VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST **VCAT Reference: BP710/2016**

CATCHWORDS

Building and Property List – Retain tenancy – Review of Rent – Substantive application for Tribunal to instruct valuer on matters to take into account – Application for summary dismissal – Tribunal should not interfere with valuer's discretion – lack of jurisdiction – *Retail Leases Act 2003* s.37, 91(1)(a); *Victorian Civil and Administrative Tribunal Act 1998* s.75.

APPLICANT:	Lucky Eights Pty Ltd (ACN: 056 500 022)
RESPONDENT:	Bevendale Pty Ltd (ACN: 006 392 267)
WHERE HELD:	Melbourne
BEFORE:	Senior Member Robert Davis
HEARING TYPE:	Hearing
DATE OF HEARING:	2 September 2016
DATE OF ORDER:	2 September 2016
DATE OF WRITTEN REASONS:	4 October 2016
CITATION:	Lucky Eights Pty Ltd v Bevendale Pty Ltd (Building and Property) [2016] VCAT 1600

ORDERS

1. Pursuant to section 75 of the *Victorian Civil and Administrative Tribunal Act 1998*, the proceeding is dismissed.
2. The Respondent's application for costs is dismissed.

SENIOR MEMBER ROBERT DAVIS

APPEARANCES:

For the Applicant:	Mr M.F. Wheelahan, QC and Dr T. McEvoy, of Counsel
For the Respondent:	Mr S. Morris, QC and Mr S. Hopper, of Counsel

Note: These written reasons consist of an edited transcription of reasons given orally at the conclusion of the hearing.

REASONS

Application

1 This is an application by the landlord of premises being Shops 28 and 28A (the **Premises**) at the Epping Plaza Shopping Centre and the premises are known as the 'Epping Plaza Hotel'. There are two leases of the premises and they are in similar terms. The application before me is by the landlord seeking summary dismissal of an application by the tenant that seeks declarations in relation to what a valuer should be told and what a valuer should be instructed by the Tribunal as to its powers. The valuation is in relation to a rent review.

2 The application is brought pursuant to s.75 of the *Victorian Civil and Administrative Tribunal Act 1998* (the **VCAT Act**) which reads relevantly:

> (1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion—
>
> (a) is frivolous, vexatious, misconceived or lacking in substance; or
>
> (b) is otherwise an abuse of process.

3 The landlord says that the Tribunal has no jurisdiction to make the declarations that the applicant seeks and the claim is not tenable. In the applicant's Particulars of Claim and in the Prayer for Release, the applicant seeks orders as follows:

(a) An order pursuant to s.91 of the *Retail Leases Act 2003* (Vic) (the **Act**) as follows:

(b) That the landlord fix the revised base rent, or instruct any valuer appointed to fix the revised base rent on the basis that:

i The Premises Approval is the property of the tenant.

There are four other declarations which are sought. However, Mr Wheelahan and Dr McEvoy, who appeared on behalf of the tenant, submitted that the terms of declarations 2, 3 and 4 would be altered or, to use Mr Wheelahan's words, "would be massaged at a later time". What I have to be concerned with is the application for a declaration in relation to is the "Premises Approval" the property of the tenant. The Premises Approval that the tenant is talking about is approval for Gaming Machines and Mr Wheelahan and Dr McEvoy referred me to paragraph 4 (d) and (j) of the tenant's Particulars of Claim.

Paragraph 4(d) reads:

> On 31 August 1998, amendments to the *Gaming Machine Control Act 1991* came into force, which introduced the concept of a 'Premises Approval' for a gaming venue. As a result of the operation of section 163(5)(b) of that Act, the tenant was deemed to be the holder of the Premises Approval from that date.

Paragraph 4(j) reads:

> By two renewals of lease dated 6 September 2006, the parties recorded the renewal of both leases for the second option terms commencing in July 2006, and also confirmed the grant by the landlord of an extra option term of another five (5) years.

