

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP61/2019

CATCHWORDS

Section 37 *Retail Leases Act 2003* (Vic) – Rental determination – adequacy of reasons – special nature of premises – confidential information about comparables – failure to disclose reasoning behind analysis of comparables – contradictory description of a key fixture - expert's determination vitiated by error.

APPLICANT	Leonello Service Centre Pty Ltd (ACN 005 378 807)
RESPONDENT	Rany Pty Ltd (ACN 108 294 480)
WHERE HELD	Melbourne
BEFORE	H. Nash, Member
HEARING TYPE	Hearing
DATE OF HEARING	21 and 22 August 2019
DATE OF ORDER	8 November 2019
CITATION	Leonello Service Centre Pty Ltd v Rany Pty Ltd (Building and Property) [2019] VCAT 1752

ORDER

- 1 I declare that the rental determination of Stuart Norman of Sutherland Farrelly dated 11 April 2017 in respect of the BP Service Station, 1-7 Ormond Road (Corner Hallam Road) Hampton Park, Victoria, 3976 fails to comply with section 37 of the *Retail Leases Act 2003* (Vic) and is set aside.
- 2 I declare that the rental determination of Stuart Norman of Sutherland Farrelly dated 11 April 2017 in respect of the BP Service Station, 1-7 Ormond Road (Corner Hallam Road) Hampton Park, Victoria, 3976 is vitiated by error and is of no effect.
- 3 I declare that the parties are not bound by the rental determination of Stuart Norman of Sutherland Farrelly dated 11 April 2017 in respect of the BP Service Station, 1-7 Ormond Road (Corner Hallam Road) Hampton Park, Victoria, 3976.

- 4 Costs are reserved. Any Application for costs must be made no later than 13 December 2019 and supported with written submissions with specific reference to section 92 of the *Retail Leases Act 2003* (Vic).

H. Nash
Member

APPEARANCES:

For Applicant

Mr K. Mihaly of counsel

For Respondent

Mr C. R. Northrop of counsel

REASONS

- 1 This dispute arises between Leonella Service Station Pty Ltd (the landlord) and Rany Pty Ltd (the tenant) of a service station located in Hampton Park, over a market rent determination undertaken by Stuart Norman (**Valuer**) of Sutherland Farrelly dated 11 April 2017 (**Determination**).
- 2 The landlord seeks a declaration that the Determination is vitiated by mistake or does not set out adequate reasons for reaching the conclusion about market rent and is therefore not binding on the landlord and tenant.
- 3 The lease relates to a Service Station located on the corner of Ormond Road and Hallam Road in Hampton Park. It commenced on 1 September 2008 for an initial period until 21 September 2016, with two further options for five-year terms.
- 4 The premises are retail premises and it is not disputed that the *Retail Leases Act 2003* (Vic) (**the Act**) applies.

BACKGROUND

- 5 Mr and Mrs Toma are the directors of the tenant. They commenced operating the service station in 2002 as commission agents.
- 6 In 2009 a lease was entered into between the landlord and tenant. The lease is dated 6 May 2009. It has a commencement date of 1 September 2008 and the lease term expires on 21 September 2016, with the option of two further terms each of five years.
- 7 On 18 April 2016 the first option for a further five-year term was exercised on behalf of the tenant. On 21 April 2016 this exercise of the option was acknowledged by the landlord.
- 8 The rent payable under the first lease was \$176,348.00 plus GST per annum. On 19 September 2016 the landlord advised that the new rent for the first option would be \$275,000 plus GST per annum. The tenant in response, requested that the market rent be determined under the lease, and referred to an independent valuer pursuant to clause 11¹.
- 9 Neither party could agree as to the identity of the valuer and so an application was made to the Office of Small Business Commissioner to appoint an independent valuer to undertake the process of determining the market rent for the new lease.
- 10 On 13 January 2017 the Office of Small Business Commissioner appointed the Valuer to undertake the rent review. As part of the submissions received by the Valuer, the landlord provided a confidential report to the effect that the market rent ought to be \$270,000 plus GST per annum, based on a valuation prepared by a specialist valuer, which included details of other service stations and their current rent.

