1965
*Nov. 17, 18, 19, 22, 23
1966
Mar. 11

THE CORPORATION OF THE CITY OF TORONTO ..... APPELLANT;

AND

W.H. HOTEL LIMITED ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Arbitration—Option to purchase certain lands—One component of purchase price determined by arbitration—Arbitrator's award reduced by Court of Appeal—Interpretation of option's terms.

Three parcels of land, referred to as the Walker House lot, the Petrie Garage lot and the Elgin Motors lot, were owned by the appellant City in fee simple subject to leases which it had granted of each property. Under the lease between the City and the respondent company the latter leased from the City the land and buildings composing the Walker House Hotel and as a term of the said lease was granted an option to purchase the said lands upon which the hotel stood and also the adjacent lands covered by the Petrie and Elgin leases. The hotel building on the Walker lot was dealt with specifically in the option and the price for its transfer settled. The buildings on the other two lots were owned by the respective lessees who were separate companies. The two leases gave right of renewal and certain rights of compensation for the buildings if the City refused a renewal, as it had the right to do.

The option was divided into two periods, firstly, that running from the date of the execution of the lease, August 1, 1956, to February 1, 1958; secondly, from February 1, 1958, to the end of the term of the lease, July 31, 1966. According to para. 2 of the option, the purchase price when the option was exercised during the currency of the lease but after February 1, 1958, the event which occurred, contained three components. The parties failed to agree on the second of these components, which was "such amount as the parties shall agree upon as the then value of the lands (excluding buildings) in Schedules 'A' and 'B' as the parties shall agree upon, and failing such agreement, the then value of such lands as determined by arbitration pursuant to the provisions of *The Municipal Arbitrations Act*, R.S.O. 1950, Chapter 244". The question was submitted to the arbitrator and he fixed the component at $780,000. The Court of Appeal reduced the arbitrator's award to $422,057.08.

The arbitrator, after a review of the option terms, concluded that "the amount to be determined in this arbitration is the value of the land without regard to the buildings, i.e. as if vacant". The Court of Appeal, on the other hand, held that there were substantial errors in arriving at that conclusion caused in the main by the erroneous construction placed upon the option terms by the arbitrator and held that the option was to be construed in the light of the provisions as to renewals and as to payments for buildings erected upon refusal of renewal in both the Elgin and Petrie leases. The Court of Appeal, in addition, in construing para. 2 in the option held that due weight must be given to the purchase price which would have been effective during the first eighteen months of the option term.

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*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

Held (Judson J. dissenting): The appeal should be dismissed.

Per Martland, Ritchie, Hall and Spence JJ.: As to the latter conclusion of the Court of Appeal, it was agreed that this transaction being an ordinary commercial transaction it was the duty of the Court in interpreting the agreement to avoid such an interpretation as would result in commercial absurdity. *Reddy v. Strople* (1911), 44 S.C.R. 246; *Grey v. Pearson* (1857), 26 L.J. Ch. 473; *Diederichsen v. Farquharson Brothers* (1898), 1 Q.B. 150, referred to.

The approach of the Court of Appeal was a correct one, and what should be calculated in order to determine "as the then value of the lands (excluding buildings) in Schedules 'A' and 'B' is the fee simple in the Walker House lands less the agreed upon valuation of the buildings thereon plus the reversionary interest of the [lessor] in the rest of the site with all its interests, advantages and burdens". Accordingly, the appeal should be dismissed subject, however, to the right of the appellant, if it is of the opinion that part of the sum deducted in reference to a bar premises on part of the Petrie lot is for tenant's fixtures, to require the arbitrator to consider this item and to reduce it by any amount which, in the opinion of the arbitrator, did not represent value of the building upon the lands leased to Petrie.

Per Judson J., *dissenting*: The arbitrator was not in error in his interpretation of the agreement. What he had to ascertain was the value of the land. With the exercise of the option in December 1962, the buildings would become the problem of the optionee company when it took an assignment of the leases on the Petrie and Elgin lots. It then became the landlord and would have to decide whether to renew the leases or pay for the buildings. There was, in fact, no problem because of the common control of the three companies and it was never expected that there would be. Further, if the option had been exercised after the expiry of the Petrie and Elgin leases, whatever sum the City had been compelled to pay by way of compensation for the buildings would have been payable by the optionee company in addition to the value of the land.