Background

4 The situation with the lease is that the lease was for a period of five years with five further terms. The current lease or renewal of lease that I am concerned with is a document dated 6 September 2006 and in particular clause 4 of that document. It was conceded by Mr Wheelahan that a summary of what was to be determined by the current valuer made by Mr Morris and Mr Hopper who appeared for the landlord while referring to the wrong document indeed fits into the matters referred to in 4.1, 4.2 and 4.4 of the renewal of lease. For ease I shall refer to what was stated in paragraph [1] by Mr Morris and Mr Hopper:

> [1] The lease provides that the Base Rent shall be the rental determined by the Lessor; but if the Lessee objects within a specified time, the Base Rent:
>
> > Shall be referred for determination at the current market rent on the highest and best use of the Demised Premises by a valuer appointed [in a specified manner] and such valuer in so determining shall be deemed to act as an expert and not an arbitrator.

5 That stated the lease provides that the base rent shall be the rental, the rental determined by the lessor and if the lessee objects within a specified time, the base rent shall be referred for determination at the current market rent on the highest and best use of the demised premises by the valuer appointed (in a specified manner) and such value so determining shall be deemed to act as an expert and not an arbiter.

6 I note that when these proceedings were issued the landlord had not determined what increase in rental it wanted but subsequent to the issue of these proceedings the landlord notified the tenant that it wanted an increase in the rental from $401,446 per annum + GST to $1,800,000 + GST. The tenant not surprisingly was shocked by the proposed increase. As a result the tenant decided a valuer should be appointed. The tenant told the Tribunal that the "Premises Approval" is the property of the tenant. It is noted that the Gaming Approval which the tenant holds for the machines requires a number of matters and inter alia it does require that a venue make application for a licence.

7 I was referred to provisions of the *1991 Gaming Machines Act* which is still relevant to the present proceedings. In particular s.163(5)(b) which states the venue operator at the approved premises is deemed to be the holder of the approval.

Section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* Considerations

8 Applications pursuant to s.75 of the Victorian Civil and Administrative Tribunal Act 1998 have a very high bar indeed and the applicant pursuant to s.75, the landlord in this particular instance, must show that the tenant's case is not tenable. So much has been conceded by Mr Morris. I was referred to a decision in *Forrester v AIMS Corporation & Ors* (2004) VSC 506 by Justice Kaye whose decision was delivered on 8 December 2004. In that decision he confirmed what I have just said that it must be shown that the case is not tenable. At paragraph [25] His Honour said:

> The following propositions, relevant to this case, emerge from the above consideration of *Rabel*'s case:
>
> [1] In order to justify the summary dismissal of a proceeding under s.44C of the *Equal Opportunity Act 1984* the onus lay on the respondent to the complaint to show that the complaint is undoubtedly hopeless. That onus is similar to the burden imposed by courts when considering applications under Order 23.01 and 23.03 of the Rules of the Supreme Court.

9 Thus I accept, as all parties do, that it is incumbent upon the landlord in this case to show that the remedy sought by the tenant in the substantive proceedings herein is untenable.

Considerations

10 The starting point in this matter is the *Retail Leases Act 2003* (Vic) which gives jurisdiction to this Tribunal. Section 81 of that Act defines a retail tenancy dispute as arising in relation to a retail premises lease and ss.(b) arising under provisions of the *Retail Tenancies Reform Act 1998* and the *Retail Tenancies Act 1986* in relation to a lease to which the Act applies or applied.

11 Subsection (2) is perhaps more relevant. That reads as follows:

> However a retail tenancy dispute does not include a dispute solely relating to the payment of rent or a dispute that is capable of being determined by a specialist retail valuer under ss. 34, 35 or 37.

Thus, the question that I am asked in this matter is whether this dispute is capable of being determined by a specialist valuer pursuant to s.37. I also note before turning to s.37 that s.89 gives jurisdiction to this Tribunal to hear and determine an application by the following persons seeking resolution of a retail tenancy dispute:

- A landlord or a tenant under a retail premises lease; and

- A specialist retail valuer.

