole of the document and the “objective framework of facts within which the contract came into existence”. (*Codelfa Construction Pty Ltd v State Rail Authority (NSW)*(1982) 149 CLR 337 at 352).

1. In *South Sydney Council v Royal Botanic Gardens*, Spigelman CJ said (at [20]) that “[t]he most important indication from the context is usually provided by the scope, nature and purpose of the task for which the decision maker is required or permitted to take the list of facts and matters into account”.
2. Strike Australia points to the following matters, which it contends support the conclusion that par 4.5(c)(ii) was intended to be a guide, not a fetter, adopting the language of the High Court in *Rathborne v Abel* [1965] ALR 545 at 549; 38 ALJR 293.
3. First, that the task the parties assigned to the valuer was to calculate the Market Rent for the Premises. It is noted that the determination of market rent is an inherently discretionary exercise and it is submitted that it is likely that commercial parties will disagree on the market rent for a property. The provision in the contract for the appointment of a valuer to act as an expert (see par 4.5(e)) is said to be one that recognises these difficulties.
4. Second, that the only permitted use for the property was a ten-pin bowling alley, bar and ancillary facilities (including electronic and pinball machines). It is submitted that it is inherently unlikely that the Market Rent could or should be set without regard to the rent charged for other bowling alleys and bars; “[i]ndeed it might be thought unnatural and productive of an uncommercial outcome to do so”.
5. Third, that par 4.5(c) enumerates several matters to which the valuer “must have regard”, including the permitted use of the property (par 4.5(c)(iii)) and the submissions of the parties (par 4.5(c)(vii)). It is submitted that even if, contrary to Strike Australia’s submission, par 4.5(c) exhaustively defined the matters to which the valuer was to have regard, the valuer was nevertheless required to have regard to each of the matters enumerated in par 4.5(c). It is further submitted that there is nothing in the wording of par 4.5(c) to indicate how the matters contained in that clause should be weighed, or to indicate that one matter should prevail over another in the event of a conflict. It is submitted that that is a matter quintessentially for the valuer to determine in his (or her) expertise. In that regard, it is submitted that an obvious way to consider the permitted use of the property (as required by par 4.5(c)(iii)) is to consider the rents charged for other bowling alleys, with appropriate adjustments made for relevant differences such as geographical location. Strike Australia says that there is no basis to conclude that the valuer can only have regard to these rents if they otherwise comply with par 4.5(c)(ii). Similarly, insofar as the primary judge’s construction of the clause permits the valuer only to have regard to the submissions of the parties to the extent that they refer to matters that come within par 4.5(c)(ii) (see his Honour’s reasons at [39]), it is submitted that there is nothing in the wording of par 4.5(c) to support such a construction.
6. Fourth, that par 4.5(d) enumerates specific matters to which regard must not be had. It is submitted that it is implicit from the inclusion of this clause that the valuer is not restricted to the matters identified in subpar (c) (“much less (c)(ii)”); since, if that were the case, subpar (d) would be redundant. Strike Australia sees this as perhaps the clearest indication that the matters in par 4.5 are intended to be indicative, rather than exhaustive.
7. Fifth, Strike Australia points to the fact that the rent at the commencement of the sub-lease in 2007 was $475,000 and says that there is nothing to indicate that this was not the market rent at the time the sub-lease was struck. It is noted that, at the time of the expiry of the first term in 2017 the rent was $647,376. Strike Australia says that on the construction of par 4.5(c)(iii) for which Data Base contends, the only rents to which the valuer could have regard were in the range of $1,169/m2 to $1,635m2 (i.e., an increase of almost 100%). It is submitted that this is an incongruous result from a rent review, and one which tells strongly in favour of the interpretation of par 4.5 for which Strike Australia contends.

