

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1344/2017

CATCHWORDS

Retail Tenancies -rent review by valuer -whether Rent Determination vitiated by error – relevant principles

APPLICANT	Di Dio Nominees Pty Ltd (ACN 005 304 914)
RESPONDENT	JVR Enterprises (Vic) Pty Ltd (ACN: 165 130 325)
WHERE HELD	Melbourne
BEFORE	Senior Member L. Forde
HEARING TYPE	Hearing
DATE OF HEARING	17 May 2018
DATE OF ORDER AND REASONS	28 May 2018
CITATION	Di Dio Nominees Pty Ltd v JVR Enterprises (Vic) Pty Ltd (Building and Property) [2018] VCAT 772

ORDER

1. The Tribunal finds and declares that the rental determination undertaken by the Valuer and issued to the parties on 6 March 2017 is vitiated by error and is of no effect.
2. Liberty to apply on the question of costs. Such liberty to be exercised, if at all, by 15 June 2018.

L. Forde
Senior Member

APPEARANCES:

For Applicant	Mr TJ Mullen of counsel
For Respondent	Mr S Hopper of counsel

REASONS

- 1 This case concerns a rent determination made in relation to a newsagency and Australia Post office in Keilor. The applicant landlord leased premises at 700 Old Calder Highway Keilor to the respondent tenant. Pursuant to the lease, the annual rent payable for 2016 was \$97,332.24. The lease provided for a market rent review on 1 January 2017
- 2 David Matler of BMT Valuers (the Valuer) was appointed to determine the market rent review. On around 6 March 2017, the Valuer issued a rental determination of \$46,475 per annum plus GST.
- 3 The landlord says that the rental determination did not comply with the lease and the provisions of the *Retail Leases Act 2003* (Vic) (the Act) and is vitiated by error. The tenant does not agree.
- 4 If I find for the landlord, I must make a declaration that the determination is vitiated by error and is of no effect. If I find for the tenant, the determination will stand.

Summary of Landlord's claim

- 5 The landlord claims that the determination did not comply with the terms of the lease and the provisions of the Act and is vitiated by error in that the Valuer has not:
 - a determined the current market rent taking into account the definitions and matters set out in s37 (2) of the Act;
 - b further or alternatively, provided detailed reasons within the meaning of s37 (6) of the Act; or
 - c further or alternatively, taken into account the written submissions of the landlord.

General legal principals regarding expert valuations

- 6 The parties agreed in principle on the general legal principles. Expert determinations can only be set aside in exceptional circumstances. In *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*¹ McHugh JA said at 355 to 356:-

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... 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*; *Arenson v Arenson*. 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

¹ (1985) 1 NSWLR 314

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...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.

7 In *Epping Hotels Pty Ltd v Serene Hotels Pty Ltd*² (*Epping Hotels case*) Croft J described the Tribunal's task as being

to consider whether the Rental Determination answered the contractual description of what the Valuer was required to.

8 In *Commonwealth of Australia v Wawbe Pty Ltd*³ Gillard J said

In my opinion it follows that the court should consider three questions-

What did the parties agree to remit to the expert?

Did the Valuer make a mistake and if so what was the nature of the mistake?

Section 37 of the RLA

9 Section 37 of the RLA provides as follows:

- (1) A retail premises lease that provides for a rent review to be made on the basis of the current market rent of the premises is taken to provide as set out in subsections (2) to (6).
- (2) The current market rent is taken to be the rent obtainable at the time of the review in a free and open market between a willing landlord and willing tenant in an arm's length transaction having regard to these matters—
 - (a) the provisions of the lease;
 - (b) the rent that would reasonably be expected to be paid for the premises if they were unoccupied and offered for lease for the same, or a substantially similar, use to which the premises may be put under the lease;
 - (c) the landlord's outgoings to the extent to which the tenant is liable to contribute to those outgoings;
 - (d) rent concessions and other benefits offered to prospective tenants of unoccupied retail premises—

² [2015] VSC 104

³ [1998] VSC 82

but the current market rent is not to take into account the value of goodwill created by the tenant's occupation or the value of the tenant's fixtures and fittings.

