COURT DECISIONS

The summaries appearing before the court decisions published in The Valuer 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.

Wrong determination of market rent by valuer

The following summary of two recent New South Wales Supreme Court decisions is reprinted from the Property Law Newsletter, June 1990, published by Henry Davis York, solicitors. The first case is published hereunder; the second will be included in the February 1991 Valuer.

Two recent decisions by single judges of the New South Wales Supreme Court illustrate problems that can arise on the determination of current market rent under rent review clauses in commercial leases.

In the first case, *Horowitz Grahame Books Pty Limited* v. *Mid City Centre Pty Limited,* the relevant premises were leased to the lessee for use as a bookshop. The lease provided that the premises could not be used for any other purpose without the lessor's consent.

The lease contained a standard market review clause which provided that if the parties could not agree on the market rent at two yearly intervals, the determination would be made by a qualified valuer acting as an expert and that the valuer's decision would be final and binding. The valuer was required by the lease to have regard to the terms, covenants and conditions of the lease including the restrictive use clause.

Before determining the rent, the valuer sought legal advice as to whether he should disregard the restrictive user clause and simply determine the rent that could be obtained from a hypothetical willing lessee. The valuer was wrongly advised that he should disregard the restrictive user clause and determined the rent accordingly. The lessee sought a declaration from the court that the valuation was erroneous and therefore not binding on the parties.

The court decided that in this particular case, notwithstanding that the valuer's assumption and legal advice regarding the use of the premises was incorrect, the determination was binding on both parties. The court held that the error was not of such a nature that justified the setting aside of the determination.

The second case, *Bestwood Pine Mart (Victoria Avenue) Pty Limited* v. *Coles Myer Limited,* also came before the court as a result of one party to a lease being dissatisfied with the decision of an expert valuer appointed under the terms of the rent review clause in the lease.

The facts are reasonably complicated. However, the dispute once again arose out of the assumptions made by the valuer in arriving at his determination.

The court held that even if the determination was wrong it did not follow that the determination was not binding upon the parties. Provided that the valuer complies with the terms of the lease then an erroneous determination will not be set aside if the lease provides that the expert's decision shall be final and binding.

These two decisions illustrate the difficulty of challenging an expert's rent review even if errors can be established when the terms of the lease have been complied with and where the lease provides that the expert's decision may not be challenged. It should be borne in mind, however, that there may be a right of action in negligence against the valuer.

Horwitz Grahame Books Pty Ltd
v.
Mid-City Centre Pty Ltd

(In the Supreme Court of New South Wales, Equity Division, 5 February 1990, Bryson J.)

Bryson J: These proceedings relate to rent review provisions in a lease of commercial premises, where a purported valuation is affected by error.

Shop P24 in the Mid-City Centre, Pitt Street, Sydney, is occupied by the plaintiff as a bookshop under lease X 103519 dated 26 March 1987 and registered on 30 September 1987 which grants a term of six years commencing on 1 October 1986. In the lease the plaintiff is lessee and the defendant, under a former name, is lessor. The lease incorporated some of the terms in memorandum T177415, although there were modifications. Clause 8.01 was so incorporated and it includes the following:

> "PERMISSIBLE USE. The Lessee shall not use the demised premises or any part thereof or permit the same to be used for any purpose other than as set out in Item 14 of the Reference Schedule hereto without the consent in writing of the Lessor first had and obtained which consent may be granted or refused or granted subject to conditions at the absolute discretion of the Lessor . . ."

Item 14 of the Reference Schedule said "Permitted Use of Demised Premises: Retail Sale of Books and other items ordinarily stocked by bookshops".

The provisions relating to rent review are partly in the memorandum and partly in the lease. Clause 3.01 of the memorandum is as follows:

"The Lessee shall pay to the Lessor during the term of this Lease rent (hereinafter called 'Minimum Annual Rent') at the rate specified in Item 10 of the Reference Schedule hereto or where increased in accordance with the express provisions of this Lease at the increased rate."

Clause 3.03, drawn from the lease, is in these terms:

"If the term of this Lease is in excess of two (2) years from the date hereof then during the six (6) months (herein called the 'review period') immediately preceding the expiration of such period of two (2) years during the term hereof, the Lessor shall be entitled to serve a written notice upon the Lessee advising the amount which the Lessor considers to be the minimum annual rent for the next succeeding two (2) year period being *the current annual open market rental value of the Demised Premises based on a lease between a willing Lessor and a willing Lessee renting with vacant possession and taking no account of any goodwill attributable to the Demised Premises by reason of any trade or business carried on therein by the Lessee and in all other respects (except as to rent payable) on the terms, convenants and conditions of this Lease.*"

I have emphasised some significant words.