Respondent’s submissions on ground 1

1. Data Base contends that, if the appellant’s submissions as to the proper construction of par 4.5(c)(ii) are accepted then the words “in the vicinity of the Premises” in that paragraph serve no purpose; and that the construction accorded by the primary judge to the paragraph is commercially sensible and in accordance with the objective fact that the Premises are approved for a place of public entertainment and within an established entertainment and recreation precinct attracting large numbers of domestic and international visitors.
2. As to the matters to which Strike Australia has pointed in support of its submission that par 4.5(c)(ii) is not exhaustive, Data Base submits as follows.
3. First, that the first feature the appellant raises (i.e. that the task the parties assigned to the valuer was to calculate the Market Rent for the Premises) is “unremarkable”.
4. Second, that the submission based on the definition of permitted use ignores that the “Permitted Use” as defined in cl 1.1 of the sub-lease is defined to mean the use of the Premises specified in Item 13 “and such other use as the Landlord may in its absolute discretion approve by Notice”. It is noted that the permitted uses in the head lease (which the sub-lessor would be entitled to permit) are “Fitness centre, Retail, Entertainment, including a Theatre, Restaurant, Takeaway Food, Commercial Offices and Licenses Premises under the Liquor Act” and “Commercial Offices, Retail, Entertainment, including a Theatre, Restaurant, Takeaway Food, Fitness centre and Licensed Premises under the Liquor Act”. Further, it is said that Strike Australia’s submission on this point also ignores that the Premises are licensed to serve alcohol and that, when determining the Market Rent, the valuer is required to disregard the Tenant’s Property (as that term is defined in cl 1.1 of the sub-lease). Accordingly, it is said that, when selecting comparable premises, the valuer is required to treat the Premises as: cleared space, licensed to serve alcohol and with a permitted use extending to such use as the sub-lessor may in its absolute discretion approve (which it is submitted broadens the range of premises suitable for selection as comparable premises).
5. Third, as to the requirement that the valuer must have regard to the “Permitted Use” of the Premises (par 4.5(c)(iii)) and to “any written submissions made by or on behalf of either or both of the parties” (par 4.5(c) (viii)), it is submitted that the requirement to have regard to the “Permitted Use” assists the valuer in the task of selecting comparable premises and that the requirement of the valuer to have regard to the submissions of the parties was correctly dealt with by the primary judge (his Honour concluding that the matters prescribed by pars 4.5(c)(i)-(v) can all be ascertained from the sub-lease; and that the matters prescribed by pars 4.5(c)(vi)-(vii) can be determined by the valuer using his or her training, knowledge and experience; and that those matters can all be addressed by the parties in their written submissions).
6. Fourth, as to the submission by reference to par 4.5(d), Data Base submits that par 4.5(c) is prescriptive and must be read in conjunction with par 4.5(d) (in accordance with “the objective theory of contract and the desirability of harmonious operation” of provisions of this kind). It is submitted that the matters prescribed by pars 4.5(d)(i), (ii), (iii), (iv), (vi) and (vii) all relate to the Premises and its use; and that, by disregarding these matters, the valuer is further directed to the type of premises suitable for selection as “comparable premises”. As to the matter prescribed by par 4.5(d)(v) (“the effect or alleged effect of any incentives, periods of rent abatement or reimbursement ... or other incentives provided to tenants …”) it is said that this relates to the valuer’s selection or treatment of premises as “comparable premises” when calculating the Market Rent and that this is simply an instruction to disregard inducements and incentives provided to attract or secure a tenant to premises (which, it is said, are likely to reduce the rent and involves an arithmetical exercise). As to the matters prescribed by pars 4.5(d)(viii) and (ix) (which require the valuer to disregard the specified GST components), again it is submitted that this is an arithmetical exercise.
7. Fifth, as to the range of ‘‘$1,169/m2 to $1,635m2” referred to by Strike Australia, it is noted that this is taken from the limited range of leasing transactions selected by Mr Anderson from the parties submissions relating to the King Street Wharf Complex. Data Base does not accept that the rent at the commencement of the sub-lease in 2007 was market rent but in any event says that this submission ignores that the valuer, when assessing market rent in accordance with par 4.5, was required to select comparable premises in the vicinity of the Premises and, if necessary, make adjustments for other physical attributes for the selected premises to bring them in line with the Premises. It is said that the sub-lease does not cap the determination of market rent that may be determined in accordance with par 4.5. It is submitted that the proper determination of the Market Rent will take into account the unique location of the Premises and changes in market conditions and that there is nothing uncommercial about the primary judge’s construction of the elements contained in par 4.5(c)(ii).
8. Data Base submits that the primary judge correctly perceived that the critical question for determination was whether the determination by Mr Anderson was made in accordance with the terms of the sub-lease; and that the five matters advanced by Strike Australia do not raise any ground for impugning the primary judge’s construction of par 4.5(c)(ii) or his Honour’s determination that, in forming his opinion of Market Rent, Mr Anderson has had regard to rents for premises that are not in the vicinity of the Premises (as well as to rent for premises that are in the vicinity of the Premises) and that, in so doing, the primary judge did not carry out his determination of the Market Rent in accordance with par 4.5 of the First Schedule to the sub-lease.