12 It is worth noting that if a valuer has a problem when he or she has a matter referred to them for valuation there is an avenue by which that person can come to the Tribunal and have it resolved.

13 Section 91(1)(a) is relevant, it provides the Tribunal may in a proceeding under this part make one or more orders –

> Requiring a party to do or not to do anything including provide specified facilities, services, fixtures or fittings under a retail premises lease or to return specific fixtures or fittings to another party.

14 It is noted that the section 91(1)(a) says nothing about determining who owns an approval for a Gaming Licence or any other matters and, in my view, I state at this early stage that a Gaming Licence does not fit or come within the meaning of any of the words in s.91(1)(a). It is not a specified service to be provided, a fixture or fitting.

15 Section 37 requires some examination because it is important to the issue before me. Section 37(1) and (2) provide:

> (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 subsection (2) to (6).
>
> (2) The current market rent is taken to be the rent obtainable at the time of the review in a free and open market between a willing landlord and willing tenant in an arm's length transaction having regard to these matters—
>
> (a) the provisions of the lease;
>
> (b) the rent that would reasonably be expected to be paid for the premises if they were unoccupied and offered for lease for the same, or a substantially similar, use to which the premises may be put under the lease;
>
> (c) the landlord's outgoings to the extent to which the tenant is liable to contribute to those outgoings;
>
> (d) rent concessions and other benefits offered to prospective tenants of unoccupied retail premises—
>
> but the current market rent is not to take into account the value of goodwill created by the tenant's occupation or the value of the tenant's fixtures and fittings.
>
> (3) If the landlord and tenant do not agree on what the amount of that rent is to be, it is to be determined by a valuation carried out by a specialist retail valuer appointed by—
>
> (a) agreement between the landlord and tenant; or
>
> (b) if there is no agreement, the Small Business Commissioner-

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

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

16 Mr Wheelahan said that s.37(2) meant that the Gaming Approval would be relevant to the valuer and he would have to make a determination. In my view, subsection (4) is not relevant to this proceeding at all. The rest of the sections do not assist me any further apart from subsection (5):

(5) In determining the amount of the rent, the specialist retail valuer must take into account the matters set out in subsection (2).

17 It seems to me that there is common ground and I accept what Mr Morris says that the effect of s.37(3) overrides the method of appointment as specified in the lease. It is also clear that s.37(2) says what the valuer must not have regard to. He is required to fix the rent and do that alone and fix the rent on a particular basis.

18 In this particular instance, Mr Wheelahan and Dr McEvoy have argued that the question of whether the Gaming Approval is personal to the tenant is a question of law and must be determined by a Tribunal rather than a valuer. In my view, that is not correct. It is common for valuers to determine both questions of law and questions of fact. In determining a question of law it is an opinion which the valuer is able to hold and act upon. If he is wrong in that, then it is appropriate to come to a Tribunal or a Court. There is considerable case law to the effect that a valuer's discretion should not be fettered.

19 In Commonwealth of *Australia v Wawbe Pty Ltd* (1998) VSC 82 His Honour Justice Gillard held at paragraph [14]:

[14] It is well established in the absence of fraud or collusion, a court should be slow to interfere with a decision made by an expert valuer pursuant to an authority given him by the contract.

…

[17] … His (the valuer's) authority derives from the contract. The terms of the contract are to be considered by him. It would be contrary to the parties' common intention to expect the valuer to construe the contract and apply it as a court would. The parties have entrusted the task to an expert valuer, not a lawyer. They must be taken to accept the determination "warts and all" and subject to such deficiencies as one would expect in the circumstances. The parties put in place the procedure, they must accept the result unless it would be contrary to their common intention.