Clause 3.04 is in the memorandum but was modified by the lease and as modified is in these terms:

"The Lessee within a period of twenty-one (21) days after receipt of the said notice from the Lessor may give a written notice to the Lessor stating that the Lessee does not agree that the amount nominated by the Lessor is the current annual open market rent. If the Lessee does not give the said notice within the time and in the manner referred to in this Lease then the amount nominated by the Lessor in its notice shall be the Minimum Annual Rent for the next succeeding two year period."

Clause 3.05 is drawn from the Memorandum and is in se terms:

"If the Lessee gives the notice referred to in the preceding Clause then the question shall be referred for the decision of a qualified valuer to be agreed upon by the Lessor and the Lessee or (in the event of failure so to agree) to a qualified valuer selected by the Lessee from a panel nominated by the Lessor of three (3) qualified valuers carrying on practice in New South Wales or if no valuer is selected by the Lessee within fourteen (14) days after the panel has been nominated by the Lessor or if no such valuer can be obtained who is willing to carry out the said valuation a qualified valuer appointed by the President or other the principal officer for the time being of the Australian Institute of Valuers (or should such Institute then have ceased to exist of such body or association as then serves substantially the same objects as such Institute) acting as an expert and not as an arbitrator *and the decision of such qualified valuer (including any decision as to the costs of such determination) shall accordingly be final and binding on the parties to this Lease.*"

Once again I have emphasised some significant words.

The defendant's managers instituted a rent review and by a process which did not exactly accord with the terms of clause 3.05 but which each party adopted and accepted before me was effective, Mr Valuer R.D. Higgins became the valuer for the purposes of clause 3.05.

Mr Higgins' determination was made by a letter of 14 February 1989 which he directed to both parties. After referring to his appointment and to clause 3.05 he said "I have determined the current annual open market rental value of the above premises as at 1st October 1988 in the sum of $595,000 per annum gross . . ." He referred to the lessee's responsibility for increases in outgoings and went on: "The determination therefore, exclusive of outgoings, as at 1st October 1988 is the sum of $469,735 per annum (net) . . ."

Except for the reference to the lessee's responsibility for increases in outgoings the letter in which the determination was set out contained no supporting reasoning or explanation.

By summons dated 2 June 1989 the plaintiff claims a declaration that Mr Higgins' valuation dated 14 February 1989 in purported exercise of a function under the lease is not binding on the parties to the lease.

From something Mr Hill said in a telephone conversation with Mr Higgins it appears that it is not disputed that Mr Higgins' valuation is correct if the restriction as to user is disregarded. It was an underlying assumption on which the whole case was conducted that the question is important and that a different rental value would be produced, having regard to market conditions, if the restriction on user were a provision of the hypothetical lease used in the valuing exercise.

The plaintiff tendered a body of evidence relating to Mr Higgins' underlying reasoning to the admission of which the defendant's counsel objected. I admitted this material into evidence subject to objection, a course which I rarely take but which I regard as appropriate in this case because it appeared to me that I would not be able to decide the objection except when disposing of the main questions in the case. Passages dealt in this way were paras 12 to 16 of Mr S.G. Hill's affidavit of 12 July 1989, para 2 of his affidavit of 2 August 1989 and Annexure G to that affidavit, and Exhibit C. The passages under objection are not otherwise contentious, and if admitted I would find the facts in accordance with them.

Their effect is as follows. While Mr Higgins had the reference before him, he told Mr Hill that he was seeking legal advice as to the restrictive user clause in the lease and that it had implications for the valuations. Later Mr Higgins told Mr Hill that he had received legal advice from Messrs Moore and Bevins, solicitors, ". . . that the restrictive user clause should be disregarded by me in making my valuation". Mr Hill challenged this and asked for a copy and later received a copy of the letter of advice; the copy Annexure G is before me subject to objection. Mr Higgins told Mr Hill: "Bearing in mind the advice which I have received, I am now in a position to determine the rent . . ."

In another conversation Mr Hill asked Mr Higgins to put words in the decision stating that he had based the decision on the advice received, and also stated that the plaintiff wished to dispute the advice and the

valuation. Mr Higgins said: "I am not prepared to do a speaking valuation because litigation invariably arises if you do. I am an expert and my decision will be binding." He also said: "I have had legal advice and have to rely on it in the absence of anything else. The evidence on which I am basing my figures relates to user without restriction."