- (3) If the landlord and tenant do not agree on what the amount of that rent is to be, it is to be determined by a valuation carried out by a specialist retail Valuer appointed by—
- (a) agreement between the landlord and tenant; or
 - (b) if there is no agreement, the Small Business Commission—

and the landlord and tenant are to pay the costs of the valuation in equal shares.

- (4) The landlord must, within 14 days after a request by the specialist retail Valuer, supply the Valuer with relevant information about leases for retail premises located in the same building or retail shopping centre to assist the Valuer to determine the current market rent.

Penalty: 50 penalty units.

- (5) In determining the amount of the rent, the specialist retail Valuer must take into account the matters set out in subsection (2).
- (6) The valuation must—
- (a) be in writing; and
 - (b) contain detailed reasons for the specialist retail Valuer's determination; and
 - (c) specify the matters to which the Valuer had regard in making the determination.
- (7) The specialist retail Valuer—
- (a) must carry out the valuation within 45 days after accepting the appointment, or within such longer period as may be agreed between the landlord and tenant, or if there is no agreement, as determined in writing by the Small Business Commission; and
 - (b) may seek to enforce under Part 10 (Dispute Resolution) an obligation of the landlord under subsection (4).

- 10 The effect of sub-s 37(1) is to imply into the lease the provisions of sub-ss (2) to (6).

Terms of the Lease

- 11 The lease commenced on 17 December 2006 with an initial term of five years. The annual rent payable for 2007 was \$52,000 plus GST with substantial pre-agreed increases each year until 2011 when the annual rent would be \$80,000. After 2012, the rent was to increase at a fixed rate of 4% per annum until a further market rent review could take place in 2017.

- 12 Clause 11 of the lease sets out the procedure for a market rent review. Clause 11.1.3 requires the parties to appoint a valuer if they are unable to agree on the current market rent to determine the current market rent as at a rent review date.
- 13 Clause 11.1.4 of the lease provides “In determining the current market rent for the premises the valuer must
- a consider any written submissions made by the parties within 21 days of their being informed of the valuer’s appointment, and
 - b determine the current market rent as an expert
- and, whether or not the Act applies, must make the determination in accordance with the criteria set out in section 37 (2) of the Act.
- 14 Clause 11.1.5 of the lease provides “the valuer must make the determination of the current market rent and inform the parties in writing of the amount of the determination and the reasons for it as soon as possible after the end of the 21 days allowed for submissions by the parties).
- 15 I now turn to an examination of each of the alleged errors.

ALLEGED ERROR 1 -Failure to determine the current market rent taking into account the definitions and matters set out in s37 (2) of the Act

- 16 As a starting point I must determine the contract between the parties and what was required of the Valuer in making a rent determination. Clause 11.1.3 of the Lease requires the Valuer to determine the “current market rent.” Clause 11.1.4 clearly sets out what the Valuer must have regard to in determining the current market rent.
- 17 The landlord alleges that the Valuer failed to determine the “current market rent” within the meaning of s37(2) of the Act and failed to consider the terms of the lease as required under s37(2)(a). In support of this allegation, the landlord refers to the absence of any detailed reference to s37(2) in the determination other than the wording of s37(2) appearing on page 19 without any commentary and a reference on page 20 to two of the requirements in s37 (2) as being salient issues. The landlord submits that reference to only two matters in s37(2) shows that not all the matters in s37(2) were taken into account by the Valuer.
- 18 To understand the objections, it is necessary to set out the rental assessment contained in the determination. The determination includes the following:

“7. RENTAL DETERMINATION MATTERS

7.1 Rental Assessment

I am required to assess the “market rental” for the premises. However, as the Lease is silent and does not defined “market rent” within the Lease documentation. (sic) I have used the following definition.

