Ropart Pty Ltd
v.
Kern Corporation Limited and Superannuation Fund Investment Trust & Anor.

(In the Supreme Court of New South Wales, Equity Division, 15 May 1991, Rolfe J.)

Sub-lease – Rent reviews – Appointment of valuer for determination of rental – Matters the valuer shall and shall not have regard for in determining the current annual rental value – Lease incentives.

Challenge by the tenant of level 43 of Grosvenor Place, Sydney, arguing the valuer appointed to determine rent review should have regard to lease incentives when calculating market rental. The lease provided that the valuer should take no account of lease incentives, but should take account of the rental of similar premises.

The lessee argued that on a true construction of the lease, a proper determination of the rents of similar premises must involve consideration of the incentives linked to the rents of similar premises.

Held that as the parties in the contract had specified that incentives were to be disregarded then that is what should happen. Not up to the parties to rewrite the contract into what the parties had entered.

Lessee also argued that as incentives "paid or payable to the lessee" were to be excluded from the valuer's consideration, non-cash incentives (which could not be "paid") should be considered by the valuer.

Held: *Non-cash incentives could be said to be "paid or payable" and, thus, incentives were not to be considered by the valuer.*

Rolfe J: The plaintiff, as sub-lessee, and the first defendants, as sub-lessors, entered into a registered sub-lease, No. X925185, for the whole of level 43 Grosvenor Place, Sydney, on 4 May 1989. It provided for a commencement date of 6 June 1988 and for an initial term of eight years. The plaintiff has the option to renew for two further terms each of five years.

The sub-lease provides for a review of the minimum rent, the initial procedures for which I find unnecessary to state in these reasons. It then provides that in the event of there being no agreement between the parties as to the current annual rental value to be applied for a rent increase, a valuer is to be appointed to determine that value. Such valuer is to act as an expert and not as an arbitrator and is required pursuant to clause 3.6(b)(iv), subject to clause 3.6(c)(ii), to consider

> "representations in writing submitted in accordance with clause 3.6(b)(vi) hereof by the lessor and the lessee as to the current annual rental value of the demised premises at the relevant review date".

It was common ground that all things necessary had been done to bring about the appointment of a valuer to carry out the rent review.

The basic dispute between the parties is, in effect, to which matters the valuer shall have regard and shall not have regard in determining the current annual rental value. The immediately relevant provision is clause 3.6(c), which provides:

"(c) (i) The valuer appointed pursuant to Clause 3.6(b)(i) hereof shall establish what the current annual rental value of the demised premises will be is or was at the relevant review date having regard to all matters which in the opinion of the valuer are relevant and having regard to the following specific criteria:

(aa) the demised premises as first class commercial office premises; and

(bb) the current annual rental value of other commercial office premises in the Central Business District of the City of Sydney being premises of a quality, nature, size and location similar to the demised premises; and

(cc) taking no account of any goodwill attributable to the demised premises by reason of the trade, business or activity carried on therein by the lessee; and

(dd) taking no account of the fact of any premium and/or other inducement paid or

payable to the lessee to take this lease; and

(ee) taking no account of the fact of any premium and/or other inducement then being paid or payable to a lessee in relation to that lessee's taking a lease of any premises referred to in clause 3.6(c)(i)(bb) hereof or of any other premises; and

(ff) taking no account of the relevance of the fact that any relocation cost would be payable by the lessee moving from the demised premises and/or by any lessee moving from any premises referred in clause 3.6(c)(i)(bb) hereof or from any other premises; and

(gg) taking into account that the base amount of lessor's outgoings will be updated as at the relevant review date and the date by reference to which such updating will be effected; and

(hh) taking no account of the fact that partitioning is included in the demised premises; and

(ii) the terms conditions provisions and agreements contained in this lease.

(ii) The valuer shall not take into account any fact, matter or thing including any written representation referred to in clause 3.6(b)(vi) hereof which is not consistent with the criteria referred to in clause 3.6(c)(i) hereof.