Exhibit C is a file note from Mr Higgins' file dated "2/89". Mr Higgins' file was produced on subpoena and so far as the evidence shows the file note was not communicated by him to anybody; its contents seem to show that it was prepared by him to record his thoughts as he worked on his valuation. It includes this statement:

> "Legal advice concludes that the 'user clause' is to be disregarded and that what is to be determined is 'the current annual open market rental value of the demised premises based on a lease between a willing lessor and a willing lessee granted with vacant possession and taking no account of any good will attributable to the demised premises by reason of any trade or business carried on therein by the lessee and in all other respect (except as to rent payable) on the terms, covenants and conditions of the lease."

In the letter of advice Messrs Moore and Bevins referred to the decision of the Court of Appeal of New South Wales in *Burns Philp Hardware Limited* v. *Howard Chia Pty Limited* (1987) 8 NSWLR 642 and the conclusion reached there. They said:

> "However, the rent review clause in the *Burns Philp Hardware* case and the UK authority supporting that view differ from the clause now in question since this lease requires a determination of the rental based on a lease granted with vacant possession and having no regard to the goodwill of the business carried on."

The solicitors regarded the lease considered in *The Law Land Company Ltd* v. *Consumers Association Ltd* (1980) 253 Estates Gazette Law Reports 617 as similar, almost identical to the relevant parts of clause 3.03.

In *Burns Philp Hardware Ltd* v. *Howard Chia Pty Ltd* (1987) 8 NSWLR 642, a rent review clause required the assessment of a market rent — "the then current annual market rent of the premises". It was accepted by the Court of Appeal and so far as appears was not disputed by a party that in determining the current annual market rent, it should be assumed that the property was to be leased on the market on the terms of the lease between the existing parties, which included a term whereby the lessee could not use the premises otherwise than as a hardware store without the lessor's consent. Mahoney JA said at 644:

> "Therefore, in my opinion, what is referred to by the review clause is what the relevant prospective lessee would pay for the lease of the premises on the terms of and for the term remaining for the lease in question."

Priestley JA at 659 addressed a question of alleged waiver by the lessor on a basis which shows that it was assumed that in the absence of waiver the restriction on user was to be taken into account.

I see these judgments as providing a valuable illustration rather than any authoritative expression of judicial opinion. The illustration is clear and strong in favour of treating the restriction as applicable in a valuation exercise. In *The Law Land Company* case the appellant's arguments seems to have taken this position as an assumed starting point and to have developed its position from there to a conclusion which the terms of its lease would not support.

There are usually difficulties in proceeding from a decision on the construction of one lease to a conclusion on the construction of another lease, particularly for complex commercial leases. In my opinion, the decision of the Court of Appeal in *The Law Land Company Ltd* v. *Consumers Associated Ltd* is not truly a basis for the advice which the solicitors founded on it, nothwithstanding similarities which can be perceived in the terms of the documents under consideration there and here. The lease before the Court of Appeal contained internal inconsistencies which the Court of Appeal resolved in a matter which I would not doubt was correct but which was closely related to the unsatisfactory terms of that document which Lord Templeman, then Templeman LJ, described, with pungent phrases, as "roughly stitched together".

The lease in that case contained a definition of market rent as

> "the yearly rent at which the demised premises, fully repaired in accordance with the provisions of the lease, might reasonably be expected to be let in the open market with vacant possession by a willing lessor for the then remainder of the term thereby granted without taking a premium, and subject to the provisions of the lease other than the rent thereby reserved, there being disregarded any of the tenant's goodwill and any of the tenant's improvements." (p. 617)

There is a fairly gross anomaly between these expressions and another covenant by which

> ". . . the tenants covenanted not without the prior written consent of the landlord to use or permit the demised premises or any part thereof to be used other than as offices of the Consumers' Association and its associated organisations."

As there could be no open market and there could hardly be any market at all if this restriction had to be assumed to be in effect the Court of Appeal treated the restriction on user as relating not to the Consumers' Association but to the hypothetical tenant to whom the premises were to be let in the open market for the purpose of the valuation exercise.