I have therefore adopted the Australian Property Institute definition of “market rent” which can be defined as follows: –

“The estimated amount for which a property, or space within a property, should be lease (sic) on the date of valuation, between a willing lessor and willing lessee on appropriate terms in an arm’s length transaction, after proper marketing wherein (all) the parties had each acted (reasonably) knowledgeably, prudently and without compulsion.”

I have had regard to the terms and conditions of the Lease and the respective rights and obligations of the lessor (landlord) and lessee (tenant) set out in that documentation.

In my view, the salient issues to be reviewed as part of this Determination should include the following matter:

The Lease refers to section 37(2) the Retail Leases Act 2003 which specifically states (amongst other things) that the premises are to be valued as(sic) they were unoccupied and is to recognise (the nominal) rent concessions and any other benefits offered to prospective tenants of unoccupied retail premises.

I have been provided with a copy of the Lease documentation as part of this Determination process which is assumed to represent the full and complete agreement between all the parties.

- 19 The landlord submits that the Valuer fell into error when stating that the Lease is silent and does not define market rent thereby entitling him to assess the rent based on the API definition of market rent. It is submitted that the Valuer should have assessed the current market rent according to the Lease and s37(2) of the Act and by assessing it in accordance with the API definition has not made the determination in accordance with the contract between the parties. Whether the Valuer reached the same valuation is submitted to be irrelevant as it is the process of the rent determination which must be followed.
- 20 The landlord contends that the Valuer misconceived his function as the Lease instructs him what he is required to do when determining the rent and accordingly he is not entitled to look for another mechanism by which to determine the rent such as the API definition of market rent.
- 21 The tenant submitted that the Valuer is not substituting the API definition for the s37(2) requirements but rather is weaving both together. It is submitted that there are no inconsistencies between the two definitions.
- 22 In *Perri v Exego Pty Ltd*⁴ the New South Wales Administrative Decisions Tribunal had to consider s19(1)(a) of the *Retail Leases Act 1994* (NSW) a similar provision to s37(2) of the Act. The valuer in that case stated that in fixing the market rental value he adopted the definition approved by the API. Unlike the present case, he did not refer anywhere in his valuation to the *Retail Leases Act 1994* (NSW). It was submitted in that case that the API definition was not the definition in s19(1)(a). It was held that the valuer fell into error and that the phrases “current annual market rental value” and

⁴ [2009] NSWADT 170

“current annual market rental” did not mean the same but rather they embraced two different rental review mechanisms.

- 23 The Valuer has clearly referred to s37(2) in his determination and identified at least two of the considerations in that section which were relevant to his determination. I do not accept that reference to two considerations is proof that there was no consideration of the other matters in s37(2).
- 24 The API definition of “market rent” is not the same as the requirements set out in the current lease. I do not know whether applying the different definitions or mechanisms has any practical effect. It is not relevant for present purposes.
- 25 I reject the submission of the landlord that the Valuer limited his considerations to the matters set out in the API definition of “market rent”. Had he done so he would have fallen into error. I am satisfied that by reference to s37(2) on two occasions in the determination as well as some of the lease provisions it demonstrates that the Valuer was aware of the section and its requirements and found some of the considerations to be influential in his determination.
- 26 The landlord contends that the Valuer failed to consider the provisions of the lease, a requirement under s37(2)(a) of the Act. Reliance was placed on the absence of any reference to the substantial fixed rent increases (well over 4%) in the 2nd, 3rd, 4th or 5th years rent as set out in item 6 of the Lease. These increases caused the rent immediately prior to the determination to be \$97,332.24. The landlord submits that had the Valuer taken these increases into account noting that the current lease was an example of a lease in a free and open market he may not have made the determination.
- 27 The tenant submitted that the Valuer is only required to look at the rent for the current market rental and there is no obligation to look at the past rental.
- 28 It is unclear from reading the determination whether the Valuer knew of the fixed rent increase provisions or whether he took them into account. The failure to set out every provision of the lease does not mean that all non-referenced provisions were ignored. The difficulty is the absence of reasoning in the determination to explain how the determination was made. This difficulty is address in the next section.
- 29 The tenant made a submission to the effect that notwithstanding the lease requirements, when making the determination the valuer is entitled to rely upon s37(2) only for his procedural requirements to determine the rent. No authority could be cited for this proposition. I do not accept this proposition. The lease provisions are clear about what must be considered.
- 30 As set out in paragraph 13 above, while the determination must be made in accordance with s37(2) of the Act, reference must be had to the submissions of the parties. The words in clause 11.1.4 are specific. They read “In determining the current market rent for the premises the valuer must” consider any written submissions made by the parties, determine the current