¹ The terms of clause 11 are set out later in this decision

- 11 The tenant also provided confidential information wherein it provided an expert valuation which included details of rental being paid at other service stations together with information regarding the sales at the convenience store component of the premises and the volumes of petrol sold. The tenant's valuation determined that the market rent should be \$163,000 plus GST per annum.
- 12 On 11 April 2017 the Valuer published the Determination and found that the market rent for the premises starting 1 September 2016 was in his opinion \$210,000 plus GST per annum.
- 13 These proceedings challenging the validity of the Determination were issued in January 2019.
- 14 At the hearing before the Tribunal Mr Leonello gave evidence on behalf of the landlord and Ms Toma gave evidence on behalf of the tenant. Each of these witnesses' evidence was directed towards the background of the relationship between the parties and a long-running dispute between them regarding a seven-metre high sign and some information regarding the landlord installations at the premises and the subsequent works by the tenant using funding from BP.

The dispute

- 15 The primary question for resolution by the Tribunal is whether or not the Determination is valid.
- 16 In order to determine the validity of the Determination, I must decide whether it is vitiated by error or whether it fails due to inadequate reasons.
- 17 It is claimed that the Determination fails in two respects:
 - i that there is an ambiguous or erroneous reliance on certain facts -
 - (a) the number of fuel hoses at the service station;
 - (b) the tenant obligation to maintain the structure, which is not correct;
 - (c) the tenant responsibility for essential safety measures which is not correct; and
 - (d) that it is not clear how the valuer dealt with the landlord's installations and the tenant's installations including how it dealt with the tenant's works done to the landlord's installations as part of the BP refurbishment.

Further it is submitted there is no indication or explanation of how these facts have been considered by the Valuer and whether they have any impact on the rent determination.

and

- ii that the rent determination does not provide detailed reasons in accordance with section 37(6) of the Act.

- 18 If the Determination is invalid for any reason, the tenant asserts that equity must step in and save it, due to the conduct of the landlord after receipt of the Determination.
- 19 However, should I find that the rent determination is not valid then the tenant relies on the affirmative defences of equitable election, waiver and estoppel by conduct. The tenant claims that these defences, if established, are sufficient to justify the Tribunal not making a declaration in favour of the landlord to set aside the rent determination.

IS THE RENT DETERMINATION VALID?

When can an expert determination be set aside?

- 20 The law as to when an expert determination can be reviewed by the courts and tribunals is clear. It is only when there has been fraud, collusion or a mistake arising from the failure of a valuer to carry out the task in accordance with the contract between the parties.
- 21 In this case, there is no suggestion of fraud or collusion, therefore it must be considered whether the landlord has a basis to claim that the Determination is vitiated by a mistake because the Valuer has failed to consider the matters set out in section 37 of the Act or the terms of the Lease.
- 22 The trend of the authorities establishes that the mistake must be of a kind which demonstrates that the valuer did not perform the task as required by the contract, making allowance for the fact that the valuer in construing the agreement, where necessary, is a valuer not a lawyer.
- 23 In *Wawbe*² Gillard J set out the three questions to be considered by a court [or tribunal] in considering whether an expert determination is vitiated by mistake:
- (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 made in accordance with the terms of the contract and accordingly does not bind the parties?³

What was remitted to the Valuer?

- 24 The Valuer was appointed by the parties in accordance with the terms of the lease. His authority derives from this agreement between the parties and the scope of his retainer is set out in the terms of the lease.
- 25 In order for the landlord to succeed in seeking to have the Determination set aside, it must satisfy the Tribunal that the Valuer did not undertake the task of determining the market rent as he was required to do. Simply being

² *Commonwealth of Australia v Wawbe Pty Ltd & Pinebark Park Pty Ltd* [1998] VSC 82

³ See also *Keriani Pty Ltd v Long* (Building and Property) [2015] VCAT 1212 at [14]–[18] per DP Aird.

unhappy with the result is not sufficient. The parties have through the terms of the lease agreed to be bound by the Determination unless it is vitiated by a fundamental error⁴.

Lease terms

26 Clause 11 of the lease relevantly states

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 their being informed of the **Valuer's** appointment, and
- (b) determine the current market rent as an expert.

