VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1065/2018

CATCHWORDS

Retail Tenancies – application for hearing to be conducted by a judicial member – s64(3) *Victorian Civil and Administrative Tribunal Act 1998* – discretion as to constitution of Tribunal not concerned with 'category of member' – whether parties should be heard as to constitution of Tribunal – application refused.

APPLICANT	Lucky Eights Pty Ltd (ACN: 056 500 022)
RESPONDENT	Bevendale Pty Ltd (ACN: 006 392 267)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	7 November 2018
DATE OF ORDER	14 November 2018
CITATION	Lucky Eights Pty Ltd v Bevendale Pty Ltd (Building and Property) [2018] VCAT 1807

ORDERS

1. The application by the respondent that the final hearing of this proceeding be listed before a judicial member of the Tribunal is refused.

2. **The proceeding is listed for a directions hearing on 18 December 2018 before Deputy President Aird commencing at 11.00 a.m. at 55 King Street Melbourne at which time directions will be made for its further conduct.**

3. Costs reserved.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr S G Guidolin of Counsel
For Respondent	Mr S Hopper of Counsel

REASONS

1 Since September 1999, the applicant Tenant has leased premises in a shopping centre in Epping from the respondent Landlord – there are two leases ('the Leases'). The Tenant operates a 'gaming room' within the Premises. The Tenant holds a Premises Approval and a Venue Operator's Licence ('the Licences'), which together authorise it to operate 100 gaming machines within the 'gaming room'.

2 By letter dated 11 December 2015 the Tenant exercised its option to renew the Leases. By letter dated 26 May 2016 the Landlord advised the Tenant what it considered to be the current market rent, which was a significant increase in the rent being paid at the time. The Tenant advised the Landlord by letter dated 22 June 2016 that it disputed that the rent stated in the Landlord's notice was current market rent.

3 On 26 September 2017, in accordance with the terms of the Leases, Mr Peter Grieve was appointed as a specialist valuer to determine the market rent of the Premises in accordance with s37 of the *Retail Leases Act 2003*. ('the RLA'). In his determination of 23 March 2018 ('the Determination'), Mr Grieve determined the current market rent at slightly less than notified by the Landlord in May 2016, but still significantly more than then being paid by the Tenant. The rent for the Premises as determined by Mr Grieve exceeds $1m per year.

4 The Tenant commenced this proceeding on 1 June 2018 seeking various orders including:

   a a declaration that the Determination was not in accordance with s37(2) of the RLA or the terms of the Leases; and

   b an order under s91(e)(ii) of the RLA or s116 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') setting aside the Determination.

5 The Tenant alleges that Mr Grieve has failed to carry out the Determination in accordance with s37(2) and/or the terms of the Leases. There are a number of Particulars set out in the Points of Claim dated 6 July 2018. However, put simply, as I understand it (appreciating there are a number of issues to be considered) the Tenant alleges that Mr Grieve has erred in his treatment of the Licences and gaming machine entitlements, when determining the current marked rent that would reasonably and objectively be paid for the Premises if they were unoccupied and offered for the same or substantially similar use.

6 The Tenant has requested that the Tribunal be constituted by a judicial member for the final hearing of this proceeding. This application is said to be made under s64(3) of the *Victorian Civil and Administrative Tribunal Act 1998*. Section 64(3) provides that the President of the Tribunal determines how the Tribunal is to be constituted for each proceeding. This power has been delegated to each Deputy President of the Tribunal.

7 Mr Guidolin of Counsel appeared on behalf of the Tenant and Mr Hopper of Counsel appeared on behalf of the Landlord who indicated that the application is opposed by the Landlord. Counsel spoke to the written submissions which had been filed in accordance with the Tribunal's orders.

Section 64(3)

8 The parties agree that in determining how the Tribunal should be constituted for a particular proceeding the President or her delegate (which for the purposes of these Reasons I will refer to as 'the Tribunal') is exercising a discretion. The Tenant submits that the only limitation on the exercise of the discretion is that it be exercised reasonably.

9 Neither party addressed me as to the proper construction of s64(3). They proceeded on the basis that the reference to determining how the Tribunal is to be constituted refers to determining the 'category' of member to constitute the Tribunal. In my view, this is to misunderstand s64(3) which must be read in conjunction with ss 64(1) and (2).

10 Sections 64(1) and (2) provide:

> (1) Subject to the rules, the Tribunal is to be constituted for the purposes of any particular proceeding by 1,2,3,4 or 5 members.
>
> (2) If the Tribunal is to be constituted at a proceeding –
>
> (a) by one member only, that member must be an Australian lawyer; and
>
> (b) by more than one member, at least one must be an Australian lawyer.

11 The decision required by s64(3) is <u>how</u> the Tribunal is to be constituted not by <u>whom</u>, in other words, whether by a single member or a panel of two to five members. Section 64(2) specifies that the presiding member must be an Australian Lawyer. There is no mention in s64 about any determination being made as to the 'category' of member to constitute the Tribunal. Therefore, the application must fail as it relates to a matter which does not fall within s64(3).