market rent as an expert and must make the determination in accordance with the criteria set out in section 37(2) of the Act. The s37(2) criteria are in addition to the consideration of written submissions and determining the current market rent as an expert.

- 31 Because the Valuer has not provided detailed reasons in his determination, I do not know whether he has considered all of the definitions and matters set out in s37(2) of the Act. He has considered at least two of the matters in s37(2).

Alleged error 2 -Failure to provide detailed reasons within the meaning of s37 (6) of the Act;

- 32 Section 37(6) of the Act provides that the valuation must contain detailed reasons for the specialist retail Valuer's determination. The landlord contends that the valuer did not comply with this provision. The landlord relies upon the decision of *Higgins Nine Group Pty Ltd v Ladro Greville St Pty Ltd*⁵ wherein Croft J quoted from a decision of *Adwell Holdings Pty Ltd v Bourne*⁶ concerning the prevalent provision in New South Wales where it was held at [39]

The contract required the valuer to give “detailed” reasons; this goes further than merely requiring “sufficient” reasons and requires the valuer to set out details as to how he or she arrived at the determination. Further, when it says that it is to specify the matters to which the valuer had regard, that does not just mean setting out by rote what is in the Act, but actually dealing with how those matters were considered in the process of making the valuation.

- 33 Then, his honour concluded at [40]

It is clear that it is not sufficient for a valuer to “leap into a judgement”: the valuation must disclose the steps of reasoning. This position is, in my view, reinforced by the provisions of s37(6) of the Retail Leases Act. Not only does para (b) of this subsection require “detailed reasons” for the valuer’s determination, but in para (c), adds the requirement that the valuer “specify the matters to which the valuer had regard”. These provisions are relevantly the same as the New South Wales equivalent provisions considered in *Adwell*. Clearly, both the Victorian and New South Wales provisions eschew and do not entertain any “blinding flash of light” as satisfying their “requirements”.

- 34 The tenant relied upon the Privy Council decision of *A Hudson Pty Ltd v Legal & General Life Australia Ltd*⁷ where it was held:

In general their Lordships consider that it would be a disservice to the law and to litigants to encourage forensic attacks on valuations by

⁵[2016] VSC 244

⁶ (2007) NSW ConvR 56-188

⁷ (1986) 66 ALR 70 at 72

experts where those attacks are based on textual criticisms more appropriate to the measured analysis of fiscal legislation.

- 35 The landlord was critical of the Valuer's inclusion in the determination of 12 properties as Rental Evidence in section 7.2 of the determination. No commentary was made in relation to nine of these properties by the Valuer. Properties marked (A), (C) and (I) in the determination were referred to a second time in the section marked "Rental Determination" but without any explanation as to how those three properties were considered in the process of making the valuation.
- 36 I find that no detailed or even vague reasons were provided in the determination addressing how the 12 properties in the Rental Evidence section of the determination were considered.
- 37 As discussed above, the landlord is critical of the omission in the determination of reference to the substantial fixed rent increases in the 2nd, 3rd, 4th or 5th years' rent. These increases are said to explain how the rent at the time of the determination had reached \$97,332.24.
- 38 The Tribunal is left guessing how the Valuer came to find that the Rental Determination is \$46,475 plus GST when the prior year's rent was \$97,332.24 and when many properties are referenced in the determination with a much higher rent. The determination does not contain detailed reasons. Detailed reasons are a mandatory requirement of s37(2) of the Act and an attack on a determination for failing to comply with that requirement cannot be seen as suggested by the tenant as an attack based on textual criticisms.

