**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST** VCAT REFERENCE NO. BP704/2017

## CATCHWORDS

RETAIL LEASE; review of rental Determination; s 37 and s 52 of the *Retail Leases Act 2003* considered; declaration that the Determination fails to comply with the requirements of s 37 of the *Retail Leases Act 2003* and is set aside.

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| **APPLICANT** | Josephine Ung Pty Ltd (ACN 158 852 487) |
| **RESPONDENT** | Jagjit Associates Pty Ltd (ACN 164 331 480) |
| **WHERE HELD** | Melbourne |
| **BEFORE** | C. Edquist, Member |
| **HEARING TYPE** | Hearing |
| **DATE OF HEARING** | 20 October 2017 |
| **DATE OF REASONS** | 15 December 2017 |
| **CITATION** | Josephine Ung Pty Ltd v Jagjit Associates Pty Ltd (Building and Property) [2017] VCAT 2111 |

## ORDER

1 The Tribunal finds and declares that the rental Determination undertaken by the Valuer dated 14 October 2016 is vitiated by error, and is of no effect.

2 The parties have leave to make application to the Tribunal for further orders with respect to whether the Valuer should conduct any further valuation.

3 Costs, and reimbursement of fees under s115 B of the *Victorian Civil and Administrative Tribunal Act 1998*, are reserved.

C Edquist
**Member**

**APPEARANCES:**

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| For Applicant | Mr S. Hopper of Counsel. |
| For Respondent | Mr R. Hay, QC. |

## REASONS

1 This case concerns a rent determination made in relation to a cafe in South Yarra. The applicant landlord, Josephine Ung Pty Ltd (ACN 158 852 487) owns two shops in Claremont Street which it leased to the respondent tenant Jagjit Associates Pty Ltd (ACN 164 331 480) for a term of 10 years commencing 3 February 2012. The lease provided that the rent should be reviewed on the fourth anniversary of the commencement date. Mr Tim Perrin, a specialist retail valuer ("the Valuer"), conducted a market review of the rent under the lease for the year commencing 3 February 2016. The Valuer also issued a determination ("the Determination") on 14 October 2016 and issued a letter supplementing his written reasons in the Determination on 29 November 2016. The Determination of the rental was $87,200 per year excluding GST.

2 The landlord says that the Determination is vitiated by error, and alternatively says that the Valuer failed to provide detailed reasons. The tenant denies this.

3 My task is to determine if the landlord is right. 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 the tenant is correct, the Determination will stand.

4 The landlord says the Determination is vitiated by error, or alternatively that the Valuer failed to provide detailed reasons, arising out of the following three related errors:

   a the Valuer failed to have regard to rent concessions or other concessions as required by s 37(2)(d) of the *Retail Leases Act 2003* ("RLA), or, further or alternatively, his reasons fail to adequately disclose that consideration;

   b the Valuer did not have regard to the provision by the applicant of the items listed in Annexure E to the lease and, in so doing, failed to have regard to the terms of the lease as required by s 37(2)(a) of the RLA and valued the wrong premises, or, further or alternatively, his reasons do not adequately disclose the regard given by him to those items; and

   c the Valuer:

      (i) incorrectly assumed that, except for fair wear and tear, the tenant was required to keep the premises properly cleaned and maintained;

      (ii) failed to have regard to the term implied into the lease by s 52(2) of the RLA; and

      (iii) in so doing, failed to have regard to the terms of the lease as required by s 37(2)(a) of the RLA;

5 Further or alternatively, the landlord says that the Valuer failed to provide sufficient reasons with respect to his consideration of the tenant's and the landlord's repair and maintenance obligations.