...

11.1.7 The **Valuer** must make the determination of the current market rent and inform the parties in writing of the amount of the determination and the reasons for it as soon as possible after the end of the 21 days allowed for submissions by the parties.

...

11.2 The **Valuer's** determination binds both parties.

...

11.4 Until the determination is made by the **Valuer**, the **Tenant** must continue to pay the same **Rent** as before the review date. Within 7 days of being informed of the **Valuer's** determination, the parties must make any necessary adjustments.

27 In addition to the terms expressed in the lease, section 37 of the Act is incorporated into those terms.

Were there mistakes by the Valuer?

28 The landlord complains that there are four erroneous or ambiguous statements in the Determination. Each of those is set out below.

1. Landlord's installations and tenant's works

29 Of relevance is Annexure A to the lease which sets out a list of the landlord's installations. Items in this list include:

- i the fuel pumps (noting that there are 3 x 4 fuel hoses, 2 x 2 LPG hoses, and 1 x 2 diesel hoses),
- ii the fit out for the convenience store including
 - a the shelving,

⁴ such as where the valuation relates to the wrong premises, as suggested by McHugh JA in *Legal & General Life of Australia Ltd v Hudson Pty Ltd*, supra

- b the security system,
 - c the point of sale system, and
- iii all other fixtures and fittings not shown as tenant's installations [sic].
- 30 Annexure B sets out the list of tenant's installations at the commencement of the lease, and records that there are none.
- 31 In 2014 the tenant changed the business from 'Foodies' to become a BP branded petrol station. Under the terms of the agreement between the tenant and BP, changes were made to the signage and other aspects of the premises.
- 32 As part of the arrangement with BP, BP also provided the tenant with \$50,000 to be used to make improvements to the interior of the service station in the convenience store area. The tenant used these funds to change the carpet, curtains, lighting and to replace some of the damaged tiles of the false ceiling and paint the rest of the ceiling.
- 33 The tenants also updated the security camera system from a PCR-based system to a digital system and changed the point of sale system so that it interacted with the BP network system.
- 34 Previously the tenants had chosen to replace the landlord's shelving units with new units and moved the shelving units owned by the landlord into storage.
- 35 The point of sale system cost \$15,047.78. By an agreement between the landlord and the tenant, the landlord paid for the system upfront and the tenant reimbursed the landlord \$12,000, by payment of \$1000 per month for 12 months.
- 36 The landlord complains that the Determination does not accurately reflect what are the landlord's installations as compared with the tenant's installations when the Determination states that there were improvements to the premises undertaken by the tenant⁵.
- 37 In particular, it refers to the tenant having undertaken refurbishment works of the shop including replacement of shelving, CCTV equipment, security wires above the counter, new suspended ceiling, replacement 'point of sale' equipment and replacement signage also installed by BP.
- 38 The Valuer does not then state whether or not these items have been considered in the Determination as landlord's installations or whether they have been disregarded now by reason of the tenant's refurbishment works indicating that the Valuer considered them to now be tenant's installations⁶.
- 39 I do not agree, this reference to landlord's installations and tenant's installations is recognition by the Valuer of his obligations as to what he

⁵ Page 6, paragraph 2 of the Determination.

⁶ Page 8, paragraph 2 of the Determination.

must have regard to and what he must disregard when undertaking the market rent determination.

- 40 The Valuer's reference to these matters cannot be read in isolation from the remainder of his discussion about installations and in particular his reference on page 8 in the third paragraph that in accordance with the Act his assessment of rental value "*excludes all items regarded as tenant's fittings or tenant's improvements, noting the description above.*" There is no ambiguity in this explanation of his obligations.

2. Tenant's obligations to maintain the premises

- 41 The Determination refers to the tenant's responsibility for maintenance at the premises as "*all usual repairs and maintenance*"⁷ and at another place in the Determination states that the tenant is "*responsible for the payment of all usual outgoings including ... routine maintenance*"⁸.
- 42 When the statements in the preceding paragraph relied on by the landlord as being ambiguous or perhaps contrary to the tenant's obligations under the Act, are read in the context of the sentence and paragraphs in which they occur, the alleged ambiguity falls away.
- 43 The reference on page 10 of the Determination in context states:

Finally, I reiterate the following provisions of the Lease Agreement, previously discussed in my report:

...