Appellant’s reply submissions on ground 1

1. Strike Australia maintains that its construction of par 4.5(c)(ii) of the first schedule to the sub-lease does not leave the words “in the vicinity of the Premises” with no work to do; rather, it is said that these words provide a guide to the valuer in the selection of comparable premises to which the valuer is to have regard, but do not limit the valuer. Strike Australia reiterates its argument that par 4.5(c)(ii) does not state that the valuer should only have regard to comparable premises in the immediate vicinity of the Premises, and says that that is the effect of the construction adopted by the primary judge.
2. Strike Australia submits that it is not necessary for the purposes of its first ground of appeal to establish error in the primary judge’s interpretation of the expression “comparable premises in the vicinity” (that being the subject of the second ground of appeal).
3. As to the five features relied on by it as supportive of the conclusion that par 4.5(c)(ii) was intended to be a guide, rather than a fetter, Strike Australia reiterates those matters.
4. As to the first, it argues that the nature of the task assigned to the decision-maker is an important indication of whether the matters to which the decision-maker is to have regard are intended to be exhaustive (referring to *South Sydney Council v Royal Botanic Gardens* [1999] NSWCA 478 at [20]) and says that the determination of market rent is not a simple or mechanical task but, rather, requires a commercial judgment on the part of the valuer (and hence it is unlikely that it was intended that the valuer would be confined in the manner found by the primary judge).
5. As to the second, Strike Australia says that for the purposes of determining market rent under the sub-lease the uses which, under the head lease, the landlord would be entitled to permit are only potential permitted uses; and that the only use which was permitted at the time of the valuation was that set out in Item 13 of the reference schedule to the sub-lease (as set out earlier).
6. As to the third, it is said that the suggestion that, in selecting comparable premises for the purpose of considering market rents in accordance with par 4.5(c)(ii), the valuer should consider market rents for premises which may be used for those potential permitted uses rather than the actual permitted use at the time of valuation, Strike Australia argues that this would involve an entirely hypothetical valuation process based upon what the landlord could permit the Premises to be used for, rather than what the Premises are in fact permitted to be used for. It is submitted that it is unclear how the primary judge’s interpretation of par 4.5(c)(ii), which precluded consideration of rents outside the immediate vicinity of the Premises, was to be reconciled with the other matters that the valuer was required to consider (including, relevantly, the submissions of the parties). It is submitted that there is nothing in the wording of par 4.5(c) to suggest that paragraph 4.5(c)(ii) should prevail over the other matters to which the valuer is to have regard and that the unconfined wording of par 4.5(c)(viii) is itself an indication that par 4.5(c), properly construed, does not exhaustively define the matters to which the valuer may have regard.
7. As to the fourth, criticism is made that Data Base’s response (at [24]-[27] of its submissions) is “somewhat opaque”. Strike Australia says that if the primary judge’s conclusion that par 4.5(c) exhaustively defines the matters to which the valuer can have regard, then par 4.5(d) (which lists specific matters which the valuer must disregard) is unnecessary. It is said that the requirement in par 4.5(d)(i)-(iv); (vi) to disregard specific matters for which the Tenant is responsible that may affect rent value does not bear on what type of premises the valuer may have regard to as “comparable premises” for the purpose of par 4.5(c)(ii). Strike Australia contends that the fact that in par 4.5(c)(vi) and (vii), the valuer is to have regard to specific matters for which the Landlord is responsible that may affect rent value, and the fact that any impact on rent value attributable to the Tenant is explicitly excluded from consideration by par 4.5(d), indicate that the proper construction of par 4.5(c) is that it does not list the only matters to which the valuer is entitled to have regard (since otherwise the express exclusion of the matters in par 4.5(d) would be unnecessary).
8. Strike Australia argues that the express exclusion in par 4.5(d)(viii) of “the GST component of any market rents used for comparative purposes” would be otiose if par 4.5(c) was exhaustive; because par 4.5(c)(ii) already requires the valuer to disregard the GST component of any market rents for comparable premises in the vicinity of the Premises. Given this express injunction in par 4.5(c)(ii), it is submitted that par 4.5(d)(viii) can only be directed to any other market rents used for comparative purposes (and hence reflects an expectation that the rent determination process will include consideration of market rents for premises other than those referred to in par 4.5(c)(ii)).
9. As to the fifth matter, Strike Australia says there is nothing to suggest that the starting rent in 2007 was not market rent; and that, since then, as a result of the annual 3.5% fixed annual rent review, the rent has increased at a rate which has exceeded bars and restaurants in more attractive premises in the King Street Wharf complex. Although there is no express cap on the determination of the Market Rent, Strike Australia argues that the concept of market rent itself contains an important implied restriction (namely, what a tenant would be prepared to pay) and that the primary judge’s construction is not apt to produce a “market rent”. Finally, Strike Australia submits that the concession by Data Base that the proper determination of the Market Rent “will take into account the unique location of the Premises and changes in market conditions” (as is the concession that the valuer will be required to select comparable premises which may then require adjustments to bring them into line with the Premises) is an important concession. It is said that thereby Data Base accepts that an adjustment is appropriate but does not identify the basis on which an adjustment should be made; whereas the approach adopted by the valuer, to consider premises in the immediate vicinity, and then make adjustments having regard to other premises with more similar space and use, was an appropriate and permissible way to undertake this task.