## Relevant Legal Principles

6 There was a high degree of agreement between the parties regarding the legal principles to be applied.

7 In reviewing the authorities, an appropriate starting point is the following passage taken from the judgement of McHugh JA in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*[1] *("Legal & General").*

> In my opinion the question whether a valuation is *binding* upon the parties depends in the first instance upon the terms of the contract, express or implied. This was pointed out by Sir David Cairns in the Court of Appeal in *Baber v Kenwood Manufacturing Co Ltd*. A valuation obtained by fraud or collusion can usually be disregarded even in an action at law. For in a case of fraud or collusion the correct conclusion to be drawn will almost certainly be that there has been no valuation in accordance with the terms of the contract. As Sir David Cairns pointed out, it is easy to imply a term that a valuation must be made honestly and impartially. It will be difficult, and usually impossible, however, to imply a term that a valuation can be set aside on the ground of the Valuer's mistake or because the valuation is unreasonable. The terms of the contract usually provide, as the lease in the present case does, that the decision of the Valuer is "final and binding on the parties." By referring the decision to a Valuer, the parties agree to accept his honest and impartial decision as to the appropriate amount of the valuation. They rely on his skill and judgment and agree to be bound by his decision. It is now settled that an action for damages for negligence will lie against a Valuer to whom the parties have referred the question of valuation if one of them suffers loss as the result of his negligent valuation: *Sutcliffe v Thackrah*; *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 or the certificate of valuation, nevertheless, the mistake may be of a kind which shows that the valuation is not in accordance with the contract. A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties. But a valuation which is the result of the mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the Valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. The question is not whether there is an error in the discretionary judgment

[1] (1985) 1 NSWLR 314.

> of the Valuer. It is whether the valuation complies with the terms of the contract.[2]

8 Croft J in *Epping Hotels Pty Ltd v Serene Hotels Pty Ltd*[3]*("Epping Hotels")* observed that in this passage McHugh JA makes clear the sensual question for Determination is: "Was the valuation made in accordance with the contract?"[4]

9 Croft J went on to quote Nettle JA in *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* ("*AGL Victoria"*) where he said (Maxwell P and Bongiorno AJA agreeing):

> I agree with the judge that the question of whether it is open to review an expert Determination on the ground of error is in the first place to be decided according to whether the Determination answers the contractual description of what the expert was required to determine.[5]

10 Another leading authority to which both parties referred me was *Commonwealth v Wawbe Pty Ltd* where Gillard J agreed with McHugh JA's statement of the law, and went on to add:

> In my opinion it follows that the court should answer consider three questions-
>
> (i) What did the parties agree to remit to the expert?
>
> (ii) Did the Valuer make a mistake and if so what was the nature of the mistake?
>
> (iii) Is the mistake of such a kind which demonstrates that the valuation was not in made in accordance with the terms of the contract and accordingly does not bind the parties?[6]

11 From these authorities, it is clear that my task is to identify the terms of the contract made between the parties, as this will identify the parameters within which the rental valuation was to be conducted. In other words I must identify what Croft J described in *Epping Hotels* as the Valuer's "charter".[7]

12 It was common ground between the parties that the lease was subject to the RLA. Under a lease governed by the RLA, it is critical to have regard to the provisions of s 37(2) of the Act.

13 With respect to the requirement contained in s 37(6) of the RLA that the Valuer provide "detailed reasons", both parties referred to the decision of Croft J in *Higgins Nine Group Pty Ltd v Ladro Greville St Pty Ltd*.[8] Relevantly, his Honour said:

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2 (1985) 1 NSWLR 314 at 335-336.
3 [2015] VSC 104.
4 [2015] VSC 104 [56].
5 [2006] VSCA 173 [51].
6 [1998] VSC 82 [45].
7 [2015] VSC 104 at [27].
8 [2016] VSC 244.

It is clear that it is not sufficient for a Valuer to "leap to a judgement." The valuation must disclose the steps of reasoning.[9]

14 Croft J went on to note that the position is reinforced by the provisions of s 37(6)(c) of the RLA, which requires the Valuer "to specify the matters to which the Valuer had regard in making the determination".

## Section 37 of the RLA

15 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—
>
> 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.
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> Penalty: 50 penalty units.

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9 [2016] VSC 244 at [40].

(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).

16 I emphasise that the effect of sub-s 37(1) is to imply into the lease the provisions of sub-ss (2) to (6).

17 I now turn to an examination of each of the alleged errors.

## ALLEGED ERROR 1

### Did the Valuer fail to have regard to rent concessions and other benefits offered to prospective tenants of unoccupied retail premises as required by s 37(2)(d) RLA; or fail to give adequate reasons?

The landlord's contentions

18 The landlord notes that the lease, in additional provision 18.1,[10] allows for a 12 week rent free period in the first term only.

