VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1065/2018

CATCHWORDS

Building and Property List; retail premises lease; provision for fixing of rent or renewal as "current market rent"; *Retail Leases Act* 2003 (Vic) section 37; whether errors by expert valuer such as to invalidate determination; *Gaming Machine Control Act* 1991; *Gambling Regulation Act* 2003

APPLICANT:	Lucky Eights Pty Ltd (ACN: 056 500 022)
RESPONDENT:	Bevendale Pty Ltd (ACN: 006 392 267)
WHERE HELD:	55 King Street, Melbourne
BEFORE:	Judge Macnamara, Vice President
HEARING TYPE:	Hearing
DATES OF HEARING:	7, 8 & 9 October 2019
DATE OF ORDER:	7 November 2019
CITATION	Lucky Eights Pty Ltd v Bevendale Pty Ltd (Building and Property) [2019] VCAT 1668

ORDERS

1. Within 14 days of this date the parties must bring in short minutes to give effect to these reasons.
2. Costs reserved.

Judge Macnamara
Vice President

APPEARANCES

For Applicant	Mr A Myers QC and Mr B Holmes instructed by Gilbert and Tobin
For Respondent	Mr S Morris QC and Mr S Hopper instructed by Minter Ellison

REASONS

BACKGROUND

1 According to Wikipedia:

> Pacific Epping is a shopping centre in Epping, Victoria, a suburb of Melbourne, Australia. It opened in May 1996. It is located on the corner of High Street and Cooper Street, 500 m away from Epping railway station, Melbourne, and approximately 21 km north of the Melbourne CBD. Until September 2013, the shopping centre was known as Epping Plaza.

2 In fact, the centre is still colloquially known as Epping Plaza. It boasts over 230 stores including 12 "anchor tenants". According to the Wikipedia entry there are some 350 above ground car parks and a further 950 underground parks.

3 This proceeding concerns the fixation of the market rent for the premises known as the Epping Plaza Hotel leased by tenant Lucky Eights Pty Ltd the applicant in the proceeding from the lessor Bevendale Pty Ltd the respondent.

4 The history of this tenancy was set out in the witness statement by Mr Russell O'Brien, chief financial officer of Hotel Leisure Management Pty Ltd, apparently the principal company in the group of which Lucky Eights Pty Ltd is a member. According to Mr O'Brien's statement, Lucky Eights was incorporated as a special purpose corporate vehicle to operate the Epping Plaza Hotel (paragraph 10), although a company search attached to Mr O'Brien's statement shows the company was incorporated in 1992, some four years prior to the opening of Epping Plaza in 1996 (Mr O'Brien's statement, Exhibit RO1 page 5).

5 Lucky Eights executed a document styled "Agreement for Lease" on 18 October 1995 with Bevendale as lessor. This document recited that Lucky Eights Pty Ltd "agreed to carry out on the Premises the Fitting-Out Work" (*Ibid,* Exhibit RO1 11) clause 16 of the Agreement for Lease obliged Lucky Eights Pty Ltd "forthwith at its own expense" to apply for and obtain a licence or licenses under the Liquor Control legislation for the sale of intoxicating liquor. If the liquor licence was not granted by 31 December 1995 or by an extended date approved by Bevendale of no more than 3 months, Bevendale had the option of avoiding the agreement (*Ibid,* clause 16, Exhibit RO1 25).

6 When this agreement was entered into the shopping centre had not yet been constructed (*Ibid,* paragraph 19).

7 Ultimately, a lease was executed between the parties for Shop 28 in the centre comprising 1017.4 square metres for a term of five years

commencing 12 July 1996. A further five new options each of five years was reserved (*Ibid*, paragraph 20, Exhibit RO1 89-147).

8 On the same day the parties executed another lease for premises described as Shop 28A for a similar term with similar options. According to Mr O'Brien Shop 28A was, and continues to be, principally used as an administration office and goods storage area for the Epping Plaza Hotel (*Ibid*, paragraph 21, Exhibit RO1 148-55). The Hotel also holds a licence for a smoking area adjacent to the two shops to deal with the situation resulting from the refurbished non-smoking and indoor public areas taking effect in 2005 (*Ibid*, paragraph 22, Exhibit RO1 156-65).