Determination

1. The first ground of appeal turns on whether the list of matters set out in par 4.5(c) is an exhaustive list of the matters to which the valuer is required to have regard and, in particular, whether the valuer (while obliged to take into account comparable premises in the vicinity of the Premises) may in his or her discretion also have regard to other premises not in the vicinity of the Premises if he or she considers them to be comparable premises (or if reference is made thereto, in a party’s submissions or the need to have regard to the permitted use of the Premises requires this).
2. In *Woodside,* the majority (French CJ, Hayne, Crennan and Kiefel JJ (as her Honour then was)) held (at [35]) that:

[t]he meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding “of the genesis of the transaction, the background, the context [and] the market in which the parties are operating”. As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption “that the parties … intended to produce a commercial result”. A commercial contract is to be construed so as to avoid it “making commercial nonsense or working commercial inconvenience”. [footnotes omitted]

1. *Woodside* was recently cited with approval by the High Court (Kiefel CJ, Gageler, Nettle and Gordon JJ) in *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13 (at [44]):

It is well established that a commercial contract should be construed by reference to the language used by the parties, the surrounding circumstances, and the purposes and objects to be secured by the contract.

1. Similarly, in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544; [2017] HCA 12 the majority of the High Court (Kiefel (as her Honour then was), Bell and Gordon JJ) at [17] stated that the relevant clause was “to be construed by reference to the commercial purpose sought to be achieved by the terms of the lease” and, citing *Woodside*, “that the court is entitled to approach the task of construction of the clause on the basis that the parties intended to produce a commercial result, one which makes commercial sense”.
2. Textually, the strongest point for Strike Australia in this regard is the inclusion in par 4.5(d) of reference to GST in the list of factors required to be disregarded. There is force to Strike Australia’s submission that this sub-paragraph would be otiose if the valuer were not permitted to take into account comparable premises other than those required to be taken into account by par 4.5(c)(ii) (and indeed in oral submissions Data Base effectively conceded this). That said, there seems to have been a focus on GST implications in the sub-lease (see, for example, cl 3.5) and there is also much to be said for the proposition that this was simply a repetition in order to emphasise the requirement that the valuer must disregard this factor.
3. The consideration which in my view points more strongly to the construction for which Data Base contends (and which his Honour accepted) is the mandatory nature of par 4.5(c) and the fact that the words “in the vicinity” clearly operate as a limitation on the preceding words “comparable premises”. That, coupled with the fact that the valuer is to be someone with expertise in the CBD (“and fringe CBD of Sydney”), makes clear in my opinion that the valuer was obliged to take into account comparable premises in the vicinity of the Premises only; not premises that he or she might consider comparable elsewhere in Sydney or the State or elsewhere.
4. True it is that par 4.5(c) does not say the valuer must have regard “only” to the listed factors; but nor does it expressly empower the valuer to take into account such other premises as the valuer may consider relevant. The mandatory requirement to have regard to comparable premises is specifically limited to those that are in the vicinity of the Premises. The construction for which Strike Australia contends gives no meaningful operation to that limitation.
5. It is also here relevant to note that the valuation is expressly required to be made “in accordance with” par 4.5 (see par 4.4). That confines the task to what is required to be taken into account by par 4.5(c), disregarding what is required to be disregarded by par 4.5(d).
6. Contextually, it is clear from the attributes required by the expert valuer that the parties contemplated that an analysis would need to be made of comparable premises in the CBD and fringe CBD area.
7. I do not consider that the construction of the contract as requiring the valuer only to have regard to comparable premises in the vicinity of the Premises would be a commercial nonsense or would work a commercial inconvenience. Rather, this may simply mean that the range of comparable premises is more limited and/or that further adjustments than might otherwise be necessary must be made to reflect the differences between those premises in the vicinity of the Premises and the Premises themselves.
8. In my opinion, the primary judge did not err in his conclusion that the valuer’s determination was not in accordance with the sub-lease insofar as the valuer clearly had regard to premises outside the vicinity of the Premises (those at Bondi Beach and Macquarie Park to name but two) and the first ground of appeal is not made good.