- The tenant is responsible for all usual repairs and maintenance, including monitoring and managing the fuel storage and supply equipment.

...

- 44 It is clear that this is a summary of the relevant provisions of the lease indicating that the Valuer has had regard to the terms of the lease. Further, throughout the Determination, the Valuer acknowledges the application of the Act to the lease.
- 45 There is nothing in the Valuer's references to the tenant's maintenance obligations under the lease and the Act which gives rise to any apparent error in the Valuer's consideration of these matters.
- 46 I find that it is not an ambiguous reference but rather a statement of what is recorded in the lease between the parties.

3. Tenant's obligation to maintain essential services

- 47 This complaint refers to the statement in the Determination that the tenant is "*responsible for the payment of all usual outgoings including rates, building and other insurances, essential services and routine*

⁷ Page 10. Penultimate dot point

⁸ Page 11 first paragraph under the heading 2.7 Outgoings

maintenance”⁹. The landlord suggests that the use of the term “*essential services*” is a reference to the essential safety measures of a retail premises which, under the Act, are the responsibility of the landlord, not the tenant.

- 48 The tenant argues that term “*essential services*” should be given its ordinary or common usage meaning and is a reference to water, gas and electricity. If it does take on this meaning, then the valuer is correct in stating that they are the obligation of the tenant to pay for.
- 49 I find that the reference to essential services in this context is those as asserted by the tenant. It is stretching the language beyond its clear and unambiguous wording to suggest that it is a reference to essential safety measures. The choice of words is an accurate one by the Valuer.

4. Number of fuel hoses at the premises

- 50 When describing the canopy area and fill stations for petrol¹⁰ the Valuer describes the area as being
- the petrol filling area includes four pump islands, having a total of 12 fill points with six dispensers (three 4-point fuel dispensers, single 2-point diesel, plus two 2-point LPG).
- 51 The landlord says that this is confusing and ambiguous because there is a reference to 12 fill points when in fact there are 18 and that the description of the breakdown of the fill points in brackets total 18 points. The landlord argues that it is therefore unclear as to whether or not the Valuer has had consideration of there being 12 fill points or 18 fill points. The landlord says that the number of fill points would have a material impact on the market rent determination, and it is unclear from this sentence, how many fuel fill points the Valuer has taken into consideration in the Determination.
- 52 The tenant says that it is clear that the number of total petrol bowsers and LPG bowsers and diesel bowsers is 18 and it’s simply perhaps the way that the Valuer has described them as only being 12 fill points meaning fill points for petrol as opposed to the diesel and LPG points. In any event the tenant says that this is not sufficiently ambiguous or erroneous to undermine the validity of the Determination nor has the landlord identified whether or not it would have made a difference to the valuation.
- 53 There is ambiguity in this description of the fill points at the premises. The reference to 12 fill points contradicts the actual number of fill points on site and the fill points enumerated in brackets.
- 54 I accept the landlord’s position that the contradictory description of the fill points is at best ambiguous and at worst erroneous.

⁹ Page 11 of the Determination

¹⁰ Page 7 of the Determination

If there were mistakes made by the Valuer, are they sufficient to vitiate the Determination?

- 55 The submission from the landlord was that the number of fill points has an impact on the volume of sales of fuel in that the more fill points the more fuel that can be sold as the more vehicles that can pass through the service station. As the volume of fuel sales is a factor that the Valuer has said that he has considered in reaching the Determination, I accept that the number of fill points available at the premises is a matter which may have an impact on the market rent determination.
- 56 I find that this mistake is one which is sufficient to vitiate the Determination. This is because the misdescription or contradictory description inhibits an understanding for how many fill points the Valuer took into account when reaching the Determination and if it was 12 fill points rather than 18 fill points, that is an error which would be sufficient to have a material effect on the Determination.