In relation to the difficult document before the Court of Appeal this conclusion commands respect; but it is not readily applicable to any other document. In particular it establishes no rule for the present lease, in which the restriction would not operate to restrict user to the plaintiff, but would allow use by any tenant for the retail sale of books; this restriction is not in my opinion inconsistent with ascertaining the current annual open market rental value defined as it is in clause 3.01. Disregard of the goodwill attributable to the plaintiff's bookshop business carries no implication requiring modification of the covenant restricting user to retail sale of books.

In my opinion the advice given by Messrs Moore and Bevins to Mr Higgins was erroneous and the correct position is generally similar to that reached in the *Burns Philp* case, in which the restriction on user is assumed to apply in the hypothetical lease. As the question must

be addressed anew for each lease, the decision of the Court of Appeal in the *Burns Philp* case is not authority for this conclusion; the analogies are comforting but I base my view on the terms of Lease X103519 which to my mind present no real anomaly."

Mr Sackville, the defendant's counsel, did not present any arguments which would support Messrs Moore and Bevins' advice; the presentation of his case did not require him to deal with that matter as according to his case it is irrelevant whether or not the advice was correct.

In my finding the letter of 14 February 1989 is Mr Higgins' decision; this is obviously the only available finding if the material under objection were rejected, but looking at the matter as if it were admitted in evidence I would make the same finding. The decision was expressed in a single document, although the valuer was not required by the parties' agreement to give his decision in writing or in that manner. Nothing contained in any conversation with Mr Hill by way of explanation or otherwise was Mr Higgins' determination, or part of his determination, nor was any of it intended so to be; nor was Messrs Moore and Bevins' advice incorporated in the determination.

To a limited extent the decision of Mr Higgins was a "speaking" decision; that is to say, it contained internally an explanation or statement of the reasons for the decision, but that only related to part of the reasoning relating to outgoings and had no bearing whatever on the matter which is under challenge before me as allegedly an error.

Mr Hely QC for the plaintiff made submissions to the following effect. It was submitted that in fixing the rent the valuer considered a hypothetical lease which did not contain a restriction on user in the terms of clause 8.01, and that in doing this the valuer acted contrary to the express provisions of clause 3.03. For this reason the valuer did not determine the question referred to him and his valuation was not in conformity with the parties' agreement. It was submitted that the result was the same as if he had valued the wrong property.

A subsidiary contention was that it is open to a party who seeks to impeach the decision of a valuer to do so on the basis of material external to the decision itself.

Mr Hely QC contended that it is clear as a matter of fact that the valuer assessed the rent on the basis of a hypothetical lease which contained no restriction as to user. On the assumption that the evidence under objection is admitted this is clear and I so find.

Without the aid of the evidence subject to objection there is no evidence that Mr Higgins' decision was affected by any error and if I had rejected that evidence I would not find that it was.

Mr Hely QC contended that by clause 3.03 the question for decision by Mr Higgins is defined as determination of the market rental for a lease on terms and conditions of the present lease except as to rent; clause 8.01 must be included in those terms and conditions. He then contended that it can be seen as a matter of fact that Mr Higgins did not decide the matter for decision; his decision is a decision on something else, and it is not the thing by which the parties agreed to be bound. It was contended that Mr Higgins simply has not addressed or determined the question committed to his determination, and it is as if he had valued the wrong property; he has valued according to a lease containing the wrong terms.

Mr Hely's submissions naturally brought him face to face with the views expressed by McHugh JA in *Legal and General Life of Australia Ltd* v. *A. Hudson Pty Ltd* (1985) 1 NSWLR 314, and particularly the opinion expressed, after a lengthy review of earlier authorities, at 335D to 336F. Mr Hely pointed to McHugh JA's contemplation of a mistake which appears to me to be very similar to the mistake under debate now at 331C as:

> "... the mistake which I think occurred when the valuer considered other uses of the premises. In that case the valuer did not answer the question which was referred to him because his assessment was not based on 'on the terms, covenants and conditions of this lease', but the lessee has not relied on this mistake, if it be a mistake. The only mistake relied upon, therefore, is one which involves a mistake as to the process of valuation. The question is whether a mistake of that class is sufficient to avoid a valuation?"

To my reading, the rest of McHugh JA's judgment was not closely directed to mistakes of the class not relied on; yet it may be right to understand him as having expressed views in terms which may refer to that class.

