COURT DECISIONS

The summaries appearing before the court decisions published in The Valuer & Land Economist do not form part of the judges' and assessors' decisions and are provided only as a brief summary of the reported cases. Members are urged not to rely on these summaries for a complete synopsis, but to read the judgments in full. "Re Dickinson"

In the Matter of an Arbitration
and
In the Matter of the Evidence Amendment Act (No. 2) 1980
and
In the Matter of Mark David Dickinson
(First Appellant)
and
In the Matter of William McLeod Wilson
(Second Appellant)
and
In the Matter of Brian Edwards
(Third Appellant)
Between
The Board of Trustees of the National Provident Fund and Central Tower Limited (Plaintiffs)
and
Mark David Dickinson, William McLeod Wilson and Brian William Edwards (Defendants)

(In the Court of Appeal of New Zealand, 24 September 1991, Cooke P, Gault and McKay JJ.)

In the following decision, the New Zealand Court of Appeal ruled that confidentiality agreements between landlords and lessees on comparable buildings could be subpoenaed to obtain evidence of comparable rents. The court found that "it can hardly be in the public interest that business rentals should be based on false appreciation of the market".

The New Zealand court decision is not binding on the Australian judiciary, however it is open for the courts to consider the decisions delivered in this case.

Cooke P: The Australian Mutual Provident Society as lessor and Watpat Nominees Limited as lessee are engaged in a rent review relating to premises in the Trust Bank Centre in Wellington. The valuers appointed on each side have disagreed. The umpire has embarked on a hearing pursuant to clauses in the lease which provide that if the valuers are unable to agree, the current market rent shall be determined by the umpire, whose determination shall be final and binding on the parties. The relevant clause continues:

> The umpire shall have due regard to any evidence submitted by the valuers as to their assessment of the current market rent of the premises. The umpire shall give his determination and the reasons therefore in writing.

The lessee is desirous of tendering before the umpire the evidence of the rents agreed upon for certain other office premises in Wellington said to be comparable. Just as the Trust Bank Centre is a major office building in the city, so is the IBM Centre, and a third building in much the same category is the Majestic Centre. To that end the lessee Watpat has sued out subpoenas from the High Court under section 9 of the *Arbitration Act* 1908. They are directed to representatives of three lessees in the IBM Centre and one lessee in the Majestic Centre. The information sought by the subpoenas is in essence details of the rental and collateral agreements bearing on the rental in relation to each of those lettings. Those lettings are subject to confidentiality clauses between the parties, of which an example is Exhibit A to the affidavit of Mr R.W. Byrne, sworn on 22 September 1991:

> CONFIDENTIALITY
> 20.1 This Agreement is strictly confidential to the parties hereto and accordingly no party will disclose or permit to be disclosed any of the terms of this Agreement to any person not being a party to this Agreement without first consulting and agreeing with all other parties as to the terms of that disclosure but the following disclosures will not be deemed to be a breach of this clause:
> (a) disclosure made to professional advisors *[sic]* in relation to advice or opinions required pursuant to the terms and provisions of this Agreement for the Lease; or
> (b) disclosures of information which is public knowledge other than as a result of unauthorised disclosures by the parties.

The lessors of the other two buildings and the lessees in those buildings whose representatives have been served with the subpoenas have sought to have the subpoenas set aside on the ground that the confidentiality clauses should prevail.

Two proceedings or sets of proceedings have very recently come before Greig J in the High Court. On 20 September 1991 he set aside the subpoena relating to the Majestic Centre on the ground that in that case there is material arising from a compromise of litigation which, in his view, places it in a special category. That part of Greig J's decision is not in issue now before this court, although we have been informed by Mr Camp, who appears for Watpat - that is to say for the lessee in the pending review - that despite the judge's decision, the Ernst and Young material, as it is called, is in his understanding likely to be made available. We are not called upon to consider Greig J's decision with regard to that material.

As to the material relating to the IBM Centre, the judge considered that it was not entitled to protection and refused to set aside the relevant subpoenas. From that part of his decision the three lessees concerned have appealed.

There is also now before us another proceeding. The lessor of the IBM Centre is the Board of Trustees of the National Provident Fund. They and an associated company commenced proceedings against the three lessees seeking an injunction restraining disclosure under subpoena or otherwise of confidential details of the leasing arrangements. The judge granted an interim injunction until further order of the Court of Appeal, but at the same time ordered that the application be removed into this court to enable a decision as a question of law whether the interim injunction should be sustained. No procedural point has been taken on either side. In both proceedings or sets of proceedings essentially the same questions arise.