9 The lease of Shop 28 was renewed on 6 December 2000 for five years commencing 12 July 2001 (*Ibid*, paragraph 23, Exhibit RO1 166-9) with a further renewal on 6 September 2006 commencing from 12 July 2006 for five years. This renewal provided for a market review of the rent for Shop 28 for the period commencing July 2016 and added a further five year option of renewal commencing July 2026 (*Ibid,* paragraph 24, Exhibit RO1 170-80).

10 On 24 May 2012 by a document styled "This Deed of Renewal and Variation of Lease" the lease for Shop 28 was renewed for a further period of five years commencing 12 July 2011. The Deed provided that as a result of the terms of the original lease and the addition of one further five year option to renew, there remained at the end of the five year term commencing in 2011 three further terms each of five years available at the option of the tenant (*Ibid,* Exhibit R01 183-87). Corresponding renewals were made for Shop 28A (*Ibid*, paragraphs 26-28, Exhibit RO1 188-210).

11 Solicitors acting for Lucky Eights sent a letter to the Secretary, Bevendale Pty Ltd enclosing a Notice of Exercise of Option by Lucky Eights for the period "as and from the 16 July 2016" (*Ibid*, Exhibit RO1 213-14). Presumably on behalf of Bevendale Pty Ltd, the Head of Leasing of Pacific Shopping Centres Australia Pty Ltd, noting that the rental was subject to Market Review on 16 July 2016 stated that "the Landlord" [*viz* Bevendale] had determined that the current market rental value of the premises was $1,800,000 per annum plus Goods and Services Tax (*Ibid*, Exhibit RO1 215). A similar letter of even date nominated a market rental of $56,055.00 per annum plus GST for Shop 28A (*Ibid*, Exhibit RO1 216).

12 Mr O'Brien wrote a letter dated 22 June 2016 relative to Shops 28 and 28A advising Lucky Eights did not agree to the proposed rental (*Ibid*, Exhibit R01 217-18). In all the leases and renewals referred to, the permitted use for Shop 28 was shown as "hotel, restaurant and gaming, sports bet, wagering facility and bottle shop". As will appear, what sets the party at odds on the subject of rent is the proper method of assessing market rent having regard to the "gaming" portion of the business conducted by Lucky Eights. The business of the Epping Plaza Hotel comprises:

(a) a gaming room with 100 electronic gaming machines;

(b) a bistro style restaurant with bars; and

(c) a separate sports bar with TAB and Keno betting facilities." (*Ibid*, paragraph 11).

13 On the same day as the original agreement to lease was executed by the parties they entered into what was described as "This Supplemental Deed" expressed to be supplementary to the agreement for lease and required Lucky Eights "forthwith and its own expense [to] apply to the Responsible Authority for the issue of a venue operator's licence within the meaning of the *Gaming Machine Control Act 1991*." The deed contemplated Lucky Eights obtaining a venue operator's licence for 105 gaming machines and if such licence were not obtained by 15 March 1996 the lessee Lucky Eights would be entitled to avoid the agreement. Likewise, if the venue operator's licence were not approved, Bevendale might, by written notice, avoid the agreement. (Court Book ("CB") Tab 58).

14 In his statement Mr O'Brien recited the history of gaming entitlements for Shop 28. By Venue Operator's Licence dated 23 April 1996 the Victorian Casino and Gaming Authority granted a venue operator's licence to Lucky Eights Pty Ltd in respect of Epping Plaza Hotel, authorising "gaming on not more than One Hundred (100) machines in the Restricted Area … and on not more than Five (5) machines in the Unrestricted Area". The term of this licence was for five years (O'Brien's statement, Exhibit RO1 220). By a document styled "Approval of Premises for Gaming" Approval No. P98000432 dated 3 May 2001 the Authority advised Mr Gronow of Epping Plaza Hotel, "Your application received on 19 February 2001 for approval of premises for gaming at Epping Plaza Hotel… has been granted". The approval was given under the 1991 Act and provided for 100 electronic gaming machines in the restricted area and zero machines in the unrestricted area. The approval was said to expire "on 22 April 2006 unless cancelled, surrendered or revoked" (*Ibid*, Exhibit RO1 223-25)

15 By letter dated 17 May 2001 the Authority advised Mr Gronow of Lucky Eights that Lucky Eights' application for a venue operator's licence was approved by the Authority for the "approved premises", being Epping Plaza Hotel. The letter stated, "the Authority also approved your Nomination as the Nominee on behalf of Lucky Eights …in respect of the Epping Plaza Hotel" (*Ibid*, Exhibit RO1 226–28)