(d) To the extent that any of the specific criteria referred to in clauses 3.6(c)(i)(aa)-(hh) both inclusive hereof are inconsistent with the specific criteria referred to in clause 3.6(c)(i)(ii) hereof the specific criteria referred to in clauses 3.6(c)(i)(aa)-(hh) both inclusive hereof shall prevail".

Unaided by submissions and reference to a decision on a somewhat similar clause, I would have come to the conclusion that in determining that value, the valuer would first have regard to all matters which, in his opinion, are relevant. He would then have regard to the specific criteria and, in so doing, he would take into account the matters specified in sub-paragraphs (aa), (bb), (gg) and (ii). He would also take into account any fact, matter or thing referred to in clause 3.6(b)(vi) not inconsistent with the criteria referred to in clause 3.6(c)(i). Equally I consider that the valuer would not take into account, or would ignore or disregard, the matters referred to in sub-paragraphs (cc) to (ff) inclusive.

If the valuer adopted this course he would not increase the rental value because of any goodwill factor or because partitioning is included in the demised premises. On the other hand, conformably with the agreement of the parties, he would not decrease the rental value having regard to the matters specified in sub-paragraphs (dd), (ee) and (ff).

Prima facie, I am of the opinion, that the words "taking no account of" require the valuer to ignore or to disregard the matters of which the contract states that he is to take no account. Equally, when the valuer is required to take into account a matter, eg sub-clause (gg), that is a matter to which he must have regard.

The defendants contend for the prima facie view to which I would come. The plaintiff, however, submits that the starting point is the requirement that the valuer shall ascertain the current annual rental value. Firstly, the plaintiff stresses that the requirement is not to find the current annual rental, but rather the current annual rental value.

It submits that there is a distinction between these two concepts. The submission runs that one is not looking merely for a "current annual rental" ie, as I understand it, a figure which properly reflects those concepts, but rather "the current annual rental value", which, it is submitted, is different from "the current annual rental" and is the value derived by adjusting the current annual rental for the effect of an inducement or premium as referred to in sub-clauses (dd) and (ee). The submission is that the valuer is directed, pursuant to sub-clause (bb), to find the current annual rental value of what may be described shortly as comparable premises. The submission then runs that in order to remove what is said to be a possible distortion in that value, it is necessary firstly to determine if any premium and/or other inducement was paid in relation to such comparable premises and, if it was, to remove the so-called distortion by "taking no account of the fact" that the premium and/or other inducement had been paid or was payable. Thus, it is said, one comes back to what is required under sub-clause (b), namely "the current annual rental value" for comparable premises.

It is further submitted that sub-clause (ee) reminds the valuer

"that his task is not to take at face value the rental shown in the lease of comparable premises (since such rental may be inflated because an inducement has been offered) but rather to adjust that rental by removing the influence of the inducement and thereby derive the annual rental value. It is that value that he then uses to establish the current annual rental value of the demised premises and not the actual rental since that may include the effect of the premium or inducement. Only in this way can the valuer satisfy the obligation in sub-clause (ee) to take no account of any premium or inducement."

This submission does not indicate how the matters referred to in the other sub-clauses requiring the "taking no account of" apply. The words "taking no account of" in each of the sub-clauses must, in my opinion, have the same meaning. Further, so it seems to me, the words are the opposite of "taking into account" as used in sub-clause (gg). Thus, where the parties have agreed that the valuer shall take a matter into account they have said so in positive terms and without any apparent difficulty.

It also seems to me that the submission overlooks the way in which the clause is structured. The specific criteria are cumulative. Thus, the valuer must have regard to the matters specified and no regard to the matters of which he is to take no account. In other words he builds up a figure from the positive matters he is required to consider, and does not adjust that figure, either upwards or downwards, by reference to the matters he is required not to take into account. In this way, so it seems to me, the parties by their agreement provide how he is to arrive at the current annual rental value.