Do parties have a right to be heard as to the appropriate constitution of the Tribunal for a proceeding?

12 However, if I am wrong in my interpretation of s64(3) I am not persuaded that the Tribunal is bound to, or even should, hear from the parties as to the constitution of the Tribunal for a proceeding including whether or not it should be constituted as a single member or a panel. This is a decision which is entirely within the discretion of the Tribunal.

13 Parliament has seen fit to vest the Tribunal with jurisdiction to hear a wide variety of matters, including exclusive, unlimited jurisdiction to hear retail tenancies disputes which can range from relatively modest claims to complex commercial disputes where the quantum at stake is significant, as

in this proceeding. Where it has considered it appropriate to specify that the Tribunal be constituted in a particular way for the hearing of specific types of matters, Parliament has done so.[1] However, there are no requirements in the VCAT Act, the Rules, or the RLA as to the constitution of the Tribunal for hearing retail tenancies disputes.

14 Mr Hopper submitted that entertaining such applications would have the appearance of 'judge or member shopping' and, if allowed, could potentially open the 'floodgates' to similar applications.

15 Unlike the exercise of the Tribunal's discretion under some other sections of the VCAT Act, decisions about the constitution of the Tribunal do not affect a party's substantive rights. For instance, although not relevant to a retail tenancies dispute where orders for costs are subject to s92 of the RLA, in determining whether to exercise its discretion under s109(2) of the VCAT Act to make an order for costs, it is appropriate that the Tribunal hear from the parties, as any order for costs affects their substantive rights. Determining the constitution of the Tribunal for a proceeding, without reference to the parties, may well mean that a party does not have their matter heard before their preferred member or category of member, but this does not affect their substantive rights, and, as such, is not amenable to review.

The application

16 Notwithstanding my findings above, I consider it appropriate to make some general comments about the application.

17 The Tenant contends that, having regard to the Landlord's Points of Defence, certain legal and factual issues concerning the gaming elements of this proceeding will be critical. These include (and this is not an exhaustive list of the issues to be determined) the proprietary rights of a Premises Approval, in particular whether the approval is a personal right or attaches to the land (about which there is apparently no authority), and whether the specialist retail valuer was required to have regard to the regional cap for gaming machines in the City of Whittlesea, the fact that there are no gaming machine entitlements available, and the impact of the cost of acquiring gaming machine entitlements.

18 The Tenant submits that it is appropriate the hearing be conducted by a judicial member because the proceeding involves:

i. complex questions concerning the *Gaming Regulation Act 2003* ('the GRA') and the rights conferred under that Act;

ii. complex questions concerning Gaming Approval Controls;

iii. complex questions concerning Electronic Gaming Machine Entitlements and their value;

[1] See Schedule 1 to the VCAT Act

iv. questions as to the proper construction of s37(2) of the RLA;

v. it is of general public importance; and

vi. the quantum at issue is large.

Complexity and quantum

19 I accept, and it appears to be conceded by the Landlord, that there are complex legal and factual issues to be determined in this proceeding, including arising under or by virtue of the GRA. The monetary stakes are also high, as the rent to be paid by the Tenant under the Determination is many millions of dollars over the duration of the Leases. However, complexity, and the quantum of the claim are not, in my view, sufficient to cause me to determine that the Tribunal should be constituted for the final hearing by a judicial member.

20 It is not unusual for proceedings in the Building and Property List ('BPL') to require a consideration of complex issues of fact and law, and increasingly multi-million dollar claims, which if not settled at compulsory conference will be listed for hearings for 20 days or more. These are generally heard by experienced members, noting that BPL is a specialist list with specialist members.

21 The Tenant contends the BPL does not exercise any functions under the GRA, and otherwise does not have any accrued jurisdiction to determine the extent and nature of rights created by the grant of approvals pursuant to the GRA. In my view, it is irrelevant in considering the Tenant's application to set aside the Determination whether or not issues under the GRA are justiciable in the Tribunal, particularly as even if the proceeding were to be heard by a judicial member it would still be a Tribunal hearing.

The proper construction of s37(2) of the RLA

22 The Tenant submits that this proceeding raises significant questions concerning the proper constriction of s37(2) of the RLA, for which it contends there is not yet any binding authority. In particular, the Tenant observes that the pleadings reveal that the parties disagree about the meaning of various expressions used in s37(2) including: *having regard to, the rent that would reasonably be expected to be paid for the premises if they were unoccupied* and *the use to which the premises may be put*. Further, that the Tribunal will also be required to consider the characteristic of a hypothetical prospective tenant about which the parties have different views. However, it is not unusual for parties to disagree about the interpretation of certain statutory provisions – in fact, such disagreements are often at the heart of commercial litigation.