19 The landlord contends that the Valuer failed to have regard to rent concessions and other benefits offered to prospective tenants of unoccupied retail premises because the Valuer in his Determination:

a made a reference at[11] to written submissions provided for the tenant by Mr John Castran, who in summarizing the terms of the lease, had made reference to landlord's contribution to fitout and an initial rent free period;

b stated[12] that he had had regard to rent concessions and other benefits offered to prospective tenants, but did not provide details;

c made no reference to incentives when looking at comparable properties[13];

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10 Tribunal Book ("TB") 110.
11 TB 35.
12 TB 39.

d made no mention of rental incentives in the discussion of valuation.[14]

20 The landlord argues that because there are no other references to lease incentives ("the trail goes cold") after the two references identified above, either:

a the Valuer merely paid lip service to the requirement to have regard to incentives, but did not have any regard to incentives in his analysis; or

b he did have regard to incentives, but failed to provide detailed reasons of that consideration so that the Tribunal is unable to understand what reference the Valuer had to those incentives or how it affected the Determination.[15]

21 In support of its argument, the landlord says that its solicitor wrote to the Valuer about the matter on 28 November 2016[16] and received a response dated 29 November 2016.[17] The hearing proceeded on the basis that it was permissible for me to have regard to this correspondence. I comment that this is not surprising, having regard to the decision of Croft J in *Epping Hotels* where he found that the Tribunal had erred in deciding that it was able to disregard a supplementary report which had been delivered by the valuer eight months after the valuation was prepared.[18]

22 The landlord submits that the letter of 29 November 2016 demonstrates that the Valuer did not consider incentives, and misunderstood his task. The landlord points out that one of the Valuer's reasons for not applying an incentive is that the there is no rent free period under the lease for the second term. However, the landlord points out, s 37(2)(b) of the RLA requires the Valuer to have regard to rent concessions and other benefits offered to prospective tenants of *unoccupied* retail premises.

## The tenant's response

23 The tenant's submission in response is that the Valuer complied with s 37(2)(d). Specifically, the tenant points out that in section 6.1 of his Determination, the Valuer sets out s 37(2), and says in section 6.2 that he has "complied with each of the provisions specified at 37(2)"[19]. The tenant points out that the Valuer also in section 6.2[20] confirmed that he had had regard to rent concessions and other benefits offered to prospective tenants occupied premises in undertaking his determination. The tenant contends that the Valuer ultimately decided not to provide for rent concessions in the Determination. This is something he was entitled to do.

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13 TB 40-44.
14 TB 45-46.
15 Landlord's submissions paragraph 9.
16 TB 164.
17 TB 165.
18 [2015] VSC 104 at [71]-[105].
19 TB 37.
20 TB 39.

## Discussion

24 I accept the landlord's argument. Although the Valuer expressly confirmed in his Determination that he had had regard to rent concessions and other benefits offered to prospective tenants of unoccupied retail premises in undertaking his task, this is contradicted by the subsequent correspondence. In particular, in his letter of 29 November 2016 the Valuer stated:

> My deliberations in this regard have not extended to incorporating a rent free period into my Determination.[21]

25 I acknowledge the tenant's contention about the specific passage, which is:

> It would have been most unusual if Mr Perrin had included a rent free period in the Determination: a Valuer determining the rent on a market Determination decides an effective rent over the year; the Valuer does not decide that there will be a rent free period or rent concessions.

26 However I remain unconvinced. In determining an effective rent over a year, the Valuer ought to have taken into account rent concessions available to prospective tenants, as he was obliged to do under s 37(2)(d). In his letter of 29 November 2016, the Valuer confirms that he made no provision in his Determination for a rent free period, because there was no rent free period provided under the lease for the term commencing 3 February 2016.

## Is the mistake a vitiating error?

27 This conclusion opens up a new issue, which is: if the Valuer made a mistake, is there a basis for the Tribunal to find that the mistake was of the kind referred to by McHugh JA in *Legal & General* or Nettle JA in *AGL Victoria* that would entitle the Tribunal to set the Determination aside?

28 In my view, the fact that the Valuer expressly referred to the terms of the lease, and in particular to his obligation to take into account rent concessions under s 37(2) of the RLA, indicates that he was aware of his charter. However, it appears from the Dtermination that the Valuer has paid only lip service to it.