APPEAL from a judgment of the Court of Appeal for Ontario, reducing an award made by the Official Arbitrator under the provisions of *The Municipal Arbitrations Act*, R.S.O. 1950, c. 244. Appeal dismissed, Judson J. dissenting.

M. E. Fram and *D. C. Lyons*, for the appellant.

W. L. N. Somerville, Q.C., and *J. D. Holding*, for the respondent.

The judgment of Martland, Ritchie, Hall and Spence JJ. was delivered by

SPENCE J.:—This is an appeal by the vendor, the Corporation of the City of Toronto, from the judgment of the Court of Appeal for Ontario pronounced on November 13, 1964. By that judgment, the Court of Appeal for Ontario decreased the award of the Official Arbitrator made on August 22, 1963. That award had fixed the amount of one

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component of the purchase price as provided in an option to purchase contained in the lease between the parties dated August 1, 1956. The premises in question composed property in the City of Toronto on the south side of Front Street commencing at the westerly limit of York Street and running westerly 317.42 feet.

In the year 1955, these lands had been owned by the vendor, the Corporation of the City of Toronto, and had been subject to three leases as follows:

(1) A lease to the Walker House Hotel Company for a period of 21 years expiring on April 30, 1955, and covering the westerly 112 feet.

(2) A lease to Petrie's Parking Place Limited for 21 years expiring on September 30, 1965, which contained an option exercisable by the lessee for a further 21-year period. This lease covered the property from the westerly boundary of the Walker House Hotel property westerly for 165.42 feet.

(3) A lease to Elgin Motors Limited dated May 29, 1942, and expiring on December 31, 1962, which lease also contained an option exercisable by the lessee for a further 21-year period and which covered the westerly 40 feet of the property.

Mr. J. D. Crashley owned a controlling interest in Elgin Motors Ltd. and Mr. Crashley's father, with others, owned all of the shares in Petrie's Parking Place Ltd. Mr. Crashley approached the city with proposals for the development of the whole parcel and in view of the irregular termination of the leases covering the property it was suggested to Mr. Crashley that he enter into negotiations with the Estate of the late George Wright who controlled Walker House Hotel Company.

Mr. Crashley caused to be incorporated W.H. Hotel Ltd. and that company bought out Walker House Hotel Company. This transaction entailed the purchase of the balance of the term of the lease held by Walker House Hotel Company from the City of Toronto and also the purchase from that company of the building which it had erected on the said lands, *i.e.*, Walker House Hotel. This building, W.H. Hotel Ltd. sold to the Corporation of the City of Toronto, the owner of the fee, for $310,000. W.H. Hotel Ltd. then leased from the Corporation of the City of

Toronto the land and buildings composing the Walker House Hotel and as a term of the said lease were granted an option to purchase the lands upon which the hotel stood and also the lands to the west thereof covered by the aforesaid leases to Petrie's Parking Place Ltd. and to Elgin Motors Ltd. The terms of this option were as follows:

In consideration of the rent hereby reserved to the Lessor, the Lessor hereby agrees to sell to the Lessee at the Lessee's option the lands more particularly described in Schedules "A" and "B" hereto annexed, subject to the terms and conditions following:

1. If the option is exercised by the Lessee on or before the first day of February, 1958, the purchase price of the lands shall be the sum of Four Hundred and Seventeen Thousand and Eighty-one Dollars ($417,081.00) plus an amount equal to the present value of the buildings on the lands in Schedule "A" (as hereinafter defined);

