VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. **BP554/2016**

CATCHWORDS

RETAIL LEASES–Whether there was an oral agreement, supported by part performance, by which the parties agreed on the new rent for the first year of the second term of the lease, obviating the need for a third party determination pursuant to the terms of the lease–alleged part performance found not to be referrable only to the alleged agreement-allegation of oral agreement not sustained.

RETAIL LEASES ACT 2003 Section 37(2)(b)–Whether, for the purpose of determining the current market rent in respect of the first year of the third term of the lease, the written reasons demonstrate that the valuer had regard to premises "…for the same, or a substantially similar, use to which the premises may be put under the lease" within the meaning of section 37–rental determination set aside for failure to comply with the requirements of the Act.

APPLICANT	Dalmatino Pty Ltd (ACN 109 529 004)
RESPONDENT	Creative Laser Pty Ltd (ACN 007 328 672)
WHERE HELD	Melbourne
BEFORE	A T Kincaid, Member
HEARING TYPE	Hearing
DATE OF HEARING	22-23 February 2016
DATE OF ORDER	16 June 2017
CITATION	Dalmatino Pty Ltd v Creative Laser Pty Ltd (Building and Property) [2017] VCAT 875

INTERIM ORDER

I **FIND AND DECLARE** that:

1. The parties did not enter into a binding agreement to pay rent of $101,238 (plus GST) for the first year of Term 2 (1 July 2012-30 June 2015) of the lease.
2. The rental determination undertaken by the valuer for the first year of Term 3 (1 July 2015-30 June 2018) of the lease (the "**Term 3 determination**") fails to comply with the requirements of section 37 of the *Retail Leases Act 2003*, and is set aside.

AND I ORDER that:

3. The proceeding is fixed for a further hearing before Member Kincaid at **9.30 on 7 July 2017** at which time, following oral submissions from the parties, the Tribunal will make further orders with respect to whether the valuer should conduct any further valuation or valuations. Allow 1 hour.

A T Kincaid
Member

APPEARANCES:

For Applicant	Mr S Hopper of Counsel.
For Respondent	Mr W Stark of Counsel.

REASONS

INTRODUCTION

1. By an undated lease, the respondent ("**the landlord**") granted the applicant (the "**tenant**") a lease of premises at Bay Street, Port Melbourne for 3 years from 1 July 2009 to 30 June 2012, with options for four further terms of 3 years each (the "**lease**"). The premises are used as a restaurant.

2. The first issue raised in the proceeding is whether, as alleged by the landlord, the tenant agreed on the amount of rent to be paid in respect of the first year of Term 2 (such Term being 1 July 2012-30 June 2015) ("**Term 2**"). If there was such an agreement, by operation of the lease this would avoid the need for a rental valuation of the current market rent for the first year of Term 2.

3. The second issue is whether a rental determination dated 26 October 2015[1] by Mr Donald Brindley, Certified Practising Valuer (the "**valuer**"), jointly obtained by the parties for the first year of the Term 3 (such Term being 1 July 2015-30 June 2018) ("**Term 3**") (the "**rental determination**") is, as alleged by the landlord, vitiated by error. The valuer made the rental determination having been appointed by the Small Business Commissioner to do so pursuant to section 37(3)(b) of the *Retail Leases Act 2003* (the "**Act**").

QUESTIONS FOR DETERMINATION AND PARTIES' ARGUMENTS

4. The parties agree that the resolution of the proceeding requires the Tribunal to provide answers to the following questions:

   a Did the parties enter into a binding agreement to pay rent of $101,238 (plus GST) for the first year of Term 2?

   b Does the rental determination bind the parties?

   c Should the valuer conduct any further rental determination for the parties?

5. In respect of the first question, the tenant says that by letter dated 17 February 2015 it duly exercised its option for Term 2, but that the parties were subsequently unable to agree on the current market rent for the first year of Term 2. The landlord contends, on the other hand, that in about June or July 2012, the parties agreed on the current market rent for the first year of Term 2 and that, in part performance of the agreement, the tenant paid rent in accordance with the agreement.

6. In respect of the second question, the landlord says that, in purporting to provide a rental determination for the first year of Term 3, the valuer failed

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[1] The question contained in the list of questions tendered to me on 22 February 2017 states "30 October 2015", but the date "26 October 2015" appears in section 8 of the Brindley determination.

to determine the current market rent in accordance with section 37(2) of the Act, and that the rental determination ought to be set aside.

7. If the rental determination is set aside, the landlord seeks a direction that the parties be required to attempt to agree on an the appointment of an alternative specialist retail valuer pursuant to section 37(3)(a) of the Act to provide a rental determination for the first year of Term 2 (in the absence of the Tribunal finding that there was an agreement between the parties in respect of the first year), and for the first year of Term 3. If no agreement can be reached, it seeks an order directing the parties to apply to the Small Business Commissioner to appoint one pursuant to section 37(3)(b) of the Act.

BACKGROUND

The Lease

8. The lease contains the following terms and conditions:

1. DEFINITIONS AND INTERPRETATION

1.1 **market review date** a date specified in Item 16(a) (sic)

review date a date specified in Item 16.

1.5 Any change to this lease must be in writing and signed by the parties.

2. TENANT'S PAYMENT, USE AND INSURANCE OBLIGATIONS

2.1.1 …The rent is reviewed on each review date specified in item 16-

(a) on a market review date, the rent is reviewed in accordance with clause 11…

10. OVERHOLDING AND ABANDONMENT OF THE PREMISES

10.1 If the tenant remains in possession of the premises without objection by the landlord after the end of the term-

10.1.1 the tenant, without any need for written notice of any kind, is a monthly tenant on the conditions in this lease, modified so as to create a monthly tenancy…

10.1.3 the monthly rent starts at one-twelfth of the annual rent which the tenant was paying immediately before the term ended unless a different rent has been agreed, and

10.1.4 the landlord may increase the monthly rent by giving the tenant one month's written notice.

11. RENT REVIEWS TO MARKET

11.1 In this clause "review period" means the period following each market review date until the next review date or the end of this lease.

The review procedure on each market review date is-

11.1.1 each review of rent may be initiated by either party unless Item 17 states otherwise but, if the Act applies, reviewer is compulsory.

11.1.2 a party may initiate a review by giving the other party a written notice stating the current market rent which it proposes as the rent for the review period.