29 Section 37(2) of the RLA requires the Valuer to identify the rent obtainable for the leased premises 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 have regard to a number of matters including the provisions of the lease, the rent that would reasonably be expected to be paid for the premises if they were *unoccupied,* and rent concessions or other benefits offered to prospective tenants of *unoccupied* retail premises (my emphasis).

30 Accordingly, when a rent review is being carried out in respect of premises leased under a renewed lease, the exercise is to degree artificial, because the Valuer is required to ignore the fact that the premises *are* occupied by the tenant. The artificiality is underlined by the fact that the Valuer is "not to

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[21] TB 165.

take into account the value of goodwill created by the tenant's occupation or the value of the tenant's fixtures and fittings".

31 I consider that when the Valuer, in his letter dated 29 November 2016, expressly conceded that because there was no provision under the renewed lease for a rent free period he had made no provision for one, he overlooked his obligation under s37(2)(d) of the RLA. In basing his reasoning on the absence of a rent free period in the renewed lease, he overlooked an express duty to take into account rent concessions and other benefits offered to prospective tenants of unoccupied retail premises.

32 I accordingly find that the Valuer's error in failing to take into account rent concessions available to prospective tenants in determining current market rent is an error of such magnitude that the Determination has been made outside the Valuer's charter. The error is of such a nature that it vitiates the Determination.

33 In case I am wrong in this conclusion, I proceed to examine the other alleged errors.

## ALLEGED ERROR 2

### Did the Valuer fail have regard to the landlord's installations referred to in Annexure E, and in so doing, fail have regard to the terms of the lease as required s 37(2)(a) and fail to value the correct premises; and fail to give adequate reasons?

The landlord's contentions

34 The landlord says that the following provisions in the lease are relevant to the dispute:

> **"Landlords Installations"** means the Installations of the Landlord and any Owners Corporation in or servicing the Premises, the Common Areas, the Development, the Building and the Land and includes those installed by the Landlord or the Owners Corporation after the Commencement Date and includes but is not limited to the Installations described in Item 5;[22]
>
> **"Premises"** means the premises and the car spaces (if any) located in the Building let to the Tenant pursuant to this Lease as described in Item 4, together with the Landlord's Installations within and servicing the Premises;[23]
>
> **Clause 2.1**
>
> Subject to the provisions of this Lease, the Landlord leases the Premises to the Tenant for the Term commencing on the Commencement Date and ending on the Expiry Date.[24]
>
> **Rent**

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22 Lease clause 1.1.30 at TB 59.
23 Lease clause 1.1.40 at TB 63.
24 TB 66.

> $130,000 per annum plus G ST, commencing on the Commencement Date.
>
> For each year of the Lease after the first year the annual Rent shall be the Rent for the previous year increased in accordance with this Lease.[25]
>
> **Annexure E** –
>
> This sets out the Landlord's Installations.[26]

35 The landlord's principal contention is that the items in Annexure E form part of the leased premises, and yet, in making his Determination, the Valuer did not have regard to those items. The landlord points out that from the appearance of Annexure E, the tenant has been provided with fully or partially fitted out premises.

36 In support of its contention, the landlord acknowledges that the Valuer refers to the landlord's installations in Annexure E in the section 2.6 of his Determination, but says the Determination does not identify how the provision of this fitout is taken into account.[27]

37 In support of its proposition that the Valuer has overlooked the items in Annexure E, the landlord also points out that in the table setting out comparable premises,[28] there is no reference to the fitout provided to tenants.

38 Finally, in section 6.4 of the rental determination there is no value attributed to that fitout.[29]

39 The landlord concludes its submission in this way:

> If the rental determination *does* take account of a fitout contribution or a rent free period offered to other tenants, then consideration of that contribution needs to be weighed against the value of the whole or partial fitout provided by the landlord. This is important because it is part of the definition of what the landlord has supplied to the tenant. To fail to take this into account is to value something other than that which the tenant was given and does not give the landlord a rent for everything that the landlord has supplied;
>
> [A]lternatively, the Valuer may well have had full regard to those items, but his reasons fail to disclose that consideration;[30]

## The tenant's responses

40 The tenant's first arguments in response are that "Section 37(2) does not require the Valuer to "have regard" to landlord's installations" and subsection 37(2)(a) does not "require the Valuer to refer specifically to each provision in a lease."