It may be, as was submitted on behalf of the plaintiff, that there is some degree of artificiality about this approach. But, as was submitted on behalf of the defendants, any valuation process necessarily involves a degree of artificiality. In these circumstances one must look to the formula laid down by the parties in their agreement to determine how they have agreed the valuer shall determine the current annual rental value. In my opinion this approach is strengthened by reference to clause (ii), which expressly prohibits the valuer from taking into account "any fact, matter or thing" inconsistent with the specific criteria.

In my opinion the proper way to approach the construction of the relevant provisions is to bear steadfastly in mind that the valuer is to establish the current annual rental value of the demised premises. The parties have agreed that for that purpose he is to have regard to all matters which he considers relevant, which I construe to be all matters which the valuer, acting as an expert, would take into account in carrying out the exercise with which he is charged.

The parties have also agreed that the valuer is to have regard to the specific criteria, which, as I have said, are cumulative. He is to make the assumption provided for in sub-clause (aa) and he is to have regard to premises, ie in the Central Business District, comparable in physical attributes and position as stated in sub-clause (bb). He is also to take into account the matter specified in sub-clause (gg) and the terms, conditions, provisions and agreements of the lease. Clause 3.6(ii) precludes his taking into account "any fact, matter or thing . . . which is not consistent with the criteria". Therefore, if he takes into account a matter which in his opinion is relevant, he must cease to take it into account, and not allow his valuation to be affected by it, if it is not consistent with the criteria.

The criteria lay down five matters prefaced by the words "taking no account of". If one takes sub-clause (cc) and sub-clause (hh) as examples, a valuer may consider that the goodwill attaching to the demised premises or the partitioning therein are, or one or other is, a factor which he regards as relevant to determine the current annual rental value. But the parties have agreed he shall not take such matters into account and, if he does, he is not fulfilling the contractual prescription for determining the value. Similarly, if there had been a payment by way of premium or inducement to the plaintiff to take the sub-lease that is a factor of which the valuer may not take account.

If the construction I have so far applied is not correct then the words "taking no account of" do not mean what, as a matter of plain English, they say. In some way they have to be read as "taking account of" and this, in my opinion, is not what the parties agreed. When the parties wished to state that a matter was to be taken into account, they had no difficulty in saying so: eg sub-clause (gg).

Mr Gzell of Queen's Counsel for the plaintiff, in his careful submissions, drew particular attention to sub-clauses (bb) and (ee). He submitted that what had to be achieved was the current rental value in accordance with sub-clause (bb), ie by reference to properties comparable in the way to which I have referred. He said that to achieve this value one had to eradicate a matter idiosyncratic to the leasing of any particular premises, and thus remove what he described as a distortion in the valuation. Hence, the submission ran, in effect, that sub-clause (bb) was qualified by sub-clause (ee), in the sense that to achieve the value contemplated by the former sub-clause, the valuer must ascertain whether there was "any premium and/or other inducement" as described, presumably if he can, and then adjust the value under sub-clause (bb) to accommodate for the allegedly "distorting factor" said to be found in sub-clause (ee). But when one does that, one is not "taking no account of" the matter specified in sub-clause (ee): one is taking account of it, and using it to diminish the figure thrown up by sub-clause (bb). The further matter to which I adverted in passing has to be considered, namely the difficulty, in any event, which perhaps arises in ascertaining whether a premium and perhaps more particularly any other inducement has been given. One would anticipate these to be matters of confidentiality between the parties, such that it is unlikely, in many cases, that the valuer would be able to obtain any or any accurate evidence of them. This may be another reason why the parties determined that no account should be taken of such matters.

As I understand it, the submission of the plaintiff is that sub-clause (ee) is a qualification on sub-clause (bb), in that the value is arrived at after varying the value otherwise arising from sub-clause (bb) by an amount which takes account of the fact specified in sub-clause (ee). If that mode of construction is correct, consistency demands that having arrived at a figure on the facts assumed and specified in sub-clauses (aa), (gg) and (ii) and from the information the valuer is entitled to have regard to, the valuer must then adjust that figure by reference to matters specified in sub-clauses (cc) to (ff) and (hh), in so far as any of them are applicable.