11.1.3 If-

…(b) the Act applies and the parties do not agree on what the rent is to be for the review period,

the parties must appoint a valuer to determine the current market rent.

…If the Act applies, the valuer is to be appointed by agreement of the parties, or failing agreement, by the Small Business Commissioner.

[but see also section 37(3) of the *Retail Leases Act 2005*]

11.1.4 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 there being informed of the valuer's appointment, and

(b) 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.

11.2 The valuer's determination binds both parties.

SCHEDULE

Item 6 ***Rent***

$90,000 (plus GST in accordance with clause 17) per annum, plus outgoings.

Item 15 ***Permitted Use***

Licensed Cafe

Item 16 ***Review Dates***

Market review dates: upon exercise of options pursuant to clause 11 hereof.

Annual Review dates:

Rent Increases: annually fixed at 4% per annum.

Item 17 Who may initiate reviews

Market review: Landlord/Tenant

Fixed reviews: annual reviews are automatic

9. The landlord did not give to the tenant notice of the last date to exercise its option for Term 2, as it was required to do pursuant to sections 28(1) of the Act. This meant that the provisions of section 28(2)-(4) of the Act applied.

10. The tenant paid a 4% increase in rent from 1 July 2012, a further 4% increase in rent from 1 July 2013 and a further 4% increase in rent on 1 July 2014.

Tenant obtains market rent valuations

11. Mr Ino Kuvacic of the tenant gave evidence that in October 2014, he engaged Hunt & Hunt Lawyers to seek an extension of the lease, and to enquire of the landlord whether the amount of rent could be reviewed. He gave evidence that he was only then informed that "the terms of the lease required a market rent review [from 1 July 2012]" and for the 3 year period that, subject to the exercise of the further option by the tenant, would start from 1 July 2015.

12. The tenant instructed Hay Property Group ("**Hay**") to undertake a market rent review valuation for the periods starting 1 July 2012 and 1 July 2015.

13. By its report and valuation dated 26 January 2015, Hay assessed the market rent for the premises at 26 January 2015 at $75,000 per annum (the "**1 July 2015 valuation**").

14. By a further report dated 12 February 2015, Hay assessed the market rent for the premises at 1 July 2012 at $70,000 per annum (the "**1 July 2012 valuation**").

Tenant exercises options for terms starting 1 July 2012 and 1 July 2015

15. Pursuant to the term taken to be provided in the lease by section 28(2) of the Act, by its solicitor's letter to the landlord's solicitor letter dated 17 February 2015, the tenant's solicitors exercised its option for a further term starting 1 July 2012, and for a further term ending 30 June 2015. The letter stated, relevantly:

> …Our client hereby exercises its option to renew the lease for the first further term for the period 1 July 2012 to 30 June 2015.
>
> Given the above, sections 28(2)(b) and 28(4) of the *Retail Leases Act* 2003 apply and all subsequent annual increases of rent applied by your client must be refunded to our client. We are instructed that these are annual increases of rent of 4% that were applied on 1 July 2012, 1 July 2013 and 1 July 2014.
>
> We are instructed as follows:
>
> 1 A market review of the rent was not carried out at the commencement of the first further term (1 July 2012) in accordance with the lease and the *Retail Leases Act* 2003;
>
> 2 Our client requires a market review of the rent as at 1 July 2012;

3 Our client is of the view that if a market review of the rent had been carried out as at 1 July 2012 there would have been a substantial reduction in the rent at that time. Enclosed is [the 1 July 2012 valuation]. You will note that the current market rent assessed at $70,000.0 per annum plus GST;

4 Our client proposes that the current market rent for the review period (being 1 July 2012 to 30 June 2013) is $70,000.00 plus GST. Please let us know if your client agrees to the rent as at 1 July 2012 being $70,000.00 per annum plus GST;

5 Our client has continued to pay the rent as increased unilaterally (and without consultation) by your client annually by 4% resulting in a current market rent of approximately $108,000 per annum plus GST (or as we calculate, more precisely, $109,498.76 per annum plus GST);

6 Without the correction of a market review as at 1 July 2012, the rent current rent been currently charged by the client by the landlord and paid by the tenant since 1 July 2012 has been grossly overinflated and well in excess of the current market rent as at 1 July 2012;

7 Our client seeks a refund for rent paid in excess of the current market rent for the period 1 July until now.

We note that the lease provides our client exercises option to renew the lease not less than 3 months not more than 6 months from the end of the term.

Our client hereby exercises its option to renew the lease for the second further term of the period 1 July 2015 to 30 June 2018.

Please find **enclosed** [the 1 July 2015 valuation]. You will note that the current market rent of the premises has been assessed at $75,000 per annum plus GST. Please let us know if the landlord agrees to the commencing rent for the period 1 July 2015 to 30 June 2016 being $75,000 per annum plus GST…

16. The landlord's solicitors responded by letter dated 18 February 2015:

We acknowledge receipt of your email of the 17 [February] and advise that we have conveyed same to our client for instructions.

We advise that it is clear from our file that your client had the assistance of legal advice in April 2013 from McCluskys and we enclose copy letter received from the said firm dated 18 April 2013 in which no issue was raised with rental but only an extension of the lease period which did not eventuate.

Your client received the amount of the rent increases as provided for by the Lease and attended to payment of same without objection despite the opportunity to raise any issues.

We will further advise upon receipt of further instructions from our client in relation to your client's option to renew to 2018 and with respect to the documentation relation to same (**emphasis added**).

17. The letter dated 18 April 2013 from the tenant's then solicitors, McLuskys Lawyers to the landlord's solicitors, referred to by the landlord's solicitors

in their letter dated 18 February 2015, was written when the tenant was seeking a variation to the lease, granting extended options for further terms.

The letter stated:

> We refer to the [lease] and confirm that we act for the [tenant].
>
> We understand our clients have discussed and agreed to a variation to item 18 of Schedule 1 to the [lease] to the effect that [the tenant] is granted the option of eight (8) further terms of three (3) years each.
>
> We request proposed Variation of [the lease] incorporating terms as outlined above and stating that each party shall bear its own costs of the variation.

18. The landlord's solicitors sent a further letter dated 24 March 2015, stating as follows:

> We acknowledge receipt of your letter of the 24th inst[2]. and advise that we have sought further instructions from [the landlord] in relation to [the tenant's] option to renew to 2018 and the rent payable for the said period and will further advise as soon as possible.
>
> In relation to your client's request for a refund of rent, we are instructed to reject same and reiterate matters raised in our letter of the 18 February 2015.