Alleged error 3 -Failure to take into account the written submissions of the landlord

- 39 Clause 11.1.4(a) of the lease requires the Valuer to consider any written submissions made by the parties.
- 40 The parties sent emails to the Valuer with information and as such made submissions.
- 41 The determination does not address these submissions. The landlord contends that the Valuer's failure to refer to the submissions in his determination shows that he failed to have regard to the submissions or alternatively that he failed to explain how these submissions were considered by him.
- 42 I do not accept that the absence of any reference to the submissions is proof that they were not considered. I simply do not know whether the Valuer took them into account or not. The absence of reasoning in the determination makes it impossible to know whether the submissions were considered and if they were how they might have been considered in the process of making the determination.

- 43 Failure to address the submissions in the determination is another example of the Valuer's error in not providing the steps of his reasoning. It is this error that vitiates his determination.

Admissibility of recent letter

- 44 On 3 May 2018, 14 months after the determination, the then solicitors for the landlord wrote to the Valuer (landlord's letter dated 23 April 2018) and the Valuer replied by letter dated 26 April 2018 (reply letter). Neither the landlord nor its solicitors were copied into the correspondence.
- 45 The landlord's letter sought further details about the determination and how the Valuer took into account the terms of the lease and the key comparable rentals amongst other matters.
- 46 The penultimate paragraph of the letter read "We request you provide your response in writing in accordance with the principles set out in *Epping Hotels Pty Ltd v Serene Hotels Pty Ltd [2015] VSC 104 at paragraphs [85] to [103]*. Reference to these paragraphs is a reference to that part of Epping Hotels which dealt with the question of whether the Tribunal should have regard to a supplementary report.
- 47 The reply letter contains some information which fills in some of the missing gaps in the determination. It also confirms that the substantial fixed rent increases (well over 4%) in the 2nd, 3rd, 4th or 5th years' rent as set out in item 6 of the Lease were not taken into account.
- 48 The landlord contends that the Tribunal should not take the correspondence into account as it does not form part of the Valuer's report.
- 49 The tenant contends that the correspondence should be taken into account and that reference to Epping Hotels in the landlord's letter clearly shows that it is to be part of the determination.
- 50 I reject the contention that the correspondence is part of the determination for the following reasons:
- a There is a significant period of delay between the determination and the correspondence which makes it difficult to characterise the correspondence as part of the Valuer's determination.
 - b The reply letter is only addressed to one party, the tenant's solicitors and invites that party to contact the Valuer if any further information is required. This is in contrast to the determination which is addressed to both parties.
 - c The landlord's letter asks leading questions of the Valuer suggesting answers.
 - d The reply letter makes no reference to the letter being supplementary to the original determination. On its face it appears to be simply the Valuer clarifying some specific questions asked of him by one of the

parties and elicits no suggestion that it is to be read in conjunction with and form part of the original determination.

- 51 Had I accepted that the correspondence formed part of the determination, I am still not satisfied that it cures all the defects around the lack of detailed reasoning.

OUTCOME

- 52 For the reasons set out above, one is largely left to speculate as to how the Valuer formed his opinion. This does not in my view sufficiently comply with s37(2) of the Act.
- 53 I consider that the reasons of the Valuer do not have sufficient detail to determine the extent to which the current market rent was determined taking into account the definitions and matters set out in s37 (2) of the Act and whether the written submissions of the landlord were taken into account.
- 54 For these reasons, I find that the Valuer has failed to provide detailed reasons for the determination and the determination is vitiated by error and of no effect.

L. Forde
Senior Member