2. If the option is exercised by the Lessee after the first day of February, 1958, the purchase price of the lands shall be an amount equal to the present value of the buildings on the lands in Schedule "A" as aforesaid, plus such amount as the parties shall agree upon as the then value of the lands (excluding buildings) in Schedules "A" and "B" as the parties shall agree upon, and failing such agreement, the then value of such lands as determined by arbitration pursuant to the provisions of The Municipal Arbitrations Act, R.S.O. 1950, Chapter 244; plus the amount or amounts, if any, which the Lessor shall have paid to the Lessees of the lands in Schedule "B" as compensation for the buildings situate hereon, as provided in (*a*) a certain lease dated the 21st day of March, 1945 made between The Corporation of the City of Toronto as Lessor and Petrie's Parking Place, Limited as Lessee and (*b*) a certain lease dated the 28th day of May, 1942 made between The Corporation of the City of Toronto as Lessor and H.W. Petrie Co. Limited as Lessee.

The "present value" of the buildings on the lands in Schedule "A" for the purposes aforesaid shall be determined by ascertaining the value at the date of the exercise of the said option of the sum of Three Hundred and Ten Thousand Dollars ($310,000.00) amortized over a period of thirty years from the first day of August, 1956, at the rate of six per centum per annum, premising that rent paid by the Lessor to such date had been paid on account, firstly, of the accrued interest on such sum calculated monthly, and the balance to the reduction of the principal, less the amount of all insurance proceeds theretofore paid to the Lessor and not used or applied to the repair, restoration or rebuilding of the building on the demised premises pursuant to the foregoing provisions of this Lease.

3. The foregoing option shall be in force during the full term of this Lease.

4. Notice of election to purchase under this option by the Lessee or its assigns shall be in writing and shall be delivered to the Lessor at Toronto

5. It is understood that the purchase price shall be paid in such manner, at such time or times and on such terms as the parties hereto might in good faith agree upon at the time of the exercise of the said option and failing such agreement shall be paid in cash or by certified cheque.

Upon payment to the Lessor of the full amount of the purchase price the Lessee shall be entitled to a conveyance of the said lands free of

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encumbrances except such encumbrances as have been made or created by the Lessee.

6. Unless otherwise agreed the contract of purchase and sale shall be completed within ninety days of the date referred to in the said notice of election as being the date of the exercise of the said option.

It will be noted that the option is divided into two periods, firstly, that running from the date of the execution of the lease to February 1, 1958, *i.e.*, a period of 18 months, dealt with in para. 1; secondly, from February 1, 1958, to the end of the term of the lease, July 31, 1966. This period is dealt with in para. 2.

The option was exercised on December 21, 1962. As I have said, both the leases to Petrie's Parking Place Ltd. and to Elgin Motors Ltd. contained options to renew at the option of the lessees. Both the said leases also contained a provision which permitted the city to refuse to accept this renewed term upon the city paying the value of the buildings erected on the said lands by the lessees. These terms will be referred to particularly hereafter. I note now, however, that the exercise of the option to purchase by W. H. Hotel Ltd. occurred immediately before the expiry of the lease to Elgin Motors Ltd. which would have occurred on December 31, 1962, and, of course, prior to the expiry of the lease to Petrie's Parking Place Ltd. which would have occurred on September 30, 1965, and therefore before the City of Toronto had to comply with either lessee's demand for a renewal or, in refusing that demand, pay the value of the buildings erected on the said lands by the said lessees.

The purchase price applicable to the first 18-month period is set out accurately in para. 1 of the said option as being $417,081 plus an amount equal to the present value of the buildings on the lands in Schedule "A" as defined in the said lease. That present value set out in para. 2 would, during the first 18-month period, have amounted very close to the purchase price of the buildings of $310,000 so that the purchase price, had the option been exercised during that period, would have been close to $727,081.