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25 Lease Schedule, Item 5, TB 106.
26 TB 152-154.
27 TB 31.
28 TB 40 – 44.
29 TB 45-46.
30 Landlord's submissions, sub-paragraphs 13(e) and (f).

41 I acknowledge both statements are true, but I consider they do not take the tenant's argument anywhere. Subsection 37(2)(a) requires the Valuer to take into account the provisions of the lease. Annexure E is a provision of the lease, and it indicates that the tenant was to receive from the landlord the benefit of a substantially fitted out commercial kitchen and associated preparation and service equipment.

42 The tenant's next argument is that the permitted use under the lease is "café and restaurant"[31] and the tenant operates a café.

43 The tenant then links the observation that the permitted use under the lease is "café and restaurant"[32] to the Valuer's statement that he compared the leased premises with comparable premises.

44 I comment that the Valuer undoubtedly endeavoured to compare the leased premises with comparable premises. I note that in section 6.2, where he sets out his "determination rationale", he notes:

> the permitted use is quite prescriptive and I have consequently paid particular regard to rentals for other cafes and restaurants in addition to hospitality and food related premises…[33]

45 More relevantly, in my view, the tenant points out that the Valuer had regard to the "Landlord's provision of installations" on page 19 of the Determination.[34] The tenant quotes the Valuer's statement that he "had regard to the Landlord's provision of installations as set out in Annexure E".

46 I consider that this statement goes some way towards answering the landlord's concern that the landlord's installation had not been taken into account.

47 It is to be noted that the Valuer appended Annexure E to his Determination, in order to demonstrate that he was aware of it, even if he regarded it as too long to summarise.

48 To the landlord's respective complaints that "the report does not identify how the provision of this fitout [the existing fitout in the premises] is taken into account", "there is no reference to the fitout provided to tenants in the discussion of comparables", and "there is no value attributed to that fitout in the rental Determination," the tenant responds that they are all misconceived. The tenant contends:

> (a) there was no need for the Valuer to undertake any detailed analysis of the Landlord's fitout because the Valuer's Determination of the rent was based on comparable properties; and
>
> (b) for the reason referred to in (a) there was no point in the Valuer attributing a value to the fitout;

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31 Item 13 in the Lease Schedule.
32 Item 13 in the Lease Schedule.
33 TB 38.
34 Determination paragraph 6.2 (TB 38).

(c) it is not clear how the Valuer would have access to information about the fitout provided in comparable properties by landlords to tenants ...

49 The tenant also submits that the Valuer may not be qualified to place a value on the landlord's installations.

50 The tenant characterises as misconceived a further argument from the landlord to the effect that the landlord's installations must be taken into account as part of a partial fit out provided by the landlord. The tenant submits that this was "no more than unfounded speculation about the value of the alleged fitout."

## Discussion

51 I accept the landlord's arguments concerning the issue of whether the Valuer had appropriately had regard to the landlord's installation contained in Annexure E. I say this for the following reasons:

a In circumstances where the Valuer merely makes the statement that he has had regard to the "Landlord's provision of installations" but has not given any indication of how he has done this, I think there is a break in his chain of reasoning. It is not apparent that the Valuer has fully appreciated the particular nature of the premises in the present case, that is to say premises already substantially fitted out by the landlord as a commercial kitchen, with associated preparation and service equipment.

b The landlord's installation set out in Annexure E clearly had value. The fact that a value for the installation was not precisely established did not mean that the landlord's argument that the installation had to be taken into account was "misconceived".

c The landlord's complaint is that the Valuer did not really base his Determination on comparable values appears to be made out because he did not identify any other restaurant/cafe in his table of comparable properties which had a substantial landlord's fit out.

52 I find that the Valuer has not demonstrably taken into account the landlord's installations set out in Annexure E. In this respect, the Valuer has fallen into error.

## Is this error a vitiating error?

53 This finding throws up the question of whether this mistake is of the kind referred to by McHugh JA *Legal & General* and Nettle JA in *AGL Victoria* that would oblige the Tribunal to set the Determination aside.