19. The tenant says that it and the landlord were then unable to agree on the current market rent for the term starting 1 July 2012.

20. Pursuant to the term taken to be provided in the lease by section 37(3) of the Act, by application dated 18 March 2016 the tenant applied to the Small Business Commissioner for the appointment of a specialist retail valuer to determine the current market rent for the term starting 1 July 2012.

21. On about 6 April 2016, the Small Business Commissioner appointed the valuer to determine the current market rent for the term starting 1 July 2012.

22. On about 12 April 2016, the valuer sent a letter to the parties requesting confirmation of his appointment and payment of its fees so that a rental determination could be completed (the "**proposed terms of engagement**").

Landlord objects to appointing a valuer to assess the market rent as at 1 July 2012

23. On 19 April 2016, the landlord's solicitors informed the valuer by email:

> We acknowledge your emails of the 12th and 18th inst[3]. and advise that our client, the Landlord objects to the Tenant's right to a market review as at 1 July 2012.
>
> As such our client will not accept any appointment to determine the said rent unless VCAT makes such an Order obliging him to execute your terms of engagement.

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2 Not in evidence.
3 Neither in evidence.

24. The landlord denies that the parties were unable to agree on the rent to be paid from 1 July 2012. It alleges that the parties specifically agreed on the amount of rent to be paid. I note that this allegation was never made plain in the correspondence between the lawyers, to which I have referred.

The landlord's pleaded case

25. In Amended Points of Defence and Counterclaim dated 16 August 2016, the landlord alleges:

> 19. It says further that the parties specifically agreed on the rent for the further term commencing 1 July 2012 (the "**2012 Rent Agreement**").
>
> **PARTICULARS**
>
> The [alleged] 2012 Rent Agreement is partly written, partly oral and partly to be implied.
>
> In so far as it is written, it was contained in a monthly invoice from the [landlord] to the [tenant] dated on or about 1 June 2012, noting that the [landlord] required the [tenant] to pay rent for the Premises the period commencing on 1 July 2012 at the rate of $101,238 per annum, plus GST…
>
> Insofar as it is oral, it was making conversations between Mr Michael Gallas, the [landlord's] director, and Mr Nat Kuvacic and Mr Ino Kuvacic, the [tenant's] directors, in or around June and July 2012, at the premises, which were to the effect that the [tenant] agreed that the proposed rent for the premises for the period commencing 1 July 2012 was fair.
>
> In so far as it was implied, it was implied by:
>
> (a) The payment of the rent by the [tenant] at the increased rate of $101,238 per annum, plus GST from 1 July 2012, without complaint [by the tenant];
>
> (b) The acceptance of that increased rent by the [landlord] in exchange for the provision of quiet enjoyment of the premises to the [tenant]; and
>
> (c) ~~The granting to the [tenant]'s of 4 options to renew, each of 3 year terms;~~[4]
>
> (d) The fact that the [tenant] was represented by its own lawyers, McLuskys, at around the time of the [alleged] 2012 Rent Agreement, and those lawyers did not complain about the rent at the increased rate of $101,238 per annum, plus GST from 1 July 2012.

[4] This particular is no longer relied on by the landlord.

Question 1.

Did the parties enter into a binding agreement to pay rent of $101,238 (plus GST) for the first year of Term 2?

Analysis of Evidence

26. By his witness statement dated 9 December 2016 verified on oath, Mr Ino Kuvacic, a director of the tenant, responded to the allegations in the Amended Points of Defence and Counterclaim as follows:

> I have also read paragraph 19 of the amended points of defence and counterclaim dated 16 August 2016. I do not recall ever receiving a notice of increased rent. The increased rent was invoiced and paid but there was no separate agreement or notice in relation to it. By that stage, my brother [Natko] was out of the business and I was not aware that I was required to formally exercise the option for further terms or that the new term would have triggered a market rent review.

27. The evidence of Mr Gallas, director of the landlord concerning the alleged 2012 Rent Agreement, contained in his written statement dated 9 December 2016, verified on oath, was as follows:

> 13. Term 2 (1 July 2012 to 30 June 2015) Market review: **I proposed a 4% increase; there was no objection from tenant**: the tenant paid the increased rent for the entire term of the lease…
>
> Event date: APR-JUN 2012 (TENANT DID NOT EXECUTE (sic) OPTION FOR TERM 1 2012-2015!)
>
> 16. 1 JULY 2012. The rent in July 2012 was increased by 4% [for the period 1 July 2012-30 June 2013] to $8,436 + gst **as per lease** ($101k+P.A.)
>
> 17. Some time after Natko [Kuvacic] left the partnership, on multiple occasions Ino Kuvacic came into my office and we had a long discussion re Bay street shops/restaurants and that some traders are not doing as well as he is in Port Melbourne and the fact that he would like to stay in the premises long term. He also stated that **he is happy to pay the current rent**. He mention (sic) a longer lease and asked me if I would consider it…
>
> 24. Rent in July 2013 was increased 4% to $8,773 + gst per month **as per lease** ($105k +gst PA)…
>
> 29. Rent in July 2014 was increased 4% to $9,124 per month **as per lease** ($109k +gst PA)…(**emphasis added**)

28. Again, in his statement in reply dated 17 January 2017, Mr Kuvacic stated:

> With respect to paragraph 13 [of the Gallas statement], no agreement was reached with respect to rent for the period commencing 1 July 2012. The landlord did not notify me of my rights to renew the lease or provide any notice to me of the intended market review and I was not given an opportunity to dispute the alleged market rent review calculation from the landlord. The tenant did not exercise its option to renew the lease until substantially later.

29. It is common ground that the rent paid by the tenant increased by 4% each year, generally in accordance with this evidence.

30. In summary, therefore, the tenant denies that it ever agreed with the landlord to pay rent of $101,238 from 1 July 2012 (and increasing by another 4% on each of 1 July 2013 and 1 July 2014) in substitution for its entitlement to require a market review for relevant periods. The tenant says that it is entitled to a market review at any "market review date" as defined in the lease being relevantly:

    a. upon the exercise of its option (by its solicitor's letter dated 17 February 2015) for a further 3 year term from 1 July 2012; and

    b. upon the exercise of its option (again, by its solicitor's letter dated 17 February 2015) for a further 3 year term from 1 July 2015.