According to para. 2 of the option, the purchase price when the option was exercised during the currency of the lease but after February 1, 1958, the event which occurred, contained three components: (1) the present value of the lands in Schedule "A" as defined in para. 2, (2) "such amount as the parties shall agree upon as the then value of

the lands (excluding buildings) in Schedules 'A' and 'B' as the parties shall agree upon, and failing such agreement, the then value of such lands as determined by arbitration pursuant to the provisions of *The Municipal Arbitrations Act*, R.S.O. 1950, Chapter 244", (3) plus the amount or amounts, if any, "which the lessor shall have paid to the lessees in Schedules 'A' and 'B' ", *i.e.*, to Petrie's Parking Place Ltd. and Elgin Motors Ltd. Since no amount had been paid to either of the lessees, the third component may be omitted in calculation of the purchase price. The parties failed to agree upon the second component and therefore in accordance with the provisions of the option the question was submitted to the Official Arbitrator under the provisions of *The Municipal Arbitrations Act,* referred to above as R.S.O. 1950, c. 244, now R.S.O. 1960, c. 250. The Official Arbitrator, Mr. John C. Risk, Q.C., fixed the component at $780,000. The Court of Appeal for Ontario amended that award to fix the component at $422,057.08. Since in both cases the first component of the purchase price, *i.e.*, the present value of the buildings, amounted to an agreed figure of $282,143.92, the purchase price under the option according to the award of the arbitrator would have been $1,062,143.92, while according to the judgment of the Court of Appeal it was $704,201, a difference of $357,942.92.

The detailed evidence as to values was given really by only two witnesses, Mr. James Innes Stewart on behalf of the purchaser, and Mr. Robert A. Davis on behalf of the vendor.

As pointed out by the learned arbitrator:

> Mr. Davis valued the land, as if vacant and "unencumbered" at $989,000. Mr. Stewart valued "the whole site, fee simple, without leases or encumbrances", at $1,155,000, and he said that in transferring the prices of his comparables to the subject property he had tried to reflect the total value as though clear of all buildings and lessees' interests. The difference between these two figures, while a considerable sum of money, is not unduly great in proportion to the large amounts involved and the difficulties in appraising a property which is on the fringe of other developments but whose greatest potential may not be realized for ten years. The great disparity between the final amounts reached by these two eminent appraisers was the result of the opposing views as to the proper construction of the option.

It is, of course, apparent that the great disparity between the award of the Official Arbitrator and the judgment of the Court of Appeal for Ontario is in the interpretation which it places upon the words contained in the option and

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particularly in para. 2 thereof. The arbitrator, after a review of the option terms, concluded that "the amount to be determined in this arbitration is the value of the land without regard to the buildings, i.e. as if vacant". The Court of Appeal for Ontario, on the other hand, held that there were substantial errors in arriving at that conclusion caused in the main by the erroneous construction placed upon the option terms by the learned arbitrator and held that the option was to be construed in the light of the provisions as to renewals and as to payments for buildings erected upon refusal of renewal in both the Elgin Motors Ltd. and Petrie's Parking Place Ltd. leases.

The Court of Appeal, in addition, in construing para. 2 in the option held that that due weight must be given to the purchase price which would have been effective during the first eighteen months of the option term.

To refer first to the latter conclusion, I agree that this transaction being an ordinary commercial transaction it is the duty of the Court in interpreting that document to avoid such an interpretation as would result in commercial absurdity. Duff J. in *Reddy v. Strople*[1], at p. 257, added to the canon that the primary meaning if unambiguous should be adopted, the proviso that it should be "sensible with reference to the extrinsic circumstances. . .". In such a course the learned late Chief Justice of this Court adopted in terms the "golden rule of interpretation" as stated by Lord Wensleydale in *Grey v. Pearson*[2], at p. 481. I suggest it is also put with accuracy and relevancy to the question here at issue by Rigby L.J. in *Diederichsen v. Farquharson Brothers*[3], at p. 159:

> If the literal construction leads to an absurdity, repugnancy, or inconsistency which reasonable people cannot be supposed to have contemplated under the circumstances, it ought if possible to be modified so as to avoid such a result.

As I have pointed out, the purchase price for the eighteen-month period under para. 1 of the option would have been around $727,081, while the purchase price adding both components under the learned arbitrator's award would have been $1,062,143.92. The arbitrator's award was made as of December 21, 1962, and the witness Stewart, whom the learned arbitrator described as "an appraiser of

[1] (1911), 44 S.C.R. 246.
[2] (1857), 26 L.J. Ch. 473.
[3] [1898] 1 Q.B. 150.

the highest qualifications and great experience", testified that the values at the time of the option were, if anything, slightly lower at the date of the lease.