Adequacy of Reasons

- 57 The alternative reason relied on by the landlord as grounds for finding that the Determination is not binding on the parties is what the landlord says is the failure of the Valuer to provide detailed reasons in the Determination.
- 58 The authorities¹¹ establish that a failure to give adequate reasons may render a determination invalid if the scope of the valuer's retainer required that detailed reasons be given.
- 59 Pursuant to section 37(6) of the Act the Valuer is required to give detailed reasons and specify the matters to which the Valuer has had regard in arriving at his determination.
- 60 The relevant principle as to what constitutes adequate reasons is that which provides that the reasons for a decision or Determination are not required to be elaborate, they are required to set out the thread of reasoning undertaken by the decision maker such as to allow the parties reading the Determination to understand the basis for the decision and what matters were, and were not, taken into account and why¹².
- 61 In a rental determination it is usual that the most relevant consideration is the comparable properties relied upon as evidence of the market rental. It is usual for valuers to list the comparable properties they have considered and identify any distinguishing aspects of those properties from the property being valued and whether that affects the rental for the property.
- 62 In this case, the task of determining rent for a Service Station is identified as not being a simple exercise of comparing similar properties. Rather, the

¹¹ *Epping Hotels Pty Ltd v Serene Hotels Pty Ltd* [2015] VSC 104; *Higgins Nine Group Pty Ltd v Ladro Greville St Pty Ltd* [2015] VCAT 1687

¹² *756 Glenferrie Road Pty Ltd v Mountfords Shoes Pty Ltd (Retail Tenancies)* [2013] VCAT 640 at [32]-[35] per SM Reigler (as he then was)

Valuer describes the method for determining the market rental as being a “*blended approach*”. The Valuer explains it as follows:

I advise the rental evidence utilised has been obtained from various sources, noting that full particulars of certain transactions are regarded as confidential and have therefore not been disclosed.

I have also given due consideration to the advised and expected trading performance of the service station, both in terms of fuel sales and shop revenue, noting the details provided in the submission made on behalf of the Lessee, plus expectations based on industry standards, traffic flow volumes and level of competition. An assessment of market rental on this basis is commonly considered an appropriate industry methodology for service station premises, reflecting the income earning ability of the site by virtue of the lease occupation¹³.

- 63 The landlord complains that while the Valuer has set out the relevant approach taken to determine the market rental, he has failed to identify all the factual information obtained from the market and from his own investigations on which he has relied. Further he has also failed to identify that factual information which he has obtained but has not relied upon, and the reasons for relying on some and not others.
- 64 That is, in the analysis section of the Determination, the Valuer adopts a general broad-brush use of statements about what has been considered without any explanation of how those matters have been taken into account or assessed.
- 65 The requirement in section 37(6)(b) of the Act is for 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*”.
- 66 The Valuer has sought to comply with this statutory requirement by providing a broad-brush overview to those types of matters which he has had regard to when making his determination. But the Valuer has failed to provide any specificity to those matters.
- 67 Upon reading the Determination, it is unclear what actual information or transactions the Valuer has had regard to and what he has not. It is also unclear whether a consideration of any of the rental comparables may have had a significant impact on the amount of the Determination.
- 68 Further, the Valuer states he has also obtained information from his own independent investigations, but fails to identify how many properties are involved, the location and the information obtained. Rather, he provides a summary of 5 comparable properties not referred to by either party in their submissions, but only sets out the location, branding, length of lease and commencing rental. He does not identify if any of the other information he states is relevant to the blended approach to market rental determinations for service stations has been provided and if so, what that information is.

¹³ Page 14, final paragraph

- 69 The essence of the landlord's complaint is that due to the absence of any explanation of steps taken in the valuer's reasoning, what matters were considered and how the market rental determination was arrived at, the parties are unable to understand how the rent figure has been determined.
- 70 The Valuer does not provide any explanation for his decision not to explain what he has had regard to, and what he has not had regard to, when reaching his determination.
- 71 The tenant says that it is unnecessary for the Valuer to disclose his reasoning because it is not simply the use of the comparable property method of analysis to determine the market rent for a service station but rather the blended approach is the correct approach.
- 72 In addition, because of the highly competitive nature of the industry, it is an industry where it is unlikely for many comparable details to be provided, except under the cover of confidentiality.