31. I find that the evidence given by Mr Kuvacic under cross-examination was also consistent with his denial that there was an oral agreement with Mr Gallas concerning rent payable for the year from 1 July 2012.

32. Further, there is an inconsistency between:

    a. the account of the discussions alleged in the amended Points of Defence and Counterclaim, in which the landlord alleges that there were discussions between both Ino and Michael Kuvacic on behalf of the tenant when [the tenant] allegedly agreed that the proposed rent was "fair";

    b. paragraph 13 of the Gallas statement, to the effect that the tenant "did not object" to a proposed 4% increase allegedly proposed by Mr Gallas; and

    c. paragraph 17 of the Gallas statement, to the effect that only Ino Kuvacic (and not Michael Kuvacic) stated that he "is happy to pay the current rent".

33. The allegations in respect of what was actually said on behalf of the tenant are at variance with each other.[5] In fact, one of the matters relied upon as the basis for the alleged agreement is not what the tenant said, but that it simply "did not object" to the alleged proposal.[6]

34. Also, as appears from the above, the landlord case is also inconsistent with respect to whether the alleged oral agreement was with both Ino and Michael Kuvacic on behalf of the tenant, or just Ino Kuvacic.

35. I also consider that if, as the landlord alleges, there was such an agreement between the parties, it would have been something that the landlord would have been quick to assert, following receipt by its solicitors of the tenant's solicitor's letter dated 17 February 2015, when the tenant exercised its options. Instead, there is no evidence that during the period of time

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5 The amended defence and counterclaim cf. paragraph 17 of the Gallas statement.

6 Paragraph 13 of the Gallas statement.

following the landlord's solicitor's holding response dated 18 February 2015 to the tenant's solicitors, there was ever an express assertion that an agreement in respect of the rent from 1 July 2012 had been reached. In fact, the landlord's solicitor's holding reply to the tenant's solicitor dated 18 February 2015 asserts not that there was any such oral agreement, but that the rent increases that occurred on 1 July 2012 and yearly thereafter after were as "provided for in the lease". It would appear that the landlord's solicitor was referring here to the fixed 4% review dates set out in item 16 of the Schedule to the lease, and not to an agreement between the parties as would obviate the need for a market rent valuation pursuant to clause 11 of the lease.

36. Given the denial of the alleged agreement by Mr Kuvacic on behalf of the tenant, I find that the evidence of the landlord is not sufficient to persuade me that there was an agreement between the parties to the effect alleged in respect of the rent payable for the year from 1 July 2012.

Further Considerations

37. I also accept the tenant's submission that it is settled law in Victoria that an option is an irrevocable offer from the landlord which is accepted by the tenant exercising that option in the time and manner for acceptance: *BS Stillwell & Co Pty Ltd v Budget Rent-A-Car System Pty Ltd.*[7] It is difficult to see how an agreement alleged by the landlord to have been reached in June 2012 in relation to rent payable under a lease from 1 July 2012 could have formed a term of a contract that was not formed until 2½ years later, upon exercise of the option on 17 February 2015. A lease operates as a grant of an interest only from the time of its execution or, in this case, the exercise by the tenant of the option.[8]

38. Further, it follows from the landlord's submissions that the agreement for which it contends is one that arose pursuant to clause 11.1.3(b) of the lease. That clause, dealing with market reviews under the lease, is not invoked other than "upon exercise of options" by the tenant (see Item 16 of the schedule to the lease). The option had not been exercised by the tenant at the time of the alleged agreement pursuant to clause 11 of the lease.

39. I now deal with the landlord's submission that the alleged agreement can be implied by the acts of part performance by the tenant, thus also dispensing for the requirement for the alleged agreement to be evidenced in writing. The landlord relies in this respect on subsequent acts of part performance by the tenant of the alleged agreement, in effect by paying from 1 July 2012 a rent increased by 4% from the previous month "without complaint". Given that acts of part performance relied on to overcome the lack of a memorandum in writing must be specifically referrable to the alleged oral agreement, I am not satisfied that this is so. This is because:

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7 [1990] VR 589 at 594.

8 See also Woodfall *Landlord & Tenant* (loose leaf service) paragraph 5.069; Bradbrook, Croft and Hay *Commercial Tenancy Law* (2009) at 1.10.

a. The increase in rent to $101,238 (plus GST) for the year commencing 1 July 2012 is 4% over the rent for the year before. This is equally referrable to the rent being increased, pending any agreement on or determination of a market review, simply in accordance with the "[annual] fixed" rent increases of 4% provided in item 16 of the Schedule to the lease. Indeed, the landlord's invoice dated 1 June 2012, being the first invoice from the landlord relating to the period from 1 July 2012, describes the 4% increase as "a 4% increase as per lease", and not being referrable to any agreement between the parties pursuant to clause 11.1.3 of the lease.

b. From 1 July 2012, the tenant was overholding pursuant to clause 10 of the lease, the full terms of which (including the overholding clause) continued to apply pursuant to section 28(2)(b) of the Act. In this respect, I find that section 28(2)(b) of the Act does not operate so as to, in effect, create a lease and an interest in land from 1 July 2012, such that, as it was submitted by the landlord, the tenant cannot be regarded as overholding pursuant to the provisions of the lease.[9] Given then, that the tenant was overholding from 1 July 2012 pursuant to the terms of the lease, the increase may be equally referrable to an agreement between the parties of "a different rent" as contemplated by clause 10.1.3 of the lease or an 'increase [in] monthly rent" imposed by the landlord pursuant to clause10.1.4 of the lease.

Conclusion

40. I am not satisfied that there was ever an agreement as alleged in relation to the rent to be paid by the tenant from 1 July 2012. Even if there was, I find that absent a sufficient note of the agreement or acts of part performance, the alleged agreement was unenforceable.

41. My answer to the first question is "no".

Question 2.

Does the rental determination bind the parties?

Relevant provisions of the Act

42. Section 37 of the Act provides, in part:

> 37 **Rent reviews based on current market rent**
>
> (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)-(6).

[9] See texts referred to in fn 6, and Pearce & Geddes, *Statutory Interpretation In Australia* (7th edition) paragraphs 5.26-5.36 concerning presumptions against the proposition that legislation is intended to alter established common law doctrines.