Moreover, the real difference between the cost to the purchaser under the option in the first eighteen-month period and that as fixed by the arbitrator might well be even more startling. Under the arbitrator's theory, the price that he had to fix was the price as if the lands had been vacant. The purchaser then buying the lands would have been faced with the situation which was to occur at the expiry of the Petrie's Parking Place Limited lease and the Elgin Motors lease. By the terms of those leases, the lessees had the right to demand their renewal for a twenty-one-year period at a rental to be fixed by agreement of arbitration, and the lessor's right to refuse that renewal was conditional upon the lessor paying to the lessee the value of the buildings erected by the lessee.

The learned arbitrator said, in his reasons,

> If the purchaser were allowed to deduct from its purchase price the value of the buildings or leasehold interest therein enjoyed by the other lessees there would be nothing to prevent them from asserting their own claims against the city in the future.

The Court of Appeal, in the judgment of Aylesworth J., on the other hand, noted,

> It is, I think, conceded that the lessor's obligations as to renewal of the Elgin and Petrie leases or payment for the Elgin and Petrie buildings will pass to appellant upon conveyance from respondent and that after conveyance the Lessees must look to appellant, not to respondent for fulfilment of those obligations; at any rate we think that is the legal situation.

In this Court, counsel for the appellant refused to concede such a result and submitted that upon exercise of the option the appellant was still bound by the covenants in the said leases.

Without having to decide whether the view of the learned arbitrator or that of Aylesworth J.A., speaking for the Court of Appeal, is the correct view, it is sufficient to realize that if the view of the Court of Appeal were correct, the cost to the purchaser would be increased over the $1,062,143.92 by $492,837, the cost of paying to the lessees the value of their buildings as of December 21, 1962, making the total cost to the purchaser $1,554,980.92 for lands which, according to the highest evidence given by an

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appraiser before the arbitrator, had a value for their fullest and best use of $1,155,000.

It is difficult to understand how an experienced businessman would enter into any commercial transaction calling for him to pay so many hundreds of thousands of dollars more than a stranger going into the property would offer, and more than double what the parties had arrived at by negotiation at arm's length as the purchase price to cover the first eighteen-month period.

In construing the terms of the option, in the light of the provisions as to rights of renewal and payments in lieu thereof contained in the Elgin and Petrie leases, we must consider what the vendor had to sell and therefore what the optionee had a right to purchase. It is, of course, true as said by counsel for the appellant that very often parties do make an agreement whereby the vendor agrees to sell what he does not then own with the intention that the vendor should acquire ownership in that which he agrees to sell in order to carry out his contract with the purchaser.

In the second period, however, the option is, in my view, to sell just what the city owned and what the city owned was the fee simple in the land and buildings in the Walker House Hotel property and the lessees' reversionary interest in the Petrie and Elgin Motors lands. The value of the buildings on the Walker House property was easily fixed as the city had purchased that building immediately prior to the execution of the lease containing the option, for $310,000 and the formula for fixing that value is set out in the option and applies in both periods A and B. By agreement of parties, application of that formula fixed the value of the said Walker House building at the time of the exercise of the option at $282,143.92. The value of the Walker House land and of the reversionary interest under the Petrie lease and Elgin Motors lease could not be fixed with such exactitude and called for a provision such as gave rise to this litigation.

On the lands to the Elgin Motors lease, there was a small brick and frame office building and since that lease expired only 10 days after the option to purchase was exercised the parties agreed that the lessee's reversionary interest was valued at only $19,600. However, on the lands under the Petrie lease there was originally an old brick and masonry

building known as the Cyclorama and that building had stood substantially unaltered from about the turn of the century until 1927. Then Petrie Parking Place Ltd. had built into the building a substantial parking garage. According to the evidence of Mr. Cross, a consulting engineer, that parking garage had a bricks and mortar value at the date of the exercise of the option of $298,776, and according to Mr. Stewart's evidence arrived at by capitalization of the annual revenues its value was some $38,000 greater.