As to the jurisdiction to set aside such subpoenas, there can be no doubt that jurisdiction exists. It would certainly exist at common law on the ground of abuse of process of the court if that could be made out, and a possible alternative source is section 35 of the *Evidence Amendment Act* (No. 2) 1980. There is no need to determine whether jurisdiction is available under both heads for the purposes of the present case. The principles to be applied under either head must be substantially the same in a case such as this.

Accepting then that there is jurisdiction, one goes on to consider the contentions raised for the appellants and the plaintiffs in support of the argument that the subpoenas should be set aside. Mr Dunning first contended that the subpoena procedure was not available in the rent review between the AMP Society and Watpat because the lease there includes a provision that in determining the current market rent, the valuers or umpire shall be deemed to be acting as experts and not as arbitrators. It is to be noted that this provision must in any event be read subject to the express requirement "the umpire shall have due regard to any evidence submitted by the valuers as to their assessment. . ." but, subject to that qualification, the clause appears to me to be designed to ensure that the umpire may act on his own expert knowledge if he sees fit and is not in all circumstances bound to hear evidence. Such a situation is not uncommon and sometimes arises even by implication: see, for example, *Mediterranean and Eastern Export Co Ltd* v. *Fortress Fabrics (Manchester) Ltd* [1948] 2 All ER 186.

The argument of Mr Dunning is that the effect of the clause is that the *Arbitration Act* 1908 in general (as I understand it), and section 9 in particular, do not apply to the rent review. That argument must fail, bearing in mind that in the New Zealand legislation "submission" is defined as including a written agreement under which any question or matter is to be decided by one or more persons to be appointed by the contracting parties or by some person named in the agreement; while "arbitrator" includes referee and valuer. Those definitions appear in section 2 of the 1908 Act. Some discussion of their history and significance will be found in *Hunt* v. *Wilson* [1978] 2 NZLR 261, 274.

Here the umpire is conducting a hearing with the assistance of counsel. It is apparent that the parties wish to call evidence. There is a very large sum at stake. It is obviously highly desirable there be an opportunity of calling evidence and cross-examination: that is evidently what the umpire intends. Section 9 should be and, in my opinion, is available for such a case.

The more important point raised by Mr Dunning concerns confidentiality. As to that, again it may be accepted readily enough that if this were a case in which on balance the public interest required confidentiality to be preserved, the court would have jurisdiction to set these subpoenas aside on that ground. The categories of confidentiality to be protected by the law are not closed, as pointed out by Turner J in *Bell* v. *University of Auckland* [1969] NZLR 1029, 1035-37.

More recent illustrations in England of the recognition of the principle and its limits are *Science Research Council* v. *Nasse* [1980] AC 1028, especially at 1067 per Lord Wilberforce; *Campbell* v. *Tameside Metropolitan Borough Council* [1982] QB 1065, where there are helpful explanations by Lord Denning MR and Ackner LJ; and *Brown* v. *Matthews* [1990] 2 All ER 155.

I am disposed to agree with the view expressed by Ralph Gibson LJ in the latter case at 164 that the kind of claim to confidentiality made in this field need not be approached under the head of public interest immunity. It is rather a situation in which, if the claim is to be sustained, it is to be based on the private commercial interests of those objecting to the subpoenas. The interests here are primarily those of the National Provident Fund as lessor, but the three lessees support their lessor, not wishing to be in breach of their obligations of confidentiality.

It may be accepted then that, if the grounds for holding that the private interest in confidentiality should be protected are sufficiently strong, the claim should be upheld. It is a balancing exercise, although as Lord Wilberforce put it in the *Science Research Council* case:

> This is a more complex process than merely using the scales: it is an exercise in judicial judgment.

Mr Camp has argued that there is a heavy onus on those claiming confidentiality to make out their claim. I prefer to approach the matter on the footing that the court must, in the way indicated by Lord Wilberforce, weigh the competing considerations and, if in the end satisfied that the interest ought to be protected, uphold it.

Approaching the matter in that way, I have no doubt that Greig J was right to refuse to set aside these subpoenas. It is understandable that an organisation such as the National Provident Fund with very large funds under its care should be anxious to maintain rental levels in its building as high as reasonably possible. Any commercial lessor is likely to have the same approach. Perhaps in these times of economic stringency it is not surprising that confidentiality clauses have begun to appear in commercial leases of this kind. But, for very many years, leases of commercial premises in New Zealand cities have to a large extent been fixed by rent review procedures. They are a major or at least a significant element in the New Zealand economy. Generally speaking, the leases authorising or requiring such procedures speak of market rents or use some similar formula such as fair rent. In *Modick R.C.* v. *Mahoney C.A.* 12/90 (judgment 24 June 1991) this court stressed the importance of the ability of valuers or umpires to be able to refer to genuine market rents: that is to say, rents freely arrived at in negotiation between the parties, by contrast with those arrived at in the captive circumstances of rent fixations.