In applying views expressed in *Legal and General Life Australia Ltd* v. *A. Hudson Pty Ltd*, it is of course important to remember that although all members of the Court of Appeal concurred in the order, Mahoney and Priestley JJA did not concur in the observations of McHugh JA. Mahoney JA's decision appears to have been dictated by his view that there was a lack of evidence and of available conclusions as to what the valuer in fact did in reaching his valuation; see 321. Priestley JA's view was to the effect that a declaratory order should not be made in the state of the evidence. Further, the proceedings were not disposed of in the Court of Appeal; the Judicial Committee disposed of the proceedings upon the view that there was no discernible mistake in the valuation; *A. Hudson Pty Ltd* v. *Legal and General Life of Australia Ltd* (1986) 61 ALJR 280 at 281.

However, in my respectful view McHugh JA's opinion is a most illuminating opinion in a field where clarity is rare. McHugh JA placed his consideration on a basis of principle with these observations:

> "In my opinion the question whether a valuation is *binding* upon the parties depends in the first instance upon the terms of the contract, express or implied. This was pointed out by Sir David Cairns in the Court of Appeal in *Baber* v. *Kenwood Manufacturing Co Ltd* [1978] 1 Lloyd's Report 175 at 181."

I was taken by counsel to a number of the cases to which McHugh JA referred but I do not think that any additional review of them is required. The terms in which McHugh JA at 335 and 336 expressed his opinion are as follows:

> "In my opinion the question whether a valuation is *binding* upon the parties depends in the first instance upon the terms of the contract, express or implied. This was pointed out by Sir David Cairns in the Court of Appeal in *Baber* v. *Kenwood Manufacturing Co Ltd* (at 181). A valuation obtained by fraud or collusion

can usually be disregarded even in an action at law. For in a case of fraud or collusion the correct conclusion to be drawn will almost certainly be that there has been no valuation in accordance with the terms of the contract. As Sir David Cairns pointed out, it is easy to imply a term that a valuation must be made honestly and impartially. It will be difficult, and usually impossible, however, to imply a term that a valuation can be set aside on the ground of the valuer's mistake or because the valuation is unreasonable. The terms of the contract usually provide, as the lease in the present case does, that the decision of the valuer is 'final and binding on the parties'. By referring the decision to a valuer, the parties agree to accept his honest and impartial decision as to the appropriate amount of the valuation. They rely on his skill and judgment and agree to be bound by his decision. It is now settled that an action for damages for negligence will lie against a valuer to whom the parties have referred the question of valuation if one of them suffers loss as the result of his negligent valuation: *Sutcliffe* v. *Thackrah* [1974] AC 727; *Arenson* v. *Arenson* [1977] AC 405. But as between the parties to the main agreement the valuation can stand even though it was made negligently. While mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or the certificate of valuation, nevertheless, the mistake may be of a kind which shows that the valuation is not in accordance with the contract. A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties. But a valuation which is the result of the mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract. "Furthermore, when a party seeks the assistance of equitable remedies to enforce an agreement to abide by the valuation of a third party, mistake, fraud or collusion can be a defence to the action in certain circumstances: *Collier* v. *Mason; Weekes* v. *Gallard.* But those equitable defences are not available when the plaintiff seeks a common law remedy. To hold otherwise is to become a victim of 'the fusion fallacy' which Messrs Meagher QC, Gummow and Lehane so roundly condemn: *Equity, Doctrines and Remedies,* 2nd ed. (1984) at 44-58. Of course, defence of fraud, collusion or mistake may be available when a common law remedy is sought. But that is because the express or implied terms of the contract permit them. The defences of which Sir John Romilly MR spoke in *Collier* v. *Mason* were equitable defences to an equitable remedy. They are not available in a common law action.

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

I find McHugh JA's opinion persuasive and I propose to apply it. One of the respects in which it appears to me to state the position satisfactorily is that it bases the decision on the parties' agreement and not on judge-made rules or on perceptions of policy or general perceptions which may not be well applicable to the terms of particular leases. I would wish to be on guard against generalisations of purported legal rules in a field where each case should be an application of the terms of an agreement between the parties to that case.

At first instance in this State earlier case law had shown a state of judicial opinion which was not receptive to forensic assaults on such valuations; *Joint Coal Board* v. *Noone Pty Ltd* (1984) 3 Butterworths Property Report 9441 (Yeldham J), and *Wamo Pty Ltd* v. *Jewel Food Store Pty Ltd* (1983) 2 Butterworths Property Reports 9611. A similar disposition was firmly voiced by the Judicial Committee in *A. Hudson Pty Ltd* v. *Legal and General Life of Australia Ltd* 61 ALJR at 281.