16 The 1991 Act had been substantially amended in 1997 with effect from the following year. Mr O'Brien described the effect as follows:

> In about late August 1998, the *Gaming Machine Control Act 1991* (Vic) pursuant to which the Venue Operator's Licence had been issued was amended, such that the Venue Operator's Licence was split into a Venue Operator's Licence, dealing with the person or entity authorised to operate a Gaming Venue, and a Premises Approval dealing with the suitability of the premises for the conduct of gaming (**Premises Approval)**. As and from 31 August 1998, the Epping

Plaza Hotel therefore held both a Premises Approval and a Venue Operator's Licence. (*Ibid*, paragraph 39)

17 The *Gambling Regulation Act* 2003 repealed the *Gaming Machine Control Act* 1991. Pursuant to the 2003 statute the Minister for Gaming allocated Lucky Eights 100 gaming machine entitlements (*Ibid,* Exhibit RO1 229-33). According to Mr O'Brien, Lucky Eights paid $49,540.00 for each of one hundred entitlements and as at the date of his statement, 16 May 2009, Lucky Eights had "paid $4,954,000 for the one hundred gaming entitlements, pursuant to the State of Victoria's deferred payment scheme" (*Ibid,* paragraph 48). Those entitlements remained in force he said until 15 August 2022 (*Ibid*, paragraph 49). Lucky Eights obtained a renewal of its venue operator's licence by a determination of a delegate of the Commission on 8 June 2016. Mr Mark Robertson was approved as nominee. The licence was approved for the "approved venue" being the "Epping Plaza Hotel" (*Ibid,* Exhibit RO1 234-37). Mr O'Brien produced an extract from the Victorian Commission for Gambling Regulation's Entitlement Transfer Register for the period November 2014 to August 2016 obtained from the Commission's website. This extract, he said, showed "that in or about July 2016, the value of an electronic gaming machine entitlement, in relation to which there was a Premises Approval with pub license (*sic*), was about $100,000 per entitlement." (*Ibid*, paragraph 51, Exhibit RO1 238-39).

18 Next, he produced an extract from the Commission's "Expression of Interest – Gaming Entitlements for Sale" as at 30 May 2016 from the Commission's website stating, "The Gaming Entitlements for Sale shows that although there were club entitlements for sale, there were no electronic gaming machine entitlements available for sale, in respect of a premises for which there was a Premises Approval with pub license (*sic*), including for a hotel." (*Ibid*, paragraph 52, Exhibit RO1 240).

19 Whilst these events were occurring, Mr O'Brien said the liquor licence for the Epping Plaza Hotel was renewed from year to year (*Ibid,* paragraph 54, Exhibit RO1 242-46)

20 Lucky Eights obtained possession of Shop 28 in March 1996 and in the period to July of that year it undertook the necessary fitout works to the value of $1.8 million (*Ibid*, paragraph 55, Exhibit RO1 247-52). From 1997 to 2016 Lucky Eights undertook upgrade works for various parts of the venue, the establishment of the outdoor smoking area and so on to the value of $2.95 million (*Ibid,* paragraph 56, Exhibit RO1 253-56).

21 In the year ending 30 June 2016 total revenue for the hotel was $21m exclusive of GST, predominantly from gaming (*Ibid,* paragraph 58-60 Exhibit RO1 297-303) In the same financial year, according to Mr O'Brien, "the net revenue from food sales was $563,272.00 (exclusive of GST)" (*Ibid*, paragraph 68).

22 Despite a decline in food sales since 2013 Mr O'Brien said, "the Hotel continues to offer high quality food and beverage services and maintains chef, food and beverage staff to enable those services to be provided" (*Ibid*, paragraph 69).

23 As a result of the disagreement as to rental for the period from July 2016 onwards, the question of rental was referred for determination to Mr Peter A Grieve, a certified practising valuer. He received submissions from both landlord and tenant and obtained his own legal advice. He published a determination fixing the rent for Shop 28 at $1,602,043 per annum plus GST and for Shop 28A at $213,957 per annum plus GST (CB Tab 21-3).

24 Mr Grieve, in his determination, recited the tenancy history, examined the planning framework effecting the demised premises and provided a summary of the terms of the relevant lease. He referred to section 37 of the *Retail Leases Act 2003* which sets out the regime to be applied with respect to tenancies governed by the Act for the fixation of current market rent, noting that, by virtue of section 94 of that statute, the provisions of section 37 would prevail over any inconsistent provisions in the lease itself. Mr Grieve summarised the submissions made by the parties. He noted the landlord's contention that, in determining what a hypothetical tenant might pay by way of rent for the premises in an open market, it should be assumed that the hypothetical tenant would hold a Premises Approval under the *Gambling Regulation Act 2003*. This accorded with the landlord's submission and conformed with the "presumption of reality" which should guide the valuer in these circumstances.