Such genuine market rentals are not always easy to discover, and when discovered they may be of great importance in assisting an umpire in carrying out his difficult task

of assessment. It is a fair inference in the present cases that the rents agreed for the IBM centre may well be of true significance for the umpire concerned with the Trust Bank Centre. Of course one infers as much without any detailed knowledge of the situation and without in any respect seeking to fetter him, but it is desirable that he should be able to get at the truth as to these allegedly comparable rentals. Plainly details will be required such as the terms of collateral contracts offering side benefits and the like.

The contention for the lessor of the IBM Centre really does not withstand analysis. In effect it is an attempt, in the interests of lessors, to prevent true market rents from being ascertained. But in the current economic climate it is plainly in the public interest that fair levels of rent be arrived at in our main cities. One has only to consider the apparently extensive unlet areas in newly-constructed buildings to appreciate that unrealistically high levels are not in the public interest. One sympathises, as I have said, with the responsibility of the lessor for the funds in its care but, in my opinion, the overriding public interest is in as fair a fixation of market rents as possible. The upholding of the subpoenas will be conducive to that.

It remains to mention that Mr Dunning in his reply placed some reliance on section 21 of the *New Zealand Bill of Rights Act* 1990, wherein there is confirmation of the right to be secure against unreasonable search and seizure. Since, for the reasons already given, the issue of the subpoenas cannot in my view be described as unreasonable, that takes the argument for the lessor and the others no further: nor is any further discussion necessary in this case of the scope of the New Zealand Bill of Rights.

With regard to the mechanics of compliance with the subpoenas, Mr Camp has made it clear that, so far as can be foreseen at present, production of the full documents is unnecessary and a summary sheet containing all material information should be enough. That kind of question can be ruled upon by the umpire should any difficulty arise.

Mr Camp also indicated that one particular matter, as to which we permitted Mr Dunning to address us in conditions of some secrecy, does not appear to have sufficient relevance to the rents to make it necessary for him to ask for information about it to be supplied.

For those reasons I would dismiss the appeals. As to the interim injunction, the same reasons lead to the conclusion that it cannot be sustained. The court being unanimous, the appeals are dismissed and the interim injunction discharged. Watpat Nominees Limited will have costs in the sum of $1,500 to cover the hearings in both courts.

Gault J: I agree with the judgment that has just been delivered and will add only brief remarks of my own.

After hearing applications urgently last Friday and yesterday, Mr Justice Greig refused to set aside certain subpoenas except for one which he regarded as a special case, granted an interlocutory injunction restraining representatives of three of the lessees of the IBM Centre from disclosing under compulsion of the subpoenas or otherwise confidential details of leasing arrangements with the landlord and removing into this court for a decision as a question of law whether that injunction should be sustained.

While it is an urgent appeal in the context of an interlocutory application I am satisfied that it is not appropriate to deal with it on the conventional balance of convenience consideration. If the injunction is discharged and the subpoenas are not set aside the decision effectively will be determinative of the substance of the dispute and, while it may be said that some additional material might become available if more time were allowed, the principal contentions are clear and the matter can be determined now.

As outlined in the President's judgment, the lessee of space in the Trust Bank Centre, in a rent review under its lease, seeks from lessees in the IBM Centre in Wellington, said to be comparable rental space, correct details of rentals in their respective leases together with any collateral agreed details pertaining to rent. In each of the leases there is an obligation of confidence imposed upon the lessee which the appellants perceive would be breached if they were forced to disclose the information sought in evidence given under subpoena.

Even though the rent review upon which the evidence is required is being undertaken by an umpire in terms of a submission in a lease in which he is said to be acting as an expert, I am satisfied that there is no basis for setting aside the subpoenas on the ground that they are not properly issued pursuant to section 9 of the *Arbitration Act* 1908. It is clear that the umpire with the assistance of counsel is to hear evidence and make a determination which will be imposed upon the parties in the review proceeding submitted to him. Clearly he is acting upon a "submission" as defined in the *Arbitration Act* 1908 which in New Zealand is defined more broadly than in at least some overseas countries.

Accepting that in appropriate circumstances there is jurisdiction to set aside a subpoena even where properly issued, I agree that this is not an appropriate case where that course should be followed.