20 While *Wawbe*'s case may have been a case of valuation that had already taken place it is nonetheless a clear indication that it is not for this Tribunal to be fettering the discretion of what a valuer should do. A valuer can make an opinion as to questions law and act upon it. That much was made clear by both the decision of Croft J in *Epping Hotels Pty Ltd v Serene Hotels Pty* Ltd (2015) VSC 204 and in the appeal to the Court of Appeal which is known as *Serene Hotels Pty Ltd v Epping Hotels Pty Ltd* (2015) VSC 228 (VSCA). At para [74] of the *Serene Hotels* decision, Justice in Appeal Tate in the majority stated that:

> A valuation of current market rent is a sophisticated and multi-dimensional exercise. As mentioned at the outset, s.37(2) does not mandate any particular methodology.

21 I repeat that Mr Wheelahan, together with Dr McEvoy, suggested that this was a question of law and therefore it should be referred to the Tribunal. However, in my view, it is clear that what the Court of Appeal and the Court below per Justice Croft were considering was that the valuer can make and give opinions of law and act upon those opinions. I was also referred by Mr Morris to *Qantas v Lustig* (2015) a decision of Justice Perry 2015 FCA 253 at paragraph [62] that a Tribunal such as VCAT or a Federal Tribunal, a court can form an opinion on a Constitutional issue and act upon that opinion on a question of law. I agree with Mr Morris that that is a reasonable analogy to the situation we have here as the Federal Tribunal and, indeed, this Tribunal certainly does not have power as a "court" pursuant to the Constitution. However, this Tribunal and the Federal Administrative Appeals Tribunal can indeed do what Justice Perry stated.

22 I was also referred to the decision of *Maurici v Chief Commissioner of State Revenue* (2003) 195 ALR 236 at paragraph [8]:

> The making of a valuation will frequently involve an application of legal principle or principles. Questions of law, fact and opinion do not always readily and neatly divide themselves into discrete matters in valuation cases and practice.

23 Mr Wheelahan said that this was taken out of context because what the High Court was considering there was the decision of a Land Court and which is where parties can appear and make submissions to be considered judicially. That may be so but, in any event, in my view, the statement of law given by the High Court is correct. That the law and fact and opinion do not always readily and neatly divide themselves in discrete matters. In this particular instance I have taken the view that the matters as to valuation and the difficulties in dealing with the matters at hand in s.37(2) of the *Retail Leases Act* and the fact that in the applicant's submissions the tenant does own "the Approval" is something which the valuer can deal with. In my view, it would be a sorry state if every time there is a matter to be referred to a valuer issues come to this Tribunal to be decided before it goes to a valuer. The *Retail Leases Act* and indeed this Tribunal was created for easy access and cheap access for the parties to retail leases disputes.

Although not the case in this proceeding, some parties may have very limited resources indeed.

24 It would be absurd for a Tribunal to order that a landlord should instruct the valuer on a matter such as has been requested in this instance. This is a matter which the valuer can consider along with all the other matters. If it turns out that the valuer needs help from the Tribunal there is certainly power in the Act for him to come and seek that help in matters where it should be done.

25 Thus I have formed the view that if this application were brought before the Tribunal it would be doomed to failure and there is a lack of jurisdiction to instruct the valuer in these circumstances.

26 In relation to the question of jurisdiction I was referred to s. 91 and s.124 of the VCAT Act. Certainly, as s.124 of the VCAT Act gives the Tribunal power to make declarations but as Mr Morris has correctly said:

> That power can only be "piggy-backed" onto another power and if it is to be able to find the power any power it has to be s.91 of the Retail Leases Act.

27 Mr Wheelahan submitted that there was power in s.91 for the Tribunal to make a determination of this case because this was a dispute between the landlord and the tenant. There was nothing to stop the Tribunal from determining that the tenant did in fact own the "Premises Approval" for the gaming licence. In my view, s.91 does not deal with the matter of who owns the gaming permit as I have previously said. It gives the Tribunal power to determine other things but not that. Given those circumstances as I have previously said I find that there is no jurisdiction. Thus it follows that this proceeding should be dismissed pursuant to s.75 of the VCAT Act.

28 I come to this decision on the basis that if it was brought to hearing it would have no tenable basis in fact or law and could not succeed. Thus I will make the order requested by the landlord.

Robert Davis
Senior Member