Ground 2 of Notice of Appeal

Appellant’s submissions as to ground 2

1. Ground 2 of the grounds of appeal is advanced by Strike Australia in the event that ground 1 is not made good (i.e., if it is not accepted that “the valuer was not confined by paragraph 4.5(c)(ii) to considering rents for comparable premises in the vicinity of the property”). Strike Australia’s submission in that event is that the valuer nevertheless did not fail to discharge his obligation under par 4.5(c)(ii).
2. In this regard it is submitted that the primary judge erred in determining that the other basement and bowling alley properties taken into account by the valuer were objectively outside the vicinity of the Premises (see [35]); this being a matter that Strike Australia says was within the valuer’s discretionary judgment (and therefore not open to review).
3. Strike Australia submits (with reference to the distinction drawn in *AGL Victoria v SPI Networks*) that the identification of “comparable premises” involves the identification of properties that can reasonably be compared with the Premises by reason of their similar characteristics. It is submitted that this is quintessentially a value judgment, requiring a valuer to exercise a discretionary judgment with the benefit of his or her training, skill and expertise.
4. Strike Australia accepts that the words “in the vicinity” required the identification of another property within “some distance” of the Premises. However, it notes that the clause does not identify the outer limits of that distance, nor does it seek to restrict or qualify that distance by use of an adjective such as “immediate”; and hence it submits that this requires a value judgment.
5. It is submitted that the concepts of “comparable premises” (which the primary judge accepted did involve a value judgment) and “in the vicinity” are not necessarily independent of each other; and that what constitutes the “vicinity” may depend on the type of premises under consideration. It is submitted that, given the less common nature of the Premises, and the requirement to consider the “Permitted Use”, it was open to the valuer (“and indeed appropriate”) to consider a larger “vicinity” in order to identify “genuinely comparable” premises. In that sense, it is submitted that the meaning of “vicinity” is informed by the nature of the Premises and their permitted use. The submission put for Strike Australia in this regard is that “the more unique the premises, the wider the vicinity will be so that the requirement to consider comparable premises can be fulfilled”; and hence that it is quite possible that the “vicinity” will expand or contract depending on the nature of the premises.
6. Strike Australia submits that it was therefore open to the valuer, in the exercise of his judgment, opinion or discretion, to consider the comparable premises that he did, on the basis that they were in the vicinity of the premises (see *AGL Victoria v SPI Networks* at [53]), contrary to the primary judge’s conclusion.

Respondent’s submissions as to ground 2

1. Data Base submits that it was not open to the valuer to consider a larger vicinity in order to identify “genuinely comparable premises”. It is submitted that if the primary judge’s finding on the construction of par 4.5(c)(ii) is upheld, then, when determining Market Rent, the valuer was confined to select comparable premises in the surrounding area that is near to or close to the Premises; that he did not do so; and that, as such, he did not use comparable premises when determining the Market Rent (and hence the second appeal ground ought be rejected).
2. Data Base embraces the conclusion by the primary judge that the question whether particular premises are “in the vicinity of the Premises” within the meaning of par 4.5(c)(ii) is a mixed question of fact and law and submits that no ground has been advanced for challenging the finding that the parties should not be presumed to have intended that questions as to whether particular premises are “in the vicinity of the Premises’’ are to be left to the valuer (in the sense that the valuer is empowered to determine those questions, even erroneously).
3. It is submitted that the primarily judge correctly found that, even without the adjective “immediate”, the ordinary meaning of “in the vicinity of the Premises” suggests a surrounding area that is near to or close to the Premises. Data Base contends that, by selecting properties outside the vicinity of the Premises (not all of which were referred to in the parties’ submissions), the valuer has “gone outside the limits of his decision making authority” or the ambit of what the sub-lease required.
4. Data Base also submits that it can be inferred that the valuer arrived at the Market Rent solely by reference to the rental for the Woolworths Supermarket at Bondi Beach, having regard to the equivalence between the rental for those premises (which the valuer said equated to $723,576 pa gross, or $521.27/m2) and the ultimate determination of the Market Rent of the Premises ($721,812 gross, or $520/m2 gross). Data Base contends that it thus cannot be said that the valuer has had regard to comparable premises “let alone comparable premises in the vicinity of the Premises” when determining the Market Rent.

Appellant’s reply submissions on ground 2

1. Strike Australia maintains its contention that the conclusion by the primary judge that the task of identifying premises in the “vicinity”, involved an objective, reviewable matter of fact as well as an erroneous construction of par 4.5(c)(ii); and says that the process of selecting “comparable premises in the vicinity” should be treated as a single task requiring a judgment on the part of the valuer. It is submitted that there is no objectively ascertainable meaning of “vicinity” for the purpose of the rent determination as required by par 4.5; rather, the task of identifying properties in the “vicinity” requires a subjective judgment to be made by the valuer. It argues that the fact that neither the primary judge nor Data Base has identified its boundaries of the “vicinity” illustrates that there is no predefined ascertainable area that constitutes the “vicinity”. Strike Australia accepts that it would be a different matter if the valuer had been instructed to consider premises “in the same street, or the King Street Wharf precinct, or even the same postcode”; since this would impose a clear, objective limitation; but points out that the sub-lease does not use any such limitation. It is submitted that the question of what constitutes the “vicinity” will depend on the context in which that term is used (and, as noted earlier, that here the relevant context is the selection of comparable premises for a property which, on any view, is unusual, and different to other premises in the immediate vicinity).
2. As to the submission that the valuer arrived at the Market Rent solely by reference to the rental for Woolworths Supermarket, Bondi Beach, Strike Australia argues that this does not fairly represent the careful and thorough process adopted by the valuer (and says that such an arrangement was not put to the primary judge). Having regard to the process set out in the determination, it is submitted that it is plain that the valuer has not determined the rent solely by reference to the rent for the Woolworths at Bondi Beach but, rather, has considered a range of rents, and then sought to make adjustments for differences in size, standard of accommodation and location.