(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 be reasonably expected to be paid for 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) …

(d) …

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…

(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** [**emphasis added]**

Relevant Valuation Principles

43. In *Commonwealth of Australia v Wawbe Pty Ltd and Anor*,[10] Justice Gillard adopted the following statement of McHugh JA in *Legal and General Life of Australia Ltd v A Hudson Pty Ltd* as stating the law concerning challenges to valuation determinations (at [38]-[39]):

> In my opinion the question whether a valuation is binding on the parties depends in the first instance upon the terms of the contract, express or implied…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 a 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 upon 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.
>
> While mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or 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

[10] [1998] VSC 82.

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 the contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it represents 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. 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 [emphasis of his Honour].

44. Justice Gillard went on to say (at [45]):

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

45. The leading authorities on setting aside a rental determination (including the above extract from *Wawbe*) were summarised by Croft J in *Epping Hotels Pty Ltd v Serene Hotels Pty Ltd*,[11] when his Honour concluded (at [59]):

> As the authorities make clear, the Tribunal's task was to consider whether the Rental Determination answered the contractual description of what the valuer was required to do. For present purposes, it is sufficient to note that, by virtue of s 37(1) of the Act, sub-s (2) is taken to be a term of the lease, that is, a term of the contract between the parties. Therefore, the valuer was required to make a determination that accorded with the requirements of that sub-section.

46. Does, then, the rental determination fail to comply with the provisions of section 37(2)(a) and (b) of the Act, as contended by the landlord?

The landlord's submissions

47. I deal with the landlord's contentions first, for it is the landlord that seeks to impugn the rental determination, leading to the tenant bringing the proceeding.

48. The rental determination contain tabulated sections where the valuer recorded rentals for premises submitted to him by the valuers respectively engaged by the landlord and the tenant. In addition, the rental determination contains a further tabulated section containing "a range of other rental data" collected by the valuer.

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11 [2015] VSC 104.

49. The landlord submits that the rental determination failed to comply with section 37(2) of the Act, in that it failed to "take into account"[12]:

    a. the provisions of the lease (as required by section 37(2)(a) of the Act); and

    b. the rent that would be expected to be paid for the premises if they were unoccupied and offered for lease for the same, or substantially similar, use to which the premises may be put under the lease, (as required by section 37(2)(b) of the Act).

50. In respect of the second alleged failure, the landlord says that in determining the current market rent for the premises for the period commencing 1 July 2015, the valuer "took into account" other premises in the area of the premises which were not unoccupied and were not offered for lease on "the same, or substantially similar, use to which the premises may be put under the lease" within the meaning of section 37(2)(b) of the Act.

51. In order to be "substantially similar", the landlord submits, the premises to which the valuer was to have regard were those where the usage not only was "like the", "alike to the" or "resembled [that of] the"[13] premises, but that, because the similarity is required to be "substantial", the similarity is required to be "of real importance or substance".[14]

52. Counsel for the landlord went further during the course of submissions. He submitted that in order to comply with the requirements of section 37(2)(b) of the Act, the requirement that the valuer should have had regard to premises that were offered for lease for "the same, or a substantially similar, use" meant that the valuer should have had regard to other premises that have the tenant's following essential characteristics:

    a. a general liquor license;

    b. a "stand-alone" business (and not being part of a "chain" of retail outlets);

    c. seating for patrons; and

    d. open in the evenings, until late (the "**essential user characteristics**").

53. In response to a request by the tenant for particulars of the premises alleged to have been taken into account by the valuer which were not unoccupied and were not offered for lease on the same, or substantially similar, use to which the premises may be put under the lease, the landlord provided these alleged instances:[15]

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12 See paragraph 20A(c)-(e) of the Amended Points of Defence and Counterclaim (presumably intended to be a reference to refer to the requirement of the Act-"[have] regard to…").

13 See *Pocket Oxford Dictionary*, 4th edition, definition of "similar".

14 See Pocket Oxford Dictionary, 4th edition, definition of "substantial(ly)".

15 See paragraph 2 of Further and Better Particulars of Amended Defence and Counterclaim dated 12 October 2016.

Premises	**Alleged use on which offered for lease**
101 Bay Street, Port Melbourne (premises 6 and 7[16] on page 14 of the rental determination)	"were used as a pharmacy and real estate agency respectively"
103D Bay Street, Port Melbourne (premises 8 on page 14 of the rental determination)	"in the same complex as 101 Bay Street, Port Melbourne"
108 Bay Street, Port Melbourne (premises 9 on page 15 of the rental determination)	"forms part of the old Woolworths Supermarket and is due to be vacated in 2016"
271 Bay Street, Port Melbourne (premises 16 on page 15 of the rental determination)	"in which previous tenant failed and are now used as an Indian restaurant
325 Bay Street, Port Melbourne (premises 17 on page 16 of the rental determination)	"which are now used by *Yoga*
293 Bay Street, Port Melbourne (premises 18 on page 16 of the rental determination)	"which are now used by *Tiny Polkadot*"
298-300 Bay Street, Port Melbourne (premises 19 on page 16 of the rental determination)	"which are now used as a beauty salon"
136-138 Rouse Street, Port Melbourne (premises 21 on page 16 of the rental determination)	"which are away from the main trading area"
180 Bridport Street, Albert Park (premises 23 on page 16 of the rental determination)	"part of a strong restaurant chain. Larger site than subject [site]. Much superior location" without explanation as to why those comments have bene made, confirming that the valuer seems to have a pre-determined rent range in mind, and that he is taking into

[16] The premises referred to in the valuer's table on 14-17 of the rental determination were numbered, during argument, for convenient reference, with the result that the first premises first described as 49 Bay Street, Port Melbourne is no "1", and the premises last described as 71a Ackland street, St Kilda is no "27".

	account irrelevant considerations that are not expressly made clear in the body of the report.

54. Developing this argument during submissions, counsel for the landlord further contended that the following premises, not having the essential user characteristics, should therefore have been excluded from the premises to which the valuer had regard:

Premises to which, the landlord contends, the valuer should not have had regard	**Reason for the landlord contending that the valuer should not had regard to the premises**
(premises 5 on page 14 of the rental determination)	"Chicken and salad bar"-not the same, or substantially similar use to which the premises may be put under the lease
(premises 20 on page 16 of the rental determination)	"Café/bakery"-not the same or substantially similar use to which the premises may be put under the lease.
(premises 22 on page 16 of the rental determination)	"Specialty coffee"- not the same or substantially similar use to which the premises may be put under the lease.
(premises 23 on page 16 of the rental determination)	Part of a restaurant chain- not the same or substantially similar use to which the premises may be put under the lease.