25 Mr Grieve concluded, based upon the advice which he had received from Mr S R Horgan QC and Mr M D Tehan, that he was entitled to take into account the Premises Approval and assume that the premises were offered for lease to the hypothetical tenant with the Premises Approval. Mr Grieve adopted a methodology of fixing rent by reference to the profitability of Lucky Eights' business rather than by direct comparison with "comparable" rents, for instance, for other tenancies in the Centre. He referred to the judgment of Croft J in *Serene Hotels Pty Ltd v Epping Hotels Pty Ltd* [2015] VSC 104 in support of fixing the rent by reference to "the rental ratio". He said earnings before interest, tax, rent and depreciation, described as `EBITDAR', should be set upon the assumption that the hypothetical tenant would be able to bring average competent management to bear. He said, "In my view a hypothetical tenant could reasonably expect to achieve the gaming levels which have been consistently reported for the venue over the past several years." (paragraph 8.2.3)

26 He reviewed the rental for some nine "gaming" hotels, finding that the market rent for those premises ranged from a low of 32.1% of EBIDTAR to a high of 38% or for the low of 35% to a high of 40.7% "after GME provision" and adopted a 38% ratio for the following reasons:

1. The rental ratio falls within current market rent review range;

2. The rental ratio adopted is consistent with those ratios indicated by the evidence from comparable gaming hotel venues." (paragraph 8.3)

27 The rental determination was issued on 23 March 2018.

This proceeding

Points of Claim

28 On 6 July 2018 solicitors acting for Lucky Eights commenced this proceeding. Their Points of Claim bearing the same date narrated the history already described and contended that the Grieve determination was not in accordance with section 37(2) of the *Retail Leases Act* or the terms of the relevant leases. They noted, first, that clause 4.2.7 of the lease required the hypothetical prospective tenant to keep in force "all license[s], permits and approvals in relation to the conduct of the gaming business". They noted that the *Gaming Regulation Act* "does not permit a transfer of a Venue Operator's Licence and a Premises Approval".

29 Second, they observed that clause 11.12 of the lease provides that the tenant's fittings remain in the tenant's property, "and thus any application of the profits method of valuation must value the Premises as a bare shell and not merely provide a discount to the rental ratio in the calculations of the current market rent."

30 It was said that the valuer failed to consider that it was highly unlikely that the hypothetical prospective tenant would obtain a Premises Approval and/or wrongly assumed that the hypothetical prospective tenant would obtain a Premises Approval. It was said that the valuer erred by failing to accept the Premises Approval belonged to the tenant and did not run with the premises. Next, it was said the valuer failed to consider the prohibitive cost of acquiring hotel gaming machine entitlements and failed to consider that as at the review date there were no hotel gaming machine entitlements for sale or that as at the review, and all times since, all gaming machine entitlements within the City of Whittlesea were fully authorised and fully utilised. It was said that the valuer erred in finding the Premises Approval could be offered with a prospective lease of the premises and erred in finding the hypothetical prospective tenant would not be required to obtain a Premises Approval. It was said that the valuer failed to consider that the hypothetical prospective tenant would not establish that the premises satisfied the "no net detriment" test in section 3.3.7(3) of the *Gaming Regulation Act* and failed to consider the expert opinion as to the economic and social impacts of a prospective tenant obtaining a Premises Approval.

31 It was said that the valuer failed to consider, in light of these matters, that the premises could only be used as a hotel restaurant sportsbook, liquor shop and wagering facility "and that a current market rent determination should be conducted on the basis of comparable properties within this permitted use."

32 It was said the valuer "erred by assuming that a hypothetical prospective tenant with existing gaming machine entitlements would view the opportunity to lease the Premises favourably, when a gaming machine entitlement, by virtue of the GRA (Gambling Regulation Act), is granted with respect to a particular approved premises."