The difficulty I have with these submissions is that only sub-clause (ee), and that portion of sub-clause (ff), which deals with the matters raised in sub-clause (bb), can have this qualifying effect. The matters raised in sub-clauses (ee), (dd), portion of (ff) and (hh) relate to the demised premises, and not to the figure revealed by sub-clause (bb). This is so because the figure in that sub-clause relates to comparable figures, whereas the figures in the sub-clauses to which I have just referred relate to and are peculiar to the demised premises.

Therefore, to adopt the construction contended for by the plaintiff, one would have to construe the words "taking no account of" differently within the same clause. Not only is this, in my opinion, inconsistent with accepted canons of construing a commercial document, in the absence of clear words to show that the words should have a different meaning (which does not arise here), but it seems to me contrary to the whole intent of the clause. In my opinion, when the parties have said "taking no account of" they have directed the valuer to ignore or leave out of consideration the fact or circumstance following those words. Hence sub-clause (bb) is not to be construed subject to sub-clause (ee). As I have said before the various sub-clauses are cumulative and, in my opinion, each sets out a requirement or criterion to be applied or disregarded by the valuer.

In the result I am of the opinion that where the sub-lease provides in clause 3.6(c)(i) for "taking no account" of specific criteria, upon a proper construction of the document the valuer is not to take account, for

any purpose, of such matters.

The decision to which I have come is, at least prima facie, contrary to the reasoning of Mackenzie J in the matter of a Lease from ANZ Executors and Trustee Company Limited and/or Queensland Treasury Corporation and The National Mutual Life Association of Australasia Limited (10 April 1991, as yet unreported).

The clause, being construed by his Honour, stated:

"The open market rent at the relevant review date shall be determined by the expert (acting as an expert and not as an arbitrator) and shall be such as he shall decide should be the base rent for the premises at the relevant review date making the assumptions but disregarding the disregarded matters and having regard to open market rental values current at the relevant review date".

The assumptions are set forth and they require the valuer to assume a series of facts. Being assumptions, the valuer might well be valuing on a basis which does not accord with the true facts, eg the premises may not be fit for immediate occupation; or the premises may not be available to be let by a willing landlord to a willing tenant as a whole, without payment of a premium, granting of a rent-free period or the offering of any other incentive by the landlord; or the premises may have been damaged but not have been fully restored; or the covenants in the lease may not have been fully performed or observed by the tenant. But the valuer must assume all the assumptions, contrary to what may be the true facts.

Then the document sets forth "The Disregarded Matters", ie the matters the valuer was directed by the contract to disregard. Once again these matters may or may not exist. The simple fact is the contract directs the valuer to disregard them.

His Honour, after summarising the assumptions, said:

"The consequence of making these assumptions, in my view, is that finding the open market rental value of premises unaffected by factors that would distort that value is the object of the exercise".

His Honour does not explain this statement further, nor does he analyse the provision to demonstrate what he describes as "the object of the exercise". The object of the judicial exercise, as I understand it, is to construe the words used to give effect to the intention of the parties thereby arising. What the parties required, under the contract as I read it, to be found was "the open market rent", not open market rental value. The finding of the open market rent was to be done making the assumptions, disregarding the disregarded matters and having regard to current open market rental values. All the assumptions seem to be tied back to the demised premises. The first two assumptions refer to the "premises", which, I believe, must mean the demised premises, and the third assumption relates to "covenants contained in the lease". In these circumstances, I do not understand how making the assumptions would in any way affect the open market rental value of *other* premises. That will be determined in another way. What I consider the valuer was called upon to do was to have regard to open market rental values and then apply them to the demised premises assuming the matters of fact relating to those premises set forth in the assumptions. The making of the assumptions in no way relates to other premises and, therefore, in my respectful opinion, could not remove any factor "that would distort" the open market rental value of such premises. The distortion, rather, could arise from making the assumptions and applying open market rental values to the demised premises where the assumptions may or may not apply.