23 Having a judicial member hear the proceeding sitting as a Vice President of VCAT would not change the lack of any relevant binding authority – the judge's decision would still be a Tribunal decision, albeit one where leave

to appeal directly to the Court of Appeal could be sought. This, of itself, is not a reason for the Tribunal to be constituted by a judicial member.

24 BPL is a specialist list, with specialist members. As Mr Hopper observed, all significant decision challenging the determinations of specialist retail valuers over the last few years have been heard by the Tribunal. There have only been two challenges to the Tribunal's decisions, only one of which was successful. In *Higgins Nine Group Pty Ltd v Ladro Greville Street Pty Ltd*[2] the Tribunal's decision was upheld. The Tribunal's decision was overturned in *Epping Hotels Pty Ltd v Serene Hotels Pty Ltd*[3]*, and Serene Hotels Pty Ltd v Epping Hotels Pty Ltd*[4].

25 As the Tribunal has exclusive jurisdiction in relation to retail tenancy disputes, and has determined a number of applications to set aside a determination of a specialist retail valuer, with only one decision having been successfully appealed, I am not persuaded that the proper construction of s37(2) is a matter which cannot be reasonably considered by an experienced BPL member. The circumstances of, and the context in which each application to set aside a rental determination has been made, have all differed and have generally required a consideration of complex questions of fact and law.

Broad public importance

26 The Tenant contends that in considering the proper construction of s37(2) the Tribunal will be required to determine the rights conferred by the grant of a Premises Approval to undertake gaming at a venue, and upon whom and upon what those rights are granted or attached to are significant questions, not simply in the context of this proceeding, but generally are of State-wide importance.

27 Again, I am not persuaded that this is a reason for the hearing to be conducted by a judicial member. As is to be expected where the Tribunal has exclusive jurisdiction, as it does for retail tenancy disputes, or is the preferred jurisdiction, as it is for domestic building disputes, non-judicial members regularly determine matters of public importance.

Previous proceedings where the Tribunal was constituted by or with a judicial member

28 The Tenant has referred me to a number of Tribunal decisions concerning complex issues which were of broad community interests where the Tribunal was constituted by or with a judicial member. I accept that there may be instances where the Tribunal considers it appropriate for a particular hearing to be listed before a judicial member, but there are no hard and fast rules. Often, though, listings before judicial members are to enable the effective and efficient use of all resources available to the Tribunal. A quick

[2] [2006] VSC 244
[3] [2015] VSC 104
[4] [2015] VSCA 228

search of Austlii will demonstrate that not all proceedings where judicial members have presided concerned complex questions or were of broad public importance.

Any appeal from a decision of a judicial member would be to the Court of Appeal

29 The Tenant submits that it is desirable in the interests of efficiency and minimising costs for the parties, that the hearing be conducted by a judicial member so that any appeal will be directly to the Court of Appeal. I am not persuaded that this is a relevant consideration.

30 The Tenant also submits that its right to appeal directly to the Court of Appeal is a substantive right. I reject this. The Tenant's rights of appeal, limited as they are from decisions of the Tribunal by s148 of the VCAT Act, are not affected by whether the hearing is conducted by a judicial member.

31 In any event, any appeal is hypothetical until the proceeding has been finally heard and determined. There may be no appeal.

32 However, even if I accept for the purposes of this discussion only, that there is a probability of the Tribunal's decision being appealed, there is absolutely no reason why the parties in this proceeding should be afforded a preferential opportunity of leapfrogging an appeal to the Trial Division. The Tribunal has an obligation to deal with all parties fairly and equally.

One stop shop

33 Mr Guidolin referred me to the comments of the then Attorney-General in the second reading speech for the VCAT Act, in April 1998 where she said:

> VCAT will be a judicially assisted tribunal in order to provide litigants with a 'one-stop shop'. The president – a Supreme Court Judge – and the vice-presidents – County Court judges – will, while full time members of VCAT, be able to exercise the powers of the Supreme and County Courts respectively. This will reduce delays for parties who wish to appeal to the Supreme Court against a tribunal decision.

34 I fail to understand how this assists the applicant. In circumstances where the Tribunal has exclusive jurisdiction over retail tenancies matters, it is irrelevant whether a judicial member is able to exercise powers of their Court whilst sitting as a member of the Tribunal. In hearing a retail tenancies dispute a judicial member will be sitting as a member of the Tribunal exercising powers vested exclusively in the Tribunal. Although there may well be 'gaming issues' which require a consideration of certain provisions of the GRA and a consideration of proprietary rights (and I am not making any finding as to whether such interpretation will necessarily arise), the fact remains that the Tribunal will be determining a retail tenancy dispute.

CONCLUSION

35 This application will be refused. First, because I am not persuaded that s64(3) should be read as suggested, and that the discretion as to the constitution of the Tribunal for a proceeding is limited to whether it is to be constituted by a single member or a panel. Alternatively, there is absolutely nothing in the material before me to persuade me that there is anything so out of the ordinary about this proceeding that the hearing should not be conducted by an experienced member of the BPL.

DEPUTY PRESIDENT C AIRD