55. The landlord submits that the valuer therefore wrongly "took into account" "office space and other commercial premises", but not "Licensed Premises, being cafes, Restaurants and bars with extended trading hours and seating for patrons".[17]

56. In addition, counsel for the landlord contended during argument that insofar as the valuer had regard to premises broadly described as "restaurants", the information contained in the rental determination is insufficient to determine the extent to which each possessed the essential user characteristics. They were identified by counsel as:

Premises to which, the landlord contends, it is impossible to determine whether the valuer should have had regard	**Description in the rental determination**

[17] See paragraph 20A of the Respondent's Amended Defence and Counterclaim dated 12 October 2016, and paragraph 7 of respondent's written contentions.

Premises 16 on page 15 of the rental determination	"Indian Restaurant" 271 Bay Street, Port Melbourne
Premises 21 on page 16 of the rental determination	"Restaurant" 136-138 Rouse Street, Port Melbourne
Premises 24 on page 17 of the rental determination	"Itall Co Restaurant" 1/173-177 Barkly Street, St Kilda
Premises 25 on page 17 of the rental determination	"Ricardos Trattoria" 99 Dundas Place, Port Melbourne
Premises 26 on page 17 of the rental determination	"Continental Café and Restaurant" 117 Dundas Street
Premises 27 on page 17 of the rental determination	"The Vineyard" 71a Ackland Street, St Kilda

57. In paragraph 2 of its particulars dated 12 October 2016, the landlord also alleged that, presumably in reliance on the valuer's comments alongside each relevant premises, the valuer failed to take into account "correctly" the following premises:

Premises	**Objection-landlord's observations**
1R/1 Beach Street, Port Melbourne "Specialty Coffee" (premises 22 on page 16 of the rental determination)	The valuer has remarked "Rent appears high", without explanation as to why, confirming that the valuer seems to have a pre-determined rent range in mind, and that these premises do not fit within that range.
1/173-177 Barkly Street, St Kilda "Itall Co Restaurant" (premises 24 on page 17 of the rental determination)	The valuer has remarked "somewhat a fringe area with restaurant on gd floor of new apartment complex. A superior building with some captive trade" without explanation as to why those comments have been made, confirming that the valuer seems to have a pre-determined rent range in mind, and that he is taking into account irrelevant considerations that are not expressly made clear in the body of his report.
99 Dundas Place, Port Melbourne "Ricardos Trattoria" (premises 25 on page 17 of the rental	The valuer has commented "Superior location and trading area" without explanation as to why those comments have been made, confirming that the valuer

determination)	seems to have a pre-determined rent range in mind, and that he is taking into account irrelevant considerations that are not expressly made clear in the body of his report.
117 Dundas St , Albert Park "Continental Café and Restaurant" (premises 26 on page 17 of the rental determination)	The valuer has commented "Superior location close to *Ricardos*. Rent indexation is high compared to market standards" without explanation as to why those comments have been made, confirming that the valuer seems to have a pre-determined rent range in mind, and that he is taking into account irrelevant considerations that are not expressly made clear in the body of his report.
71a Ackland Street, St Kilda "The Vineyard" (premises 27 on page 17 of the rental determination)	The valuer has commented "Rent reflects Ackland Street location and site goodwill. Strong outdoor setting (sic) for 80 patrons. Far superior to subject [premises]. Rent without market review since 2011" without explanation as to why those comments have been made, confirming that the valuer seems to have a pre-determined rent range in mind, and that he is taking into account irrelevant considerations that are not expressly made clear in the body of his report.

The tenant's submissions

58. The tenant submits that the valuer is not required, when having regard to the consideration described in section 37(2)(b) of the Act, to have regard to comparables that are virtually identical to the subject property, and therefore is not required to consider only leases of other premises having the essential user characteristics of the tenant. I agree, and I therefore reject the landlord's submission that the valuer was required to have regard to premises having the essential user characteristics of the tenant in order to have sufficiently had regard to "the rent that would be reasonably expected to be paid for 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" as required by section 37(2)(b) of the Act. I see no basis for the words of the section being construed in this way.

59. The tenant submits, correctly I find, that a valuer is required only to have regard to those that have "…the same, or a substantially similar, use to

which the premises **may be put under the lease**". Item 15 of the lease states that the "Permitted Use" is "Licensed Café".

60. The tenant also submits that the terms of section 37(2) of the Act do not prescribe the properties that the valuer must take into account or disregard for the purposes of determining the current market rent. On the contrary, the tenant submits, by the expression "**have regard to**…the rent that would reasonably be expected to be paid for the premises…" (emphasis added), the sub-section leaves open to the valuer's discretion as to what other premises that should be taken into account, and the weight to be attached to those properties. This approach, the tenant submits, is understandable, given that there may be a limit to the number of comparable leases "offered for lease for the same, or substantially similar use, to which the premises may be put under the lease".

61. Importantly, the tenant submits, section 37(2) of the Act does not *require* the valuer not to have regard to premises for a different or substantially different use to which the premises may be put under the lease. In support, the tenant contends that section 37(2) of the Act proscribes certain considerations by the use of clear words, such as the valuer is required "**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" (emphasis added), as appears in the last 4 lines of section 37(2) of the Act. The tenant submits, therefore, that there is no such words of injunction preventing the valuer from having regard to premises for a different or substantially different use to which the premises may be put under the lease, as part of his general expert discretion in the valuation process, provided that one or more of the premises to which the valuer has had regard has a use of the type described in section 37(2)(b) of the Act.

62. In summary, the tenant submits, the words of section 37(2)(b) of the Act do not prescribe the extent to which the valuer must consider premises "offered for lease for the same, or a substantially similar, use to which the premises may be put under the lease", and they do not proscribe consideration by the valuer of other leases the user requirements of which do not fall into this category..

63. The tenant goes as far as to contend, as I apprehended it, that the breadth of the valuer's discretion is such that there only needs to be one premises disclosed in the valuer's table that answers to the description of having "the same, or similar use to which the premises may be put under the lease", to which the valuer can be presumed to have "had regard", as would therefore satisfy the requirement of section 37(2)(b) of the Act.