54 The landlord's contention is that by feeling to give appropriate recognition to the landlord's installation described in Annexure E, the Valuer in effect failed to value the correct premises.

55 The significance of this submission is that in the well-known passage from the judgement of McHugh JA in *Legal and General* referred to above his Honour stated that:

> A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties.[35]

56 I do not agree with the landlord that a failure by the Valuer to place appropriate weight on the landlord's installation means that the Valuer has valued the wrong premises. The Valuer clearly has valued the correct premises.

57 The error made by the Valuer is that, even though he was patently aware of the contents of Annexure E, he failed to adequately explain how he had taken the landlord's installation into account. I find that, in failing to adequately explain this, the Valuer breached s 37(6)(b) and also s 37(6)(c) of the RLA. Applying the test in *Legal & General*[36] and the other authorities referred to, this error vitiates the Determination as the Valuer has not performed the contract he made with the parties.

**ALLEGED ERROR 3**

**Did the Valuer:**

**(a) incorrectly assume that, except for fair wear and tear, the tenant was required to keep the premises properly cleaned and maintained;**

**(b) fail to have regard to the term implied into the lease by s 52(2) of the Act; and**

**(c) in so doing, fail to have regard to the terms of the lease as required by s 37(2)(a) of the Act;**

***(*d) further or alternatively, fail to provide sufficient reasons with respect to his consideration of the tenant's and the landlord's repair and maintenance obligations?**

The landlord's contentions

58 The landlord contends that the Valuer failed to have regard to s 52(2) of RLA, and erroneously had regard to a different repair and maintenance obligation expressed in the lease.

59 Section 52 of the RLA relevantly provides:

> 52 Landlord's liability for repairs
>
> (1) A retail premises lease is taken to provide as set out in this section.

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35 (1985) 1 NSWLR 314 at 335-336.
36 (1985) 1 NSWLR 314 at 335-336.

(2) The landlord is responsible for maintaining in a condition consistent with the condition of the premises when the retail premises lease was entered into—

(a) the structure of, and fixtures in, the retail premises; and

(b) plant and equipment at the retail premises; and

(c) the appliances, fittings and fixtures provided under the lease by the landlord relating to the gas, electricity, water, drainage or other services.

60 The lease provides in clause 4.2.1:

> Except for fair wear and tear and subject to clause 4.2.3, the Tenant must keep the Premises in the same condition as at the later of:
>
> (a) the Commencement Date of this Lease; or
>
> (b) the completion of the installation of the Tenants Fitout Items, and keep the Premises properly repaired and maintained. The Tenant must also comply at its cost with all notices or orders affecting the Premises.

61 The tenant's obligations under clause 4.2.1 are expanded upon in clauses 4.2.2, 4.3.1(m) and 4.3.1(n).

62 The central proposition underpinning the landlord's complaint is that clause 4.2.1 of the lease is inconsistent with s 52(2) of RLA.

63 The Valuer in his Determination noted that the tenant's covenants included a covenant:

> Except for fair wear and tear keep the premises properly cleaned and maintained.[37]

64 The landlord says that notwithstanding the erroneous reference to the obligation contained in the lease upon the tenant to keep the premises properly cleaned and maintained, except for fair wear and tear, the "Determination Rationale" set out by the Valuer at section 6.2 of his Determination[38] disclosed that the Valuer had no regard:

> to the impact on rent of the tenant's repair and maintenance obligations, or else did not make reference to those obligations

65 The landlord developed its argument in this way:

> [P]roperly construed, s 52(2) of the RLA 2003 reduces the costs of occupancy paid by the hypothetical tenant, increasing the amount that the hypothetical tenant would be willing to pay as rent for the premises. On the other hand, an obligation placed upon the tenant to maintain the premises increases the tenant's occupancy costs and reduces the amount that the hypothetical tenant would be willing to pay to rent the property;[39]

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37 TB 32.
38 TB 37.
39 Landlord's submissions paragraph 14(g).

66 The landlord's first contention arising out of the circumstances was that it was unclear what value had been attributed to the tenant's (non-existent) obligation to maintain the property.