His Honour uses this reasoning when he considers "The Disregarded Matters". He said:

"Once again if one eliminates these matters as factors in determining the rental the purpose of the exercise, in my view, is to eliminate factors distorting the true value of the premises".

His Honour then referred to a submission "that if allowances were made in the process of assessing the open market rent for any cash premium, rent-free period or other incentive, that could not be said to be disregarding those matters". His Honour did not accept that submission. I would have. He said:

"The critical element of the exercise is to ascertain the open market rent for the premises. What has to be disregarded is the distortion of the true values that may occur if factors such as cash premiums, rent-free periods and other incentives have an effect on the rental actually paid by a tenant of premises which are being used as comparable premises in the process of valuing. To achieve a true level of value it is those distortions that have to be disregarded. To treat 'disregard' as the equivalent of 'ignore' achieves the result that a true value is not achieved".

If I may say so, with respect, this line of reasoning seeks to re-write the contract into which the parties entered. The matters set forth in clauses 4.4.1 to 4.4.3 of the lease before his Honour are matters peculiar to the particular demised premises. The fourth matter is quite general and, as it is not set forth in his Honour's judgment, I shall state it here:

"Any cash premium, rent-free period or other incentive which may be payable by a lessor to a lessee for a lease, for entering into a lease, or to compensate a lessee for the costs of relocating from its previous premises".

The problem, as I see it, is that the only sub-clause which could have the effect of removing "distortions of the true value" of comparable premises is sub-clause 4.4.4. Therefore, one must say, so it seems to me, that the valuer must disregard the matters set forth in sub-clauses 4.4.1 to 4.4.3, but not those set forth in sub-clause 4.4.4. In my opinion, this fails to give effect to the intention of the parties as indicated by the words used. If a matter is to be disregarded that means, according to ordinary English, that no regard, attention or consideration is to be paid to it. If it is intended that a qualification should be placed upon the method of valuing by requiring that having ascertained a factual matter, an adjustment shall then be made to accommodate any perceived distorting factor, it seems to me that ordinary principles of drafting would incorporate the qualification within the primary obligation. In the case before his Honour, as in the present case, matters either to be disregarded or not to be taken into account are specifically designated.

In so far as his Honour's decision may be seen as dealing with matters of construction with which I am presently concerned I would, respectfully, decline to

follow it. In taking the view of the wording of the sub-clause I have before me, I have endeavoured to give effect to all the relevant provisions and, conformably with the decision of the Court of Appeal in *Modifications Pty Limited v. Doyle & Anor* (19 April 1991, as yet unreported) to bring about a sensible construction to a commercial contract, without the necessity for any drastic, or even minor, surgery on the document."

The conclusion to which I have come resolves the matter for present purposes, save perhaps for one submission. It was submitted that the construction contended for by the defendants resulted in an artificial result. In my view the construction contended for by the plaintiff would have achieved a far more artificial result for all the reasons I have sought to indicate. This, I appreciate, is in an area where almost of necessity the valuation of premises involves certain elements of artificiality. However, on reading the clauses I have come to the firm conclusion, for reasons I have already set out at perhaps too great a length, that the parties here set out the agreed formula by which the valuer is to approach his task. The construction contended for by the plaintiff is, in my opinion, contrary to the words of that formula and does not give effect to it.