By the provisions of the lease from the appellant to Petrie's Parking Place Ltd., the lessee was required to maintain the present building (the old Cyclorama) or any building of equal or greater value, and the provision permitting the lessor to refuse renewal of the lease required the lessor to pay "such reasonable sum as the buildings made and erected on the said premises shall then be worth; such value to be determined by mutual agreement or by the Official Arbitrator less the sum of $5,000 being the building as wholly or substantially situated upon the land hereby demised at the time of such determination . . .". Therefore, what the city had to sell as to the Petrie lands was the lessor's reversionary interest in a building which was the property of the lessor, it having been erected on its lands by the lessee with no reservation of title, subject to deduction therefrom of a sum representing its value less $5,000.

The Court of Appeal for Ontario accepted the sum of $298,776 less $5,000 as being the true value of the building upon the Petrie lands and I agree with the view expressed in the Court of Appeal that this is a proper valuation despite the fact that Mr. Cross in giving his estimate did not deal with any element of obsolescence. As noted by Aylesworth J.A., from the fact that Mr. Cross's valuation is $38,000 less than the capitalization value arrived at by Mr. Stewart and, according to Mr. Teperman the cost of demolishing the building, which was necessary for the development of the site, was $27,476, it would appear that the obsolescence must have been impliedly, although not expressly, considered in Mr. Cross's valuation.

Upon all of these considerations, I have therefore come to the conclusion that the approach of the Court of Appeal for Ontario was, with respect, a correct one, and that what

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should be calculated in order to determine "as the then value of the lands (excluding buildings) in Schedules 'A' and 'B' is the fee simple in the Walker House lands less the agreed upon valuation of the buildings thereon plus the reversionary interest of the respondent in the rest of the site with all its interests, advantages and burdens".

In the Court of Appeal for Ontario this calculation was set out as follows:

Value of the whole site in fee simple			$ 1,155,000.00
Deduct:	(*a*) Value of Petrie lessee's interests..	$293,776.00	
	(*b*) Value of Swiss Bear bar, etc.....	137,423.00	
	(*c*) Value of Walker House building as agreed upon	282,143.92	
	(*d*) Value of Elgin lessee's interests..	19,600.00	732,942.92
Value of "the lands (excluding buildings)" to be paid by appellant			$ 422,057.08

I am concerned with only one element in this calculation—that set out in the item marked (*b*)—"value of Swiss Bear bar etc. – $137,423". This Swiss Bear was a bar premises erected by Petrie's Parking Place Ltd. on part of the lands leased to it by the appellant and then sublet by it to W.H. Hotel Ltd. The only evidence as to how that figure was arrived at is in the evidence of Albert C. Cartledge, a chartered accountant who gave evidence on behalf of the purchaser and who testified:

> Q. Now then, Mr. Cartledge, would you be good enough to tell us the sum of money which was expended to produce the Swiss Bear Cocktail Bar? A. There was expended on account of building improvements *and equipment* the total of $137,473.37.

(The italics are my own.)

There was no cross-examination whatsoever upon that answer, counsel for the appellant then appearing to rely upon the position which the appellant has taken throughout that only values of vacant land had to be considered in the arbitration. The witness identified as his work two exhibits, Nos. 3 and 4, and neither of those exhibits contained any such item.

Under the covenant between the appellant and Petrie Parking Place Ltd., the appellant was to pay "such reasonable sum as the buildings made and erected on the said demised premises shall then be worth". Therefore, if the sum of $137,423 represented the value of the building built

by the lessee upon the lands, it is a proper item of deduction as being an item which is part of the lessee's interest. If, on the other hand, part of the sum is represented by items of equipment which have not become attached to the land then the lessee upon the termination of the lease, would have had a right to remove the same and could not have claimed the value of such equipment from the appellant as part of the consideration which the appellant had to pay for its refusal to renew. There seem to be no means whereby we might determine this question upon any of the evidence now presented. I am, therefore, of the opinion that the appeal should be dismissed with costs subject, however, to the right of the appellant, if it is of the opinion that part of the sum deducted in reference to the Swiss Bear bar is for tenant's fixtures, to require the Official Arbitrator, at its own cost, to consider this item of $137,423 and to reduce it by any amount which, in the opinion of the Official Arbitrator did not represent value of the building upon the lands leased to Petrie Parking Place Ltd.