64. In support of its position, the tenant also submits that the words "having regard to" in section 37(2) of the Act are deliberately left "ambiguous", so as not to fetter unduly the discretion of the valuer, and that this has been

recognized judicially.[18] I do not accept that the authorities relied on provide adequate support for this submission. Rather, they are directed towards the expression "take into account", which appears in the injunction at the end of section 37(2) of the Act.

65. The tenant also relies on various definitions of the word "similar", indicating that it is, in its terms, a word of "flexible import" that requires only a likeness, not an identical relationship. The tenant accepts that the word "substantially" is a word of amplification, but submits that it is also a word of flexible import, consistent with the policy of the legislature to vest the specialist retail valuer with a discretion to conduct the determination of the current market rent in the manner that he or she sees fit.

66. The tenant submits that the expression is sufficiently flexible that even if none of the restaurant or café premises referred to in the tabulations of the valuer were licensed, the landlord could not sensibly contend that they are not "substantially similar" to a licensed café, being the permitted use of the premises.

Discussion and Findings

67. I consider that in order for the valuer to have satisfied himself that he has had regard to "the rent that would be reasonably expected to be paid for 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", he need only look to the essential use of the premises under consideration. I find, doing as best I can from the valuer's descriptions given in his table, that the essential use of each of the various premises described in the valuer's table at numbers 16, 21 and 24-27 on pages 15-17 of the rental determination is that of a "restaurant, not being part of a chain of restaurants".

68. I therefore find that the premises described in premises numbers 16, 21 and 24-27 on pages 15-17 of the rental determination are offered for lease for:

    a. the "same" use (to the extent that any of them may have a general liquor license, like the tenant, or even a licence in modified form); or

    b. "substantially similar" use (to the extent that any of them may not have a liquor license)

    to which the premises may be put under the lease, within the meaning of section 37(2)(b) of the Act.

69. This leads me to consider whether the reasons contained in the rental determination are such as to indicate, when read as whole, that when determining the current market rent, the valuer had regard to "the rent that would reasonably be expected to be paid for premises having the same, or

[18] See *Epping Hotels Pty Ltd v Serene Hotels Pty Ltd* [2015] VSC 104 at [61] and *Serene Hotels Pty Ltd v Epping Hotels Pty Ltd* [2015] VSCA at [69].

substantially similar, use to which the premises may be put under the lease".

70. The giving of reasons by an expert serves generally as a means by which a reviewing Court or Tribunal is able to be satisfied that he or she took into account matters required to be taken into account. Section 37(6) of the Act expressly makes it clear that, in the case of a specialist rental valuer appointed under the provisions of the Act, the reasons given by the valuer must not only be "detailed", but they must "specify the matters to which the valuer had regard in making the determination". These are, at least, I consider, the matters set out in section 37(2)(a)-(d) of the Act.

71. For the reasons that follow, I am unable to be satisfied that this is so.

72. The extent to which the valuer has had regard to the requirement set out in section 37(2)(b) of the Act can only gathered from the text of the rental determination, the relevant parts of which read as follows:

> **5.3 Comments on [respective submissions of the parties]**
>
> The [tabulated] summary, and comments [within the tabulated summaries] on the [landlord's and tenant's respective written] submissions are not to be construed that I agree or otherwise with their content. I have considered the details of the submissions as part of the determination process.
>
> In my role as Determining Valuer I am required to make my own inquiries and form my own opinions in this matter.
>
> **6. Valuation Rationale and Methodology**
>
> **6.1 Basis of Determination**
>
> In regard to rental evidence I have noted the evidence submitted on behalf of the parties and made corrections where necessary.
>
> **I have also considered a range of other rental data collected by me from other sources**.
>
> As is often the case **there is a scarcity of directly comparable evidence**.
>
> I have considered rental data related to premises where there have been lease renewals and market reviews under leases.
>
> Although I have not been privy to sighting all leases of **comparable evidence**, consideration has been given to the following:
>
> - The term of the lease and availability of further terms
> - Date rental was set
> - Commencement date of the lease
> - Frequency of rent reviews and basis of those reviews
> - **Permitted use of the premises**
> - Building details, style, size and conditions

- Lessor and Lessee fixtures and fittings
- Incentives
- Impact of [the Act] (if applicable)

It is generally accepted that rental constitutes only one element or term of the agreement and that there are many other terms agreed upon between the parties which require consideration.

In this particular assignment there has been a considerable body of rental information either as presented in the [parties'] submissions or as a result of my own inquiry.

Although the evidence is not entirely uniform and presents considerable anomalies, it is not uncommon to find such variances given that no two properties are completely identical in all respects…

6.2 Methodology and Approach to Rental Value

I have applied the appropriate valuation technique of Direct Comparison to relate evidence to the subject premises.

For the benefit of the parties I have set out a definition of this valuation technique as derived from Rost & Collins *Land Valuations & Compensation in Australia*:

The Direct Comparison Technique is considered to be the primary method of valuation. ***This method is effectively applied where leasehold and subject premises are sufficiently alike to enable them to be compared without much adjustment for points of difference****. However, inevitable adjustments are often made for all factors which influence market rental value; including date of negotiation, lease terms and conditions, location, building size and condition, quality of accommodation, inherent appreciation, obsolescence, the inclusion or exclusion of outgoings in the rental and all other elements which differentiate between tenancies in order to ultimately establish the rental value of the subject tenancy.*

From my research, inquiry, consultation and understanding of the evidence, I concluded that unit rate adjustments were required to reflect differences in location, position in strip, variation in lettable areas, style and layout of areas and rental review dates.

It is also necessary to consider the relationship of the premises and rental review dates.

It is also necessary to consider the relationship of the premises' size to rental.

Evidence of rentals considered included research of my own and consideration of evidence provided in the submissions of the parties.

In accordance with usual practice, evidence provided in submissions was where possible verified for accuracy and currency. In some cases the evidence provided required updating, adjustment and amendment to reflect the correct position, building areas and lease variations.

6.3 Comments on Evidence

Evidence researched and considered was in some instances provided on a confidential basis and provision of specific detail is not appropriate, however such detail is retained on file.

Where it was considered appropriate I have endeavoured to provide as much information for the benefit of the parties.

The following Table sets out the rental data including data that I have collected as part of my role as Determining Valuer.