Whether or not protection of confidential information will provide a sufficient ground to allow evidence to be withheld will depend upon the circumstances in each particular case. Although we have been referred to no decision directly in point the principles are not in dispute on the submissions we have heard from counsel. It is necessary to balance the advantage of maintaining confidentiality against the competing advantage of openness where a public interest is to be served. That balance is referred to in a number of authorities and in particular *Campbell* v. *Tameside Metropolitan Borough* [1982] 2 All ER 791 in which Ackner LJ said (p 796):

> The fact that information has been communicated by one person to another in confidence is not, of itself, a sufficient ground for protection from disclosure in a court of law either of the nature of the information or the identity of the informant if either of these matters would assist the court to ascertain facts which are relevant on which it is adjudicating . . . The private promise of confidentiality must yield to the general public interest, that in the administration of justice truth will out, unless by reason of the character of the information . . . a more important public interest is served by protecting the information. . .
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> The proper approach where there is a question of public interest immunity is weighing, on balance, of the two public interests, that of the nation or the public service in non-disclosure and that of justice in the production of the documents.

Helpful guidance as to relevant principles also is available from *D* v. *The National Society for the Prevention of Cruelty to Children* [1978] AC 171, 233, and *Morgan* v. *Morgan* [1977] 2 All ER 515, 518.

There must be good reason to exclude or limit relevant evidence in any proceeding. Here Mr Dunning has advanced two principal reasons. They are first that the

information is a matter of confidence between the parties to the lease in which it is embodied and being perceived by those parties as confidential should be respected as such, and secondly that because that confidentiality is the subject of contractual obligations the court should so far as is possible support and enforce those obligations.

The courts will in appropriate cases protect confidentiality in commercial contexts and frequently do so. Weighed against that, however, is the established approach to the fixing and reviewing of commercial rentals by reference to comparable market rents. We emphasised the importance of establishing true comparisons in *Modick R.C. Limited* v. *Mahoney CA* 12/90, judgment 24 June 1991. That will be facilitated by access to relevant information. There is a public interest in an open market unless special circumstances exist. In my view it is important to get to the truth of comparable rentals where available so that proper rent levels are fixed.

So far as concerns detriment from disclosure Mr Dunning was able to refer to no more than what appears to be the short-term disadvantage for the landlord in the IBM entre seeking to let unleased space in that building. He acknowledged, however, that in the longer term his client itself no doubt will be seeking to establish new rents by reference to comparable market rentals and that, on my assessment, reflects the importance of an open market in the longer term.

Accordingly, I have not been satisfied on the argument presented that there is, or is likely to be, oppressiveness in the disclosure of the information sought in the proceedings before the umpire that justifies setting aside the subpoenas or otherwise suppressing the evidence.

One particular matter was mentioned by Mr Dunning. I am not satisfied that that goes directly to market value in any event but if it were shown that it did I would be inclined to protect it. However, Mr Camp indicated that he will be satisfied with less in the context of the rent review proceedings. He seeks simply details of the matters pertaining to the rental of the premises concerned. He will not insist upon production of the lease documents. Should there be any difficulty in that respect I have no doubt that an application to the umpire and the co-operation of counsel will lead to it being overcome readily.

Accordingly, for these reasons, and those given by the President, I would discharge the interim injunction and dismiss the appeal.

McKay J: I agree with the judgments which have just been delivered by the President and by Gault J.

The subpoenas in question were obtained under section 9 of the *Arbitration Act* 1908. Their issue was challenged on the ground that the rent review was not an arbitration. The review hearing is being conducted pursuant to a clause under which the valuers or umpire are deemed to be acting as experts and not as arbitrators. The effect of that provision is to permit the valuers and the umpire to reach their respective decisions as expert valuers without the necessity for formal hearing. In this case, however, it is clear that a formal hearing is in progress before the umpire, the valuers having been unable to agree. We were told that counsel is appearing and evidence is being called. I have no doubt, therefore, that the proceeding is an arbitration and subpoenas are available under the Act. As the President has pointed out, that would be the result in any event under the New Zealand legislation, because of the definitions in the *Arbitration Act* 1908. The term "arbitrator" includes a valuer, and the term "submission" has an extended meaning.

The court has an inherent jurisdiction to set aside a subpoena and will normally do this where it can be shown that the issue of the subpoena is oppressive. That can be done under the general jurisdiction to avoid an abuse of process, as the President has pointed out.