Confidentiality

- 73 In the final sentence on Page 13 of the Determination, the Valuer specifically notes that he has considered information provided to him on a confidential basis, the details of which are not included in the Determination, nor provided to the landlord or tenant.
- 74 It is this cover of confidentiality that is suggested inhibits the Valuer's ability to set out in any more detail the reasoning process behind his analysis of the materials provided to him in reaching his conclusion of what the market rent ought to be.
- 75 The Act provides for information to be provided to the Valuer by the parties on a confidential basis¹⁴. However, those confidentiality provisions do not extend to information obtained by the Valuer from his own investigations.
- 76 There is no provision in the Act which allows a Valuer to rely on confidential information provided to him for the purposes of reaching a market rental determination without disclosing that information to the parties to the lease in question or to use the cover of confidentiality to fail to provide detailed reasons for his determination.
- 77 Accordingly, the Valuer must disclose that information for the purposes of reaching his rental determination, or not rely upon it. It is not available to him to rely on information provided to him by third parties without disclosing that information and the weight placed on that evidence to the parties to the lease.
- 78 The failure of the Valuer to identify the path of his reasoning in the Determination, leaves the parties (and any reader) to speculate as to what matters the Valuer took into consideration, what other premises he considered comparable and why and what other transactions he considered

¹⁴ Section 38 of the Act.

to be of relevance and why. It is not up to the parties to speculate as to how the Valuer reached his conclusion. Causing a party to do so, is a failure to comply with section 37(6).

- 79 As such, I find that the Valuer has not provided adequate reasons for the Determination, as he has not addressed the substantial points required to be addressed including his findings and reasons with respect to material facts; namely why he has failed to identify with any particularity any of the “real life” comparable examples he has taken into account when considering all aspects of the blended approach to reaching the Determination.
- 80 Therefore, subject to my consideration of the positive defences raised by the tenant below, I find that the Determination is invalid and not binding on the parties.

Equitable “defences”

- 81 As noted above, the general principle is that if the Determination is vitiated by error for failing to give adequate reasons, it is invalid and not binding on the parties. The parties must then start again in the market rent determination as if the Determination had not been made. Once a new valid determination has been made, the rental payments made by the tenant are adjusted as between the parties.
- 82 The tenant says that if the determination is found to be invalid by reason of having failed to comply with section 37 of the Act then the Tribunal ought to still find in favour of the Determination binding the parties due to the conduct of the landlord after it received the Determination.
- 83 The tenant argues three affirmative defences in this regard:
- a. that the landlord made an election to be bound by the Determination;
 - b. that otherwise the landlord’s conduct constitutes a waiver of its right to challenge the validity of the Determination; or
 - c. that the conduct of the landlord constitutes estoppel.
- 84 Accordingly, I must consider the nature and effect of the landlord’s conduct after the Determination.

Landlord’s conduct after receipt of the Determination

- 85 On 12 April 2017 the landlord sent the tenant a letter about the new rent, the calculation of the shortfall from rent paid since 21 September 2016 and the further amount required to be paid to top up the security deposit paid by the tenant to the landlord under the terms of the lease. Attached to that letter was an invoice from the landlord for the outstanding rent.
- 86 On 11 August 2017 the landlord wrote to the tenant to advise the tenant of the new rent starting on 1 September 2017 which was the rent nominated by the Valuer and adjusted by CPI, being an amount of \$236,104.97 plus GST per annum.

- 87 The following year, on 3 August 2018, the landlord again wrote to the tenant to advise the tenant of the new rent starting on 1 September 2018 which was again an increased rent adjusted for CPI. The rent commencing on 1 September 2018 was \$242,060.77 plus GST per annum.
- 88 On 19 March 2019 the landlord's solicitors sent the tenant the deed of renewal and variation of the lease commencing 21 September 2016 indicating a starting rent of \$210,000 plus GST for execution by the tenant.