Determination

1. I do not accept the submission that the notion of “comparable” premises relevantly informs the geographical ambit of “in the vicinity”. That is tantamount to saying that the valuer would be entitled to take into account premises in Timbuctoo if the valuer considered those premises (in his or her discretionary judgment) to be comparable premises. That gives no work whatsoever to the limitation “in the vicinity”.
2. As to whether the contract should be construed such that it should be presumed that the parties intended the determination of “in the vicinity” to fall within the scope of the valuer’s discretion (such that it would not be open to review), I consider that the conclusion reached by the primary judge is correct.
3. The fact that reasonable minds might differ on what “in the vicinity” means in any particular case is not of assistance in the present case; not least because it is clear that the parties contemplated that “in the vicinity” of the Premises would encompass the CBD or fringe CBD in Sydney and there is nothing to suggest that they contemplated that the “vicinity” would extend beyond that area to other areas of Sydney (such as Bondi Beach or Macquarie Park) that no reasonable valuer could surely consider would be in the vicinity of the Premises. For the valuer so to have concluded seems to me to involve an error of the *Avon Downs* kind (*Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353; [1949] HCA 26) (though that was not the way in which the argument was here put).
4. Nor does the fact that the valuer was required to “have regard” to the permitted use, and to the parties’ written submissions, assist Strike Australia in my opinion. As to the former, the valuer was clearly required to take into account the permitted use of the Premises when assessing market rent and, in the context of considering comparable premises to take that into account. This does not give the valuer *carte blanche* to consider every site used as a ten-pin bowling alley (for example) wherever that site might be. As to the latter, I agree with the primary judge that it cannot be the case that par 4.5(c)(ii) could be circumvented simply by a reference in the submissions to other premises not in the vicinity of the Premises. In my opinion while the valuer is required to have regard to the written submissions of the parties he is also required to disregard anything in them that is inconsistent with the mandatory requirements of par 4.5(c).
5. Thus, I consider that the second ground of appeal is not made good.

Ground 3 of Notice of Appeal

1. This third ground follows from the above appeal grounds. Strike Australia contends that if either of its first two appeal grounds is upheld, then it follows that the primary judge erred in finding that the determination of the Market Rent by the valuer was not binding on Strike Australia and Data Base as parties to the sub-lease; and that orders setting aside the declaration made by the primary judge should be made with final orders dismissing the summons below and orders for costs in respect of both the proceedings below and this appeal.
2. Data Base submits that it follows from a rejection of the first and second appeal grounds that there is no merit in the third appeal ground.

Determination

1. It follows from the conclusions I have reached in relation to the first two grounds of appeal that this ground of appeal is not made good and that the appeal should be dismissed.

Notice of Contention

Respondent’s submissions

1. As to the notice of contention, Data Base argues that the valuer failed, as required by par 4.5(d)(ii) of the First Schedule to the sub-lease, to disregard the Tenant’s Property, noting that the term is defined in cl 1.1 of the sub-lease and that the Premises were extensively fitted out by Strike Australia for its use as a ten-pin bowling alley, bar and ancillary facilities.
2. Reference is made in this context to Part 6.3 of the Determination, in which the valuer states that:

Alternatively, Messrs Fonteyn and Lei of Intelligent Property Solutions (IPS) have taken a ‘zoned’ approach to the rental, applying market rates for four separate portions of the premises, to arrive at a blended overall rental. With the somewhat unique nature of the subject premises, I am of the view that this is a suitable approach, in the absence of comparable premises based on similar layout and utility.