67 The landlord then articulated a separate argument arising out of the particular circumstances of this lease, under which the landlord had provided a substantial amount of the fit out, including refrigerators, and ice maker, dishwashers, and extraction system, all floor coverings and certain light globes. The argument was that because sub-sections 52(2)(b) and 52(2)(c) of the RLA respectively extended the landlord's maintenance obligations to "plant and equipment at the retail premises" and "the appliances, fittings and fixtures provided under the lease by the landlord …" the hypothetical tenant had been relieved of the cost of maintaining the items listed in Annexure E. This was said to represent:

> an unusually significant saving to the hypothetical tenant, which would further inflate the rent that he or she would be willing to pay.

68 Accordingly, the landlord argued, either the Valuer did not have regard to the true terms of the lease (as amended by s 52 of the RLA) or his reasons do not disclose the regard to that section that he did have. Either way, it said the Determination is invalid and should be set aside.

## The tenant's responses

69 The tenant addressed individually the sub-issues encompassed by Alleged Error 3.

### Did the Valuer incorrectly assume that, except for fair wear and tear, the tenant was required to keep the premises properly cleaned and maintained?

70 The tenant asserts that it is wrong to say that the Valuer incorrectly assumed that, except for fair wear and tear, the tenant was required to keep the premises properly cleaned and maintained.

71 In support of this argument, the tenant, after acknowledging that the Valuer had in section 3 of his Determination referred to the tenant's covenant "Except for fair wear and tear keep the premises properly cleaned and maintained", referred to clause 13.5 of the lease. This contains an express acknowledgement by the tenant that subject to s 52, the landlord is not responsible for repairs which are the responsibility of the tenant under clause 4.2.

72 The tenant did not develop this argument. Perhaps the intention was to demonstrate that the Valuer had acknowledged s 52 of the RLA in his Determination. If that was the intention, the reference to clause 13.5 takes the tenant's argument nowhere, precisely because clause 13.5 is expressly governed by s 52 of the RLA, and the Valuer demonstrated no understanding of the impact of s 52 on the bargain made between the landlord and the tenant.

73 More relevantly, the tenant says that there:

> is no reference in the Determination to s.52, because s.37(2) does not impose an obligation on the Valuer to have "have regard" to s.52.

74 This argument does not assist the tenant, in my view. It is evident that s 37(2) does not impose an express obligation on the Valuer to have regard to s 52. However, by operation of s 52(1) a retail premises lease is taken to include the provisions set out in that section. Those provisions, of course, include subsection 52(2).

75 Given that under s 37(2)(a) the Valuer is obligated to take into account the provisions of the lease, there is an indirect direction to the Valuer to have regard to s 52.

76 Notwithstanding its argument that s 37(2) did not impose an express obligation on the Valuer to have regard to s 52, the tenant contends:

> Mr Perrin says in paragraph 2.5 of the Determination (page 11 (**TB30**)) that his Determination "is made on the basis that both of the parties fulfil their respective obligations in relation to repairs and maintenance as set out in the Lease."
>
> Because the provisions of s 52(2) are implied into the lease and therefore form part of the lease, the statement referred to in (the last) paragraph… suggests that Mr Perrin considered the effect of s 52.

77 I consider this to be a courageous contention. The Valuer expressly indicated that he was aware of the tenant's covenant to keep the premises properly cleaned and maintained, except for fair wear and tear, but he did not refer to s 52. Just because the provisions of s 52(2) are implied into the lease is not a reason for assuming that the Valuer was aware of those provisions. If the Valuer was aware of s 52, he certainly did not articulate how it affected his Determination.

78 The kernel of the landlord's argument is that the Valuer did not have regard to s 52, and the manner in which it substantially amended the bargain made between the landlord and the tenant in the lease concerning the maintenance of the premises.

79 I acknowledge the tenant's proposition that Clauses 4.2.1 and 4.2.2(a) of the lease are expressed more widely that s 52, and that the tenant may have to clean and maintain things that are not caught by s 52(2). However, I do not think this proposition substantially undermines the landlord's argument that s 52(2) imposes on the landlord, rather than the tenant, the obligation to maintain the structure and the fixtures in the premises, as well as the plant and equipment and the appliances, fittings and fixtures provided under the lease.