JUDSON J. (*dissenting*):—The Court of Appeal in reducing the arbitrator's award from $780,000 to $422,057.08, has held that he valued the interest of the city on a wrong principle and that his error was based upon a misinterpretation of the terms of the option.

The terms of the option are set out in full in the reasons of Spence J. There were three parcels of land involved which I will refer to as the Walker House lot, the Petrie Garage lot and the Elgin Motors lot. The city owned all three lots in fee simple subject to leases which it had granted of each property. The Walker House Hotel building was also owned by the city and is dealt with specifically in the option and the price for its transfer settled. The buildings on the other two lots were owned by two lessees who were separate companies. The two leases gave right of renewal and certain rights of compensation for the buildings if the city refused a renewal, as it had the right to do.

The occasion for the granting of the option, as the correspondence between J. D. Crashley and the city indicates, was that three companies interested in these three parcels of land were coming under common control. The arbitrator's finding on this point is stated in the following extract from his reasons:

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At all material times all the shares of W. H. Hotel Limited and Elgin Motors Limited were owned by Mr. John Douglas Crashley, who was President of these companies. As to Petrie's Parking Place Limited, in 1956 the controlling interest in this company was held by Mr. Crashley's father, and the son had about 300 or 400 shares in his name as nominee for his father, out of 2442 issued; by the time of the arbitration Mr. Crashley Jr. had acquired all but 398 shares and he had an agreement to purchase this remaining number.

What the city has to sell under this option is not in doubt. It was the complete interest in the Walker House property—land and buildings—and the reversionary interest in the Petrie garage lot and the Elgin Motors lot until the leases fell in and were not renewed. If the option was exercised before these two leases fell in, the city would fulfil its obligation by executing a conveyance of the fee—land and buildings in the Walker House property and a conveyance of the fee together with an assignment of the two leases in the case of the other two properties. If the option was exercised after these leases fell in, the price was to be increased by whatever sum the city had been compelled to pay as compensation for the buildings on a refusal to renew.

The price during the first period was $417,081 plus an agreed sum for the Walker House building, which at the date of the award was $282,143.92. This figure of $417,081 is one of the few certainties in the case. It was arrived at by assigning a value of $1,522 per foot frontage for the Walker House lot and $1,200 per foot frontage for the other two lots. If the option was exercised after February 1, 1958, the price was to be settled by agreement or by arbitration.

The arbitrator was confronted by two distinct methods of valuation. The city's expert, R. A. Davis, assumed a site that was vacant land and unencumbered. He valued this at $989,000. He broke this sum up into two, the city's interest as lessor at $881,000, and the lessees' interests of $108,000 for the unexpired terms. The other expert, J. S. Stewart, took a different approach. He valued the whole site, land and buildings, in fee simple, without leases or encumbrances, at $1,155,000. Then he deducted four items totalling $775,000. These were the value of the garage under the Petrie lease, the agreed value of the Walker House building, the cost of the Swiss Bear Bar, and the value of the Elgin building. This gave him a figure of $380,000 as the

market value of the city's interest in the whole site (excluding buildings). Then he had to add to this figure the depreciated value of the Walker House property, $282,-143.92, giving a total amount to be paid by the Walker House Company of $662,000.

The differences between the two appraisals, supposedly of the same thing, are serious, even startling—on the one side $881,000 and on the other, $320,000, and this for land in the centre of the City of Toronto. A comparison of the appraisals when it is broken down and dealt with lot by lot shows how this came about.