1. It is noted that the Rental Valuation/Submission by Messrs Fonteyn and Lei is attached to the Determination as Annexure 6 (IPS Submission); that Figure 6 of the IPS Submission provides a plan of the Premises showing the Tenant’s fitout plan (i.e., the Tenant’s Property) and that this is reproduced in the Determination.
2. The IPS Submission identified four “zones” based on the layout of the Tenant’s Property (the licensed area; the main retail front area; the bar area; and the entertainment, bowling and back of house area), those zoned areas all being determined by the exact delineation of the Tenant’s Property. IPS attributed value to the four zones within the Premises according to where they are located within the Tenant’s fitout.
3. Data Base notes that the final calculations of IPS, after taking the “zoned approach to rental”, are set out on page 55 of the IPS Submission (and that IPS assesses the market rental value of the Premises to be $750,000 pa gross or $550/m2 gross excluding GST). It is said that the values are attributed to the Premises according to how the Tenant has configured the Premises (i.e. the Tenant’s Property) and not (as it is said the Premises should be valued) as “cleared space” and on the basis that the entire Premises are licensed. Data Base submits that the “zoned approach” reflects the lessee’s fitout.
4. It is submitted that it was entirely up to Strike Australia to determine how the Premises were laid out and that, by accepting that the “‘zoned” approach to the rental was a “suitable approach” for determining the Market Rent for the Premises, the valuer impermissibly had regard to the Tenant’s Property.
5. In the last paragraph of Part 6.3 of the Determination, the valuer states:

In arriving at my opinion of market rental, I have had regard to both of the above views, however I have placed more weight on the available rental evidence in relation to the permitted use and physical characteristics of the premises, rather than the location, as the subject premises are not considered to be suited to typical restaurant and bar type uses that prevail in King Street Wharf and Cockle Bay, or the immediate surrounding precinct. Further, the permitted use under the lease specifically refers to the current use and the development approval.

1. Data Base submits that if the valuer had disregarded the Tenant’s Property, he would have treated the Premises as “cleared space” and licensed to serve alcohol; and that there would be no basis for his statement that “the subject premises are not considered to be suited to typical restaurant and bar type uses that prevail in King Street Wharf and Cockle Bay”.
2. It is submitted that the valuer’s determination that the Market Rent for the Premises is $720,000 pa gross arrives at a figure that does not arise from a comparison of the gross rentals of the four properties selected by the valuer as the best guide to market rent for the Premises (rather, the Market Rent was arrived at by applying the zoned approach).
3. Data Base submits that the reasons of the primary judge for not accepting the submission that the valuer effectively adopted the “zoned” approach were “the opaque approach disclosed in the Determination for assessing market rent”. Data Base submits that, having made the observations in Part 6.3 of the Determination and “having regard to the relatively modest difference between his determination of market rent for the premises ($720,000 gross per annum) and the assessment of market rent applying the zoned approach ($750,000 gross per annum)”, it should be concluded that the valuer impermissibly had regard to the Tenant’s Property when determining the Market Rent for the Premises; and hence the decision of the primary judge ought to be affirmed on the grounds that in breach of par 4.5(d)(ii) of the First Schedule to the sub-lease, the valuer failed to disregard the Tenant’s Property.

Appellant’s submissions on notice of contention

1. Strike Australia emphasises that there is no reference to the Tenant’s Property in the valuer’s calculation of the appropriate market rent and says that it is clear from the determination that the valuer understood that he was to disregard these matters (referring to page 22 of the Determination), where the valuer refers to the fact that rent is to be ascribed on the basis that the Premises are vacant. It is submitted that the valuer did have regard to the fact that the Premises are licensed to serve alcohol (referring to Part 4.6 of the Determination), and noting that the valuer expressly considered the applicable NSW Liquor Licence and the fact that a majority of the patron area is licensed for liquor sales.
2. It is submitted that the contention made as to the reference to the “zoned approach” used in the IPS Submission mischaracterises the zoned approach, the purpose of which it is said was to address the unique nature of the Premises by dividing the Premises into different zones (reference being made to the layout diagram provided by IPS and reproduced at page 10 of the Determination). It is said that the different values attributed to each zone do not reflect the Tenant’s Property but, rather, the configuration of the space (noting that the IPS Submission expressly states that “[t]he lessee’s goodwill, fixtures and fittings have not been taken into account” – page 52 of the IPS Submission).
3. Strike Australia contends that the valuer did not adopt the zoned approach, submitting that the comment made by the valuer in this regard (that the zoned approach was a “suitable one”) was made in the context of the valuer’s consideration of Strike Australia’s expert’s submission (as required by par 4.5(c)(viii)). As to the similarity between the rent determined by the valuer and the rent calculated by IPS, Strike Australia submits that it is clear from the valuer’s assessment (summarised above from [24]) that the valuer’s determination was calculated by having regard to various properties and then making adjustments as appropriate. Strike Australia argues that the primary judge’s conclusions (at [50]) are correct and should be upheld.