### Did the Valuer fail to have regard to the term implied into the lease by s.52(2) of the Act?

80 The tenant's argument is that while s 37(2) does not impose an obligation on the Valuer to have "have regard" to s 52, "it is clear that he did so". The tenant relies on the same arguments in support of this proposition as it did

in arguing that the Valuer did not incorrectly assume that, except for fair wear and tear, the tenant was required to keep the premises properly cleaned and maintained.

81 As I have rejected the tenant's arguments in the previous context, I do so again here.

Did the Valuer fail to have regard to the terms of the lease as required by s 37(2)(a) of the Act?

82 The tenant says the answer to this question must be "no". The tenant's argument here is based on "the reference in the Determination[40] to the landlord's outgoings and the tenant's obligation to contribute those outgoings." The tenant contends:

> No error is disclosed by the reference to the payment of outgoings. The respondent (tenant) was required under the lease to pay outgoings. The tenant is not required to pay the outgoings incurred by the landlord in complying with its obligations under s 52.[41]
>
> As stated above …. the Determination was made on the basis that the parties fulfilled their obligations under the lease which contained the terms implied into the lease by s 52.
>
> There is no basis for contending that the Valuer failed to have regard to the terms of the lease.

83 In my view the fact that the Valuer has made a vague but unobjectionable reference to the tenant's obligation regarding outgoings does nothing to advance the tenant's case.

### First findings concerning Alleged Error 3

84 For the reasons given above I accept the landlord's arguments in preference to the tenant's, and find the Valuer:

a incorrectly assumed that, except for fair wear and tear, the tenant was required to keep the premises properly cleaned and maintained;

b failed to have regard to the term implied into the lease by s 52(2) of the Act; and

c in so doing, failed to have regard to the terms of the lease as required by s 37(2)(a) of the Act.

85 I now turn to the remaining further and alternative issue.

### Did the Valuer fail to provide sufficient reasons with respect to his consideration of the tenant's and the landlord's repair and maintenance obligations?

86 The tenant in relation to this issue also recycles the arguments put forward above in relation to the issues of whether the Valuer incorrectly assumed

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40 TB 37.

41 *Small Business Commissioner Reference for advisory opinion* [2015] VCAT 478.

that the tenant was required to keep the premises properly cleaned and maintained except for fair wear and tear, and whether the Valuer failed to have regard to the terms of the lease as required by s 37(2)(a).

87 I do not think they assist the tenant in respect of this final issue any more than they did with the issues dealt with earlier.

88 I think it is clear from a review of the Determination that the Valuer failed to set out adequate reasons concerning his consideration of the respective obligations of the landlord and the tenant regarding repair and maintenance. There is in the Determination, as far as I can, see no express reference to s 52(2). The tenant confirms that this is the case.

89 I note that in explaining the rationale behind the Determination in section 6.2, the Valuer confirms that he must act in accordance with s 37(2) of the RLA, and then goes on to list particular matters that he has had regard to. These matters do not include the burden on the landlord under s 52(2) to maintain the structure and fixtures in the premises, the plant and equipment in the premises and the appliances, fittings and fixtures provided under the lease by the landlord.

### Finding regarding the issue of whether the Valuer gave adequate reasons

90 Applying the test articulated by Croft J in *Higgins Nine Group Pty Ltd v Ladro Greville St Pty Ltd*,[42] the Valuer must disclose the steps of his reasoning. For the reasons given above, I find there has been a failure by the Valuer to give "sufficient" reasons in respect of his consideration of the tenant's and the landlord's repair and maintenance obligations.

91 The nature of these errors is such that I am satisfied that the Valuer did not discharge the contract he had made with the parties to apply the terms of the lease, including all the terms implied by the RLA. Accordingly, applying the law as set out by McHugh J in *Legal and General*,[43] and the other authorities referred to, I find that the lease is vitiated.

92 I will make orders accordingly.

93 There is a residual issue as to whether I should order the Valuer to conduct any further valuation. I will give the parties leave to make an application about that matter.

94 Costs, and reimbursement of fees under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998*, will be reserved.

C Edquist
**Member**

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42 [2016] VSC 244 at [40].
43 (1985) 1 NSWLR 314 at 335-336.