DAVIS:	*Valuation of city's reversionary interest in land only*	
Walker House lot	$353,525.00	(based on $30 per square foot)
Petrie lot	415,465.00	(based on $22.50 per square foot)
Elgin Motors lot	112,365.00	
TOTAL	881,355.00	

STEWART:	Land and Buildings		Buildings	Land
Walker House	$542,000.00		$282,143.92	$259,936.08
		Garage $336,000		
Petrie	514,000.00	Swiss		
		Bear		
		Bar ... 137,423	473,423.00	40,577.00
Elgin	99,000.00		19,600.00	79,400.00
TOTAL	$1,155,000.00			

The frontage of the three lots from east to west were (*a*) Walker House 112 feet; (*b*) Petrie, 165.42 feet; (*c*) Elgin Motors 40 feet. Each lot had the same depth. Taking Davis' calculation and using round figures one begins to wonder at valuations of land for these contiguous parcels at $260,000, $40,500 and $79,400. It is evident that much of the difference between the two appraisers is to be found in their treatment of the Elgin property. According to Stewart, more than 9/10 of the value of this property is to be attributed to buildings and I say without hesitation that

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this is totally unacceptable to me as is the residual valuation of $40,500 for the land. I can well understand why the arbitrator rejected Stewart's mode of valuation and preferred that of Davis, and when he did so he was not in error. I cannot understand where Stewart got his initial figure of $1,155,000 for the whole property—land and buildings. I cannot see how this figure comes from his analysis of other sales which he thought comparable. He is simply telling the arbitrator that a person who wanted to buy a hotel, an appendant bar room, a parking garage and a small office building, together with the land having a frontage of 317.42 feet, would pay this sum, having in mind that redevelopment was 10 years away. To me and probably to the arbitrator, this is a meaningless estimate, and when it results in a valuation of $40,500 for the Petrie frontage of 165.42 feet, it is worse than that.

The arbitrator was rightly suspicious of a valuation of $336,000 for the parking garage. Stewart began with a figure of $298,776, which was an engineer's estimate of cost of reproduction less accrued depreciation. He increased this figure to $336,000 because of a sub-lease made by the Petrie Company to the Avis Company. The arbitrator's criticism of the engineer's estimate was that it made no provision for obsolescence. This was an obvious criticism with a building of this kind, the shell of which was more than 60 years old and the inside 25 years old. In addition, the Petrie company had assumed to grant a sub-lease to Avis for a period much in excess of its own unexpired term. It is true that it had a right of renewal or compensation on a refusal to renew but the granting of a precarious sub-lease does not increase the right to increased compensation. I am not overlooking the fact that if the head lease had been renewed, any increased ground rent was the responsibility of Avis and not Petrie, but the problem of an increased ground rent and its effect upon land valuation was only three years away and was ignored by the appraiser.

Stewart's valuation of the Swiss Bear Bar is equally open to question. It is not a valuation but a mere repetition of a cost figure. It was built on Petrie land and leased by the Petrie Company to the Walker House Hotel. Its only utility was as an appendage to the hotel and yet he deducted the whole cost from his breakdown figure of $514,000 for the Petrie property.

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Stewart's valuation takes no account of the fact, which was generally admitted, that these buildings had but a limited life. Crashley had begun his negotiations with the city, intending an immediate redevelopment. According to all the evidence he was 10 years too soon.

I do not think that the arbitrator was in error in his interpretation of the agreement. What he had to ascertain was the price for the land. He was not concerned with buildings unless he was compelled to accept Stewart's method of valuation. With the exercise of the option in December 1962, the buildings would become the problem of the optionee company, W.H. Hotel Limited, when it took an assignment of the leases on the Petrie and Elgin lots. It then became the landlord and would have to decide whether to renew the leases or pay for the buildings. There was, in fact, no problem because of the common control of the three companies and it was never expected that there would be. Further, if the option had been exercised after the expiry of the Petrie and Elgin leases, whatever sum the city had been compelled to pay by way of compensation for the buildings would have been payable by the optionee company in addition to the value of the land.

I would allow the appeal with costs both here and in the Court of Appeal and restore the arbitrator's award.

Appeal dismissed with costs, JUDSON J. *dissenting.*

Solicitor for the appellant: W. R. Callow, Toronto.

Solicitors for the respondent: Borden, Elliot, Kelley & Palmer, Toronto.