Reference was made in argument to section 35 of the *Evidence Amendment Act* (No. 2) 1980. It is not clear whether that section applies to situations such as the present. The section appears to be more obviously directed to information received by one person from another in confidence. Here what is in issue is the detail of contractual arrangements made between parties who have mutually agreed to maintain confidence as to those arrangements. If the section does apply then the matters which it sets out as relevant to the exercise of the court's discretion appear to me to be the same matters as would be considered under the inherent jurisdiction. The section requires the court to consider whether or not the public interest in having the evidence disclosed is outweighed in the particular case by the public interest in the preservation of the confidence. The court is to have regard to the likely significance of the evidence to the resolution of the issues to be decided in the proceeding, to the nature of the confidence, to the special relationship between the parties to it and to the likely effect of the disclosure of the confidence.

I do not think anything turns on whether the matter is dealt with under the section or under the inherent jurisdiction. As to the relevant principles under that jurisdiction, Mr Camp, for Watpat Nominees, referred us to the judgment of Ackner LJ in *Campbell* v. *Tameside Metropolitan Borough* [1982] 2 All ER 791. The relevant passage has been included in the judgment of Gault J.

There cannot, in my view, be any doubt that the material which is the subject of the subpoenas is of considerable importance and is material to the issues in the rent review proceedings. The issue in those proceedings is the fixing of rental for space in a central city building at the top portion of the market. The evidence sought to be disclosed by the issue of the subpoenas relates to rentals of space in another such building. There are possibly as few as three buildings in Wellington at that top level of the market which are truly comparable.

The rent review is under a clause which is apparently the standard BOMA clause in general use in Wellington. Such rent review proceedings are commonplace, and have been for many years. Their effectiveness depends very much on the availability of accurate market information relevant to the particular premises, including details of side agreements providing for rental holidays and the like without which the actual lease may give a false picture. The system of rent reviews based on assessment of market rentals has existed in this country for probably more than 100 years, and the system inevitably depends on the availability of accurate market information which can be then analysed and assessed by valuers. We were told from the bar that the information sought by the subpoenas from the appellants, relating as it does to another lease in a comparable building, relates to a lease which almost certainly has similar rent review provisions contained in it.

Given that situation, there would need to be very strong reasons before one would be inclined to say that the public interest in the disclosure of that information, so that the proceedings can proceed on reliable evidence, would be

outweighed by the need for confidentiality pursuant to the agreement.

A number of matters were urged by Mr Dunning in support of the setting aside of the subpoenas. He submitted that because the umpire was an expert and not bound by the rules of evidence, he could take into account hearsay and other indirect evidence and was, therefore, not dependent on the availability of the information sought. The fact that he may have access to inherently unreliable evidence in a matter of this kind does not appear to me to be any answer. Then it was submitted that the law will protect confidential information, and will protect contracts and enforce contracts freely made. That is true. However, the protection which the law will give to valid interests in confidentiality must yield where appropriate to the necessity for evidence to be available in proceedings whether in court or before other tribunals. It was further submitted that Watpat Nominee's interest in obtaining the information arose from its own commercial interests. That is probably true of all commercial litigation where one party seeks to subpoena witnesses. I do not regard that as a valid consideration.

It was urged on us that the National Provident Fund is the main beneficiary of the obligations of confidence in the lease agreements of which disclosure is sought. It was submitted that the National Provident Fund will be likely to suffer economic loss if there is disclosure of the confidential information. It represents a substantial portion of the public interest, it was said, as it manages 17 separate superannuation schemes with a total of 120,000 members. The only prejudice to the National Provident Fund, however, is that the disclosure of the information may lead to a true appreciation of the true rental market and therefore may lead to lower rentals being obtained by it in other rent reviews in the future.

Probably because of the recent downturn in the market and the desire of landlords to maximise rents, confidentiality clauses have become popular in recent years. The property market seemed to manage quite well without them up until the recent downturn. Landlords are not necessarily to be blamed for seeking to ensure that conditions are confidential if they perceive that they may thereby be able to obtain better rents. Likewise, lessees are not to be criticised for endeavouring to achieve lower rents. It can hardly be said, however, to be in the public interest that business rentals should be based on a false appreciation of the market. There can be no injustice to either lessor or lessee in having reviewed rentals based on correct information as to true market levels.

None of the reasons advanced carries any weight, to me, against the important consideration that proceedings of the kind envisaged in a rent review should be able to proceed with accurate information as to market levels.

Mr Dunning also invoked section 21 of the *New Zealand Bill of Rights Act* which gives every person the right to be secure against unreasonable search or seizure. That right applies, but is not limited, to persons, property or correspondence. I do not think there is anything unreasonable in information being required to be made available as evidence to the court or to a tribunal to ensure that justice can be done as between the parties to those proceedings.

For these reasons, and those that have been traversed in the other judgments, I, too, would dismiss the appeal.