I have now dealt with the main submissions made on behalf of the parties. A subsidiary submission was made, in the event of my coming to the conclusion to which I have, as to the matters the valuer may not take into account pursuant to sub-clause (ee). It was submitted on behalf of the plaintiff that the words "paid or payable to a lessee" involved nothing more than the actual payment of money in cash. It was submitted that if there were no such payment, the fact that the amount would be quantified as a cash sum, was not sufficient to make it one, which was "paid or payable". Mr Gzell, in support of the definition for which he contended, relied firstly upon the decision in *Commissioners of Inland Revenue v. St John's College, Oxford* (1915) 2 KB 621. This case depended very much upon a construction of the *English Finance (1909-10) Act* 1910. However, reliance was placed upon a passage from the judgment of Rowlatt J at page 638. Particular reliance was placed upon his Lordship's having held that the surrender of a lease is not a payment.

This, so it was submitted, indicated the proper approach to the meaning of the word "payment" and, hence, to the words "paid" and "payable". Reliance was also placed upon *Case K4* in the Board of Review (1978) 78 ATC 29 where, in considering the Income Tax Assessment Act, various statements are made in that case as to the circumstances in which payment may be made for the purposes of the section of the Act there under consideration. I do not, with respect, consider that this case advanced the submissions made on behalf of the plaintiff. No doubt after considerable research, I was also referred to the authority of *S.R. Harvey & Anor*, (1987) (3) SA 40, a decision of the Full Cout of the Zimbabwe Supreme Court. In that case the court held that the word "payment" has both a wide as well as a narrow meaning. The headnote states:

"In its wide sense it means the satisfaction or performance of an obligation. In its narrow sense it means something which can be calculated in money. Whether the word is to be given a wide or literal meaning depends entirely on the intent and purpose of the enactment in which it appears".

I substitute for that the context in which the word appears in a contractual situation.

In my opinion the words "paid" and "payable" in sub-clause (ee) should, consistently with a sensible construction of clause (ee), be given a wider meaning. Mr Tobias, of Queen's Counsel for the defendant, submitted that if this approach were taken it would avoid a somewhat anomalous consequence. He submitted that one could have a situation where there was a "rent-free holiday", in which circumstance there would be no payment as contended for by Mr Gzell and, therefore, the matter would not fall under sub-clause (ee). On the other hand he submitted one could have a situation where there was a payment of rent followed by a rebate, in which case the matter would fall under sub-clause (ee). The wider construction overcomes such a result. The anomaly is, therefore, removed and the construction is consistent with the view to which I have come on the main matter argued.

Mr Tobias submitted that I should adopt the approach taken by the House of Lords in *Elmdene Estates Limited v. White* (1960) AC 528. He submitted that prima facie the word "payment" has a wide meaning, unless the context requires it to be given a narrow meaning: per Viscount Simonds at page 539 and Lord Radcliffe at page 542. Mr Tobias also relied upon what was said by Lord Evershed in the same case in the Court of Appeal (1959) 1 QB 1 at page 15. For reasons I shall state shortly, I believe that the wider interpretation is to be preferred.

In the end the matter is one basically of impression as to the proper construction. In the context in which the relevant words were used in this carefully drawn lease, I have come to the conclusion that they should be given an expanded rather than a narrow meaning. In this way the value of an "inducement", which does not necessarily mean the payment of money, can be quantified in money terms, so that the value thereof need not be taken into account. This construction accommodates "paid" or "payable" not only to premiums, but to non-paid or non-payable inducements in money terms. Thus consistency of construction is achieved.

Mr Tobias submitted I should have regard to certain extrinsic evidence in aid of the construction for which he contended. Mr Gzell opposed the tender of such evidence which I admitted subject to relevance and which became Exhibit 1. I have not found it necessary to have regard to that evidence in coming to my conclusions.

At the request of the parties I propose to publish my reasons. The parties can then bring in short minutes of order to give effect to the views I have expressed.

It is sufficient, in conclusion, to say that in my opinion the words in the sub-lease "taking no account of" require the valuer to ignore or disregard the matters so referred to. I am further of the opinion that the words "paid" or "payable" have the wider meaning to which I have referred.

The short minutes of order should make provision, unless the parties agree upon a different order, for the plaintiff to pay the defendants' costs of the proceedings.