Tenant's argument

- 89 Upon receipt of the Determination the parties were then in a position to decide whether or not they accepted the Determination or if there were any issues about the Determination which gave rise to an ability to challenge its validity.
- 90 The tenant says at that time, the landlord was in a position to make an election as to whether or not to challenge the Determination or to proceed on the basis that the Determination was valid and binding on the parties.
- 91 The landlord for at least 16 months, if not longer, after receipt of the Determination, acted as if the parties were bound by it.
- 92 The landlord did this by:
- i immediately demanding the shortfall of rent to be paid identifying the amount in the Determination as the new starting rent under the renewal of lease;
 - ii sought to increase the rent in August 2017 to reflect the increase in CPI as provided for in the terms of the lease;
 - iii sought the further CPI adjusted rent in August 2018; and
 - iv even after having issued proceedings disputing the determination it then sent through to the tenant a deed of renewal of lease still identifying starting rent as \$210,000.
- 93 The argument made by the tenant is that the landlord's right to challenge the validity of the Determination only exists until such time as it chooses to be bound by it. It is treating the ability to challenge the validity of the Determination as being analogous to a breach of contract.
- 94 At law an election is where a party must choose between two inconsistent remedies available to it as a result of the conduct of the other party.
- 95 Clause 11 of the lease states that the Determination is binding on the parties from the minute it is made. The lease then also requires the parties to act in accordance with the Determination within seven days of being informed of it having been made.
- 96 The contractual requirement on the landlord was to act in accordance with the Determination until such time as this Tribunal were to find that it is not valid. The landlord must act on the assumption that it remains valid until

such time as this Tribunal finds that it is not. This is a decision for the Tribunal.

- 97 Accordingly, the ability to challenge the validity of the Determination is not a right which is inconsistent with acting in accordance with the Determination until such time as it is challenged, and this Tribunal determines its validity. Rather, until such time as this Tribunal determines any challenge to the validity of the Determination, it is binding on the parties and the landlord is obligated to comply with it.
- 98 Accordingly, I dismiss the tenant's claim that the landlord's conduct constituted an election from which it cannot now resile.
- 99 The tenant says if this conduct does not constitute an election it must therefore be a waiver by the landlord of its right to take any steps to challenge the determination.
- 100 A waiver of a right is in effect the other side of the argument of election. That is, that the landlord has waived its right to challenge the Determination because it has elected to be bound by the Determination.
- 101 For the reasons set out above regarding election, I also dismiss this claim.
- 102 Additionally, and in the alternative, the tenant says that the landlord by its conduct in acting wholly consistently with the Determination has by its conduct engaged in a form of estoppel from which it is not now allowed to resile. That is, it is estopped from challenging the Determination by its conduct.
- 103 The tenant says the necessary elements of an estoppel are present in that the landlord has acted in an unequivocal manner consistent with the Determination being binding on the parties, which the tenant has relied upon, and to allow the landlord to resile from that position would be to the tenant's detriment.
- 104 The detriment the tenant says it will suffer is that it has had to pay rent in accordance with the Determination as the new starting rent which is more than it would have had to pay in the interim, if the Determination had been challenged immediately and it continued to pay the old rent. Alternatively, it may find that it has to come up with a large lump sum of money to cover any shortfall should a new determination find that the market rent ought to be higher than the Determination.
- 105 The landlord says that this argument of estoppel by conduct must fail for two reasons.
- 106 Firstly, because the detriment is not a true detriment, it is merely compliance with the terms of the lease and simply the act of paying rent in accordance with the terms of the lease cannot of itself be a detriment suffered by the tenant.
- 107 Secondly, it says that the conduct of the landlord in acting in compliance with the Determination was not unambiguous unequivocal conduct

reflecting that it considered that it was bound by a valid determination, rather it was conduct in accordance with the terms of the lease¹⁵.

108 I find that while the delay on the part of the landlord in bringing the proceedings challenging the validity of the Determination was undesirable, it is not conduct which disentitles the landlord from bringing these proceedings. It is also not conduct which binds the landlord to the Determination.

CONCLUSION

109 For the reasons provided above, I find that the Determination fails to provide sufficient reasoning and as such does not comply with section 37 of the Act. As the Determination is not made in accordance with the Act, it is therefore not binding on the parties.

110 I also find that the Determination is vitiated by error and is therefore of no effect.

111 I will make orders and declarations to this effect.

H. Nash
Member

¹⁵ Clause 11 as set out in paragraph 31 hereof.