Table of Rental Information

[The valuer provides in the table details of leases in respect of premises in Port Melbourne, Albert Park and St Kilda which, for reference purposes during the hearing, were numbered 1-27, and which are referred to above in the context of the landlord's submissions**]**

From the table of rental information which includes information provided in the Submissions of the parties and from my own enquiries, it will be noted that the rental range is from a low of $385 [psm] per annum to a high of $937 [psm] per annum.

The data at the extremes of this range have limited relevance to this assignment for reasons as noted and including locational differences, building style, age, condition and area and taking into account details of lease conditions including market rental reviews.

It is my view the most relevant data is in the range of $500 to $570 [psm] per annum net.

The rental data provides one aspect of the rent review and other considerations include the provisions of the lease, the provisions of the [Act] and my own understanding and interpretation of the broader and local retail market including those matters landlords and tenants consider relevant in lease negotiations.

6.4 Conclusions:

My opinion has been derived from my interpretation of the data, consultation with estate agents operating within the Port of Melbourne area and Bay Street specifically, discussions also took place with other property consultants, landlords and tenants.

Consideration was given to the physical character of the premises and its specific position within the precinct.

In conclusion I must take into account the provisions of section 37 of the [Act] as it related to "rent reviews based on current market rent".

[Here the valuer sets out the words of section 37(1)-(2) of the Act]

Within the rental range of $500 to $570pm^2 per annum net I have determined the current market rental at the relevant date after taking into account the lease and the provisions of Section 37 of the Act at $525pm^2 per annum which may be expressed as:

163m2 @ $525pm^2 per annum net = $85,575.00 per annum net and excluding GST.

Rounded to $85,000.00 per annum net and excluding GST.

6.5 Reasons for Determination

In addition to due consideration given to the rental evidence I have also taken into account the following:

- The availability of further terms under the lease
- The submissions made by the parties or on their behalf
- Landlord and Tenant fit-out of the premises
- Style of premises, its street presence, general appeal and quality.
- The condition of the premises
- The specific location of the property.
- Adaptability of the premises to alternative use or uses
- The likely appeal the premises will have amongst potential tenants in the market place at the relevant date if offered for lease on similar terms as provided in the current lease.

7. …

8. Determination:

After considering the contents of this report together with the Submissions made either by or on behalf of the parties, my own independent enquiries, research, the lease and all appropriate valuation techniques and methodology, I determine the rental on the demised premises as at 1 July 2015.

$85,000 PER ANNUM PLUS OUTGOINGS AS PROVIDED BY THE LEASE AND EXCLUDING GST

...

Determined at Camberwell on this 26th day of October 2015.

(signed) The Valuer

[emphasis added].

73. The above extract from the reasons show, in substance, that the valuer first identified a "rental range" between a "low" of $385pm^2$ per annum (as to which particular premises referred to in the tables contained in the rental determination, it is not clear[19]) and a "high" of $937pm^2$ per annum.[20] The valuer goes on to state that, in his view, "the most relevant data is in the range of $500 to $570 [psm] per annum net". It is impossible to determine from this statement the extent to which the valuer considered, if at all, premises having the same, or a substantially similar, use to which the premises may be put under the lease. In particular it is not clear, other than perhaps by supposition, that the valuer had regard to premises 16, 21 and

[19] The premises nearest this rate is $386, being the first premises in the table of premises submitted by the tenant's valuer.

[20] Presumably premises no 27 on page 17 of the valuation.

24-27, being premises that I have found have the same, or substantially similar use as that to which the premises may be put under the lease.[21]

74. Further, having identified "the most relevant data range of $500 to $570 [psm] per annum net", there are no particulars provided by the valuer of how he then arrives at a current market rental of $525 per square metre. Having expressly informed the reader about his use of the *Direct Comparison Technique* which, he states, involves the making of "inevitable adjustments for all factors which influence market rental value", no particulars are provided as to the adjustments that were presumably applied to the rents payable for other relevant premises to take into account factors applicable to the premises that may "influence the market rental value" of the premises, even at a very general level of description.

75. Section 37(6)(b) of the Act requires the valuer to give "detailed reasons". Section 37(6)(c) of the Act requires the valuer to "specify the matters to which the valuer had regard in making the determination" including, I consider, the matters to which the valuer is required to have regard in section 37(2) of the Act. 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 section 37(6) of the Act.[22]

76. I therefore consider that the reasons of the valuer do not have sufficient detail as to determine from the terms of the rental determination the extent to which:

    a. if at all, the valuer had regard to the rent that would be reasonably expected to be paid for 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; and

    b. that if he did, the reasons (even in general terms) for the "inevitable adjustments" that the valuer would have made using the Direct Comparison Technique as described by him.

77. Without these details, I consider the reasoning to be deficient, and not in accordance with the Act.

78. My answer to question (2) is "no".

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[21] The "most relevant" rental data range of between $500 and $570 would suggest that premises 16, 21, 26 and 27 were not taken into account.

[22] See comments of Senior Member Riegler to like effect in *Higgins Nine Group Pty Ltd v Ladro Greville St Pty Ltd* [2015] VCAT 1687 at [32].

Question 3

Should the valuer conduct any further rental determination for the parties?

79. The Tribunal has broad powers set out in section 91 of the Act to "require anything to be done [as it] considers necessary or desirable to resolve the matter concerned. [23]

80. The Tribunal can also make orders requiring a party to do anything.[24]

81. My provisional view is that it would be open to me to make an order to the effect that unless the parties agree to remit the matter to the valuer so that he may undertake a rental determination in respect of the first year of Term 2 of the lease, and a further rental determination for the first year of Term 3 of the lease having regard to the matters contained in my Reasons, then the parties must apply to the Small Business Commissioner to appoint a substitute specialist retail valuer to do so, and that the parties are to pay the costs of such valuation in equal shares. I would not wish the parties to incur the costs of such a course if the knowledge and experience possessed by the valuer may yet, by agreement between the parties, be drawn upon.

82. The future course of the matter was not the subject of extensive submissions by the parties during the hearing. This may need to be re-considered, having regard to the particular declaratory orders now made. I would therefore benefit by receiving short oral submissions on the issue, before I make final orders, and my accompanying orders reflect this.

A T Kincaid
Member

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[23] Within the meaning of section 91(1)(e) of the Act.
[24] Section 91(1)(a) of the Act.