Within the terms of the opinion stated by McHugh JA the view expressed elsewhere that a "speaking" valuation is open to review in respect of mistakes which appear from its own terms although not otherwise (as was contemplated in *Joint Coal Board* v. *Noone Pty Ltd)* does not appear well based; if the effect of the parties' agreement is that they are bound by a decision the result, subject to any express provision of their agreement, follows that they are bound by the decision whether or not it states reasons on its face, and whether or not those reasons are correct. McHugh JA does not say that it is significant whether the decision is a "speaking" decision or not, and I take this as an indication that he did not regard it as significant. When mistakes are such that the valuation is not in accordance with the agreement, there appears to be no reason in principle for limiting the available factual material to prove that there had been a mistake to the express terms of the decision. During argument I gave examples such as that the valuer had been seen to inspect, measure up and make inquiries at the wrong property after a change in the street numbers, or had

inspected a property with an apparently correct street address in the wrong suburb. The examples were rather gross but they are useful to illustrate the difficulties of rejecting evidence extrinsic to the terms of the valuer's determination.

What these parties agreed to be bound by in the present case is explicitly stated in clause 3.05. The machinery in the previous clauses worked to produce a difference or dispute referred to as "the question" in some such form as this:

> "What is the minimum annual rent for the next succeeding two year period, that is to say what is the current annual open market rental value of the demised premises based on a lease between a willing lessor and a willing lessee granted with vacant possession and taking no account of any goodwill attributable to the demised premises by reason of any trade or business carried on therein by the lessee and in all other respects (except as to rent payable) on the terms, covenants and conditions of this lease?"

Then clause 3.05 provides for this question to be referred for the decision of a qualified valuer and provides "The decision of such qualified valuer ... shall accordingly be final and binding on the parties to this Lease."

Is it a question of fact, to be decided upon evidence and on the probabilities arising on that evidence whether Mr Higgins' letter of 14 February 1989 is a decision on that question. On its face and from its contents it undoubtedly is. In my opinion the evidence to be admitted on that question should not be confined to its contents. I regard the statements in Mr Hill's affidavits which are under objection, Annexure G and Exhibit C, as relevant, and I admit them.

I find on the probabilities that Mr Higgins acted on the views in Messrs Moore and Bevins' letter of advice dated 7 February 1989 that when regard is had to the whole terms of the lease "... if a valuer on a rent review is to determine the rent as if the premises were vacant and disregarding goodwill, then it is inconsistent to take into account the restriction on user provision", and that Mr Higgins "... should assess the open market rental vaue of the premises without regard to the restriction as to user contained in the lease." To do this was to act on a view on the effect for the valuation exercise of all the provisions of the lease taken together, in my holding, a wrong view, but a view based on the lease and its construction and not based on some notional lease or other document from which any part of it had been omitted. Mr Higgins' letter of 14 February 1989 is his decision on the question referred to him, and the explicit terms of the parties' agreement provide that it is to be final and binding on them. If I withheld enforcement of it on the ground that it is not correct I would be failing to enforce this agreement.

As Mr Sackville of counsel for the defendant contended, the production by Mr Higgins of a non-speaking valuation was a procedure authorised by the terms of the parties' agreement, and in no way failed to conform with their agreement. However, no provision of the agreement requires the exclusion of evidence other than material expressed in the determination if the evidence is relevant to the issue whether that letter was a determination of the question referred. In particular, the provision that the determination should be final and binding on the parties did not have that result. The final and binding quality is conferred only on a determination which has the characteristic of being a determination on the question referred. It would anticipate the answer to the question whether it is final and binding to assume that it was for the purpose of excluding evidence on the issue. The parties did not by their agreement point out any form of determination which they agreed was to be conclusive just because that form was observed.

The question stated by McHugh JA to be the critical question — was the valuation made in accordance with the terms of the contract? — should be answered by saying that it was. Mr Higgins did not make an error of the character which Mr Hely attributed to him, that is an error of the order of valuing the wrong property, or valuing the property according to the wrong lease. He had a wrong view about the meaning of the right lease.

There was not on the facts of this case any room for any question about Mr Higgins' honesty or impartiality. No attempt was made, or could be made, to cast doubt on the valuation as being his honest and impartial decision as to the appropriate amount. The evidence seems to show that he proceeded in a careful and competent manner, exemplified by the fact that where there was a legal difficulty he took legal advice and acted on it.

In my opinion the plaintiff is not entitled to the declaration which it claims.

My order is: the summons is dismissed with costs.