Respondent’s reply submissions

1. In response to the appellant’s submissions on this issue, Data Base maintains, first, that the fact that there is no reference to the Tenant’s Property in the valuer’s calculation of the appropriate market rent does not address the valuer’s rental approach and market rental assessment, which it is said impermissibly had regard to the Tenant’s Property (insofar as the assessment of the market rental was arrived at by reference to the four properties identified and that what directed Mr Anderson to use those four properties was: the “layout and utility” of the Premises; or the “permitted use and physical characteristics of the premises”; or the “current use” of the Premises, all descriptors which it is said fall within the definition of “Tenant’s Property”).
2. As to the submission that it is clear from the Determination that the valuer understood that he was to disregard the Tenant’s Property when determining market rent, it is submitted that the valuer’s reference to the fact that rent is to be ascribed on the basis that the property is vacant does not support this – it being said that, in context, the reference to “vacant” (in the statement that “[t]his approach allows rent to be ascribed on the basis that the property is vacant and offered for lease under similar terms and for a similar use”) is made in relation to the requirement imposed by par 4.5(d)(iv) to disregard “any goodwill attributed to the Premises by reason of the use to which they are or have been put by the Tenant” and that this is a reference not in relation to the Tenant’s Property but in relation to the Tenant’s occupation of the Premises.
3. As to the third argument (that the valuer did have regard to the fact the Premises are licensed to serve alcohol), Data Base reiterates that if the valuer had determined the Market Rent in accordance with par 4.5 he (or she) would have treated the Premises as “cleared space”, licensed to service alcohol; and then selected market rents for comparable premises in the vicinity of the Premises. Data Base reiterates its complaint that the valuer (in Part 6.4 of the Determination) in placing “more weight” on the permitted use and physical characteristics of the premises, rather than the location and says that by taking that approach the valuer did not treat the Premises as cleared space and the assessment of Market Rent set out in Part 6.6 of the Determination similarly does not do so. (Data Base also queries the basis on which the rental approach taken by the valuer could have lead him to select the Basement Level 2, 1 Dixon Street, Haymarket and Woolworths supermarket, Bondi Beach as properties when assessing the Market Rent for the Premises.)
4. As to the submission that the different values attributed by IPS to each zone “do not reflect the Tenant’s Property but the configuration of the space”, it is submitted that this ignores that the zones selected by IPS are based on how Strike Australia has altered, partitioned or fitted out the Premises. It is said that if IPS had considered the Premises as “cleared space”, as required by par 4.5(d)(ii), IPS would not have selected (for the purposes of assessing market rental value of the Premises) rental values based on zones for the Premises determined by the layout of the Premises and by analysing rentals of properties with a similar use to each zone to arrive at its calculation of the Market Rent for the Premises.

Determination

1. It was accepted in the course of oral argument that the need to consider the ground raised by the notice of contention does not arise if the grounds of appeal are not made good. Had it been necessary to determine the complaint the subject of the notice of contention, I would have concluded that the primary judge’s conclusion was correct.
2. The statement at Part 6.3 of the Determination that the “zoned approach” was a suitable approach “in the absence of comparable premises based on similar layout and utility” does not, on its face, do more than acknowledge the suitability of such an approach in the circumstances there contemplated. It is in my opinion comfortably clear from the balance of the Determination that the valuer nevertheless proceeded to analyse the selected comparables (having regard, among other things, to the permitted use of the Premises, as he was required to do, which included both the bowling alleys and the bar facilities) and thus arrived at his determination of the Market Rent. I do not accept that this impermissibly involved having regard to the physical configuration of the Premises or Tenant’s Property as such; rather than simply its permitted use.
3. Nor do I consider that it can be concluded simply by reason of the close similarity between the assessed Market Rent and that applicable to the Woolworths Supermarket at Bondi Beach, that it should be inferred that the valuer determined Market Rent solely on the basis of the rental for those premises or had impermissibly (or otherwise) adopted a “zoned” approach. The valuer made clear that he had arrived at his determination on the basis that the “best guide” to market rent were the four identified comparable properties and that more weight should be placed on the permitted use and physical characteristics of the Premises. But for the inclusion of “comparables” outside the vicinity of the Premises on any reasonable understanding of that expression, I would have concluded that there was no error in the Determination that was amenable to review by the Court.

Order

1. For the reasons set out above, the order I propose is that the appeal be dismissed with costs.

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1. Data Base Corporate Pty Ltd v Strike Australia Pty Ltd [2019] NSWSC 271. [↑](#footnote-ref-1)
2. Avon Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353, 360 (Dixon J); [1949] HCA 26. [↑](#footnote-ref-2)
3. See generally, Lewison and Hughes, The Interpretation of Contracts in Australia (Law Book Co, 2012) at [7.03]; see also J D Heydon, Heydon on Contract (Law Book Co, 2019) at [8.600], discussing the “presumption against redundancy” as a corollary of the principle that a contract must be construed as a whole; see also Tokio Marine & Nichido Fire Insurance Co Ltd v Holgersson [2019] WASCA 114 at [50]-[54] (Buss P, Beech and Pritchard JJA). [↑](#footnote-ref-3)
4. Compare Tokio Marine at [55]. [↑](#footnote-ref-4)