33 The valuer was said to have erred in concluding, without supporting evidence, that a number of unidentified prospective tenants with existing gaming machine entitlements would view the opportunity to lease the Premises favourably and failed to consider that such hypothetical tenant operating existing hotels "would face transactional costs which would likely be substantial, in relocating their gaming machine entitlements to the Premises (assuming that they could obtain a Premises Approval)". The valuer was said to have erred by wrongly applying the "presumption of reality" in light of section 37(2) of the *Retail Leases Act* or by assuming that a prospective tenant could reasonably be expected to have regard to the fact that a Premises Approval exists for the premises.

34 The valuer was said to have erred by applying the "presumption of reality" to assess the current market rental assuming that the hypothetical prospective tenant had 100 gaming machine entitlements to use in the premises. The valuer was said to have erred in failing to apply the presumption to the value of the electronic gaming machine entitlements was not less than $100,000 per entitlement, that there were no electronic gaming machine entitlements available for transfer at the relevant date, that other gaming operators could not move existing operations to the premises without incurring substantial or prohibitive transaction costs and that the hypothetical prospective tenant will have to incur costs of $1,600,000 "to carry-out the Landlord's base works". He was said to have erred by having regard to unqualified opinions of an unnamed employee of the Victorian Commission for Gambling and Liquor Regulation ("VCGLR") and applied an inappropriate methodology to determine the rent ratio adjustments to take account of the tenant's fixtures and fittings and by applying this appropriate methodology from the date of commencement of the lease, not as at the review date.

35 The valuer was also said to have erred by failing to take into account "the proper value of the Landlord's works which ought to have been accepted as $1.6 million and amortised over the 15 years … which would have resulted in an amortisation figure of $106,666.00 per annum, and thereby reduced the rental factor relied on in the rental determination by 2% rather than 1.5%. It was said the valuer erred by considering that the tenant operates the business "in a manner consistent with the notion of average competent management". There was no evidence to support that view. The valuer erred it was said by considering that a hypothetical prospective tenant could reasonably expect to achieve the same gaming levels when there is no evidence to support such a conclusion. It was said the valuer:

Erred by considering or taking into account as a fact, with no evidence to support such a fact, that there were a number of 'existing operators' (without identifying any of them) who had the financial capacity to view the mortgage prohibition as an inconvenience particularly as the Premises is such a highly valued gaming venue.

36 The valuer was said to have erred in failing to give sufficient weight to the uncertainty created by the State Government's Gaming Machines Arrangements Review of 15 December 2015.

37 There was also a complaint that detailed reasons had not been given explaining how a prospective tenant could meet the "no net detriment" test in section 3.3.7(3) of the *Gambling Regulation Act*; why Premises Approval runs with the premises despite the provisions of *Gambling Regulation Act*; how the adoption of the historical cost of gaming machine entitlements was preferred over the current market cost of gaming machine entitlements; why the "presumption of reality" applied despite the provisions of the *Retail Leases* Act; why the proper value of the landlord's works was found to be $1,035,000 and why the amortisation figure $82,592.00 was reasonable.

38 In light of these matters it was said that the determination was not binding on the tenant. The application sought a declaration that the determination does not comply with the Base Lease and the Ancilliary lease; an order setting aside the specialist retail valuer's determination dated 23 March 2018, costs and further or other relief.

Points of Defence

39 As to the lengthy critique of the rental determination Bevendale, the respondent, said that the valuer was required or permitted to determine the rent on the basis that the property was in fact leased, "save to the extent that the specialist retail valuer's instructions require departure from that reality".

40 The valuer was required "to assume the tenant has met all its obligations under the leases". It was said neither section 37(2) of the *Retail Leases Act 2003* nor the leases required the valuer to:

i Disregard or ignore tangible licenses, permits and approvals obtained by the tenant;

ii Assume that the licenses, permits and approvals were not in place;

iii Adopt a particular method to disregard the value of the tenant's fittings and fixtures or ignore the Tenant's installations and improvements;

iv Assume that the hypothetical tenant leased a "bare shell"; or

v Prohibit the method of disregarding the value of fittings and fixtures or ignoring the Tenant's installations and improvements adopted by the specialist retail valuer.

41 Therefore, it was open to the valuer to determine the rent on the assumption that all relevant licenses, permits and approvals were in place in relation to the conduct of a gaming business. The valuer was not required to disregard or ignore approval of the premises for gaming or assume that such approval had been "surrendered or revoked".

42 The valuer, it was said, correctly determined that the approval of the premises was not personal to the tenant or that conclusion was open to him. It was open to him to assume that the hypothetical tenant or landlord could have obtained approval of the premises for gaming in any event or it was open to the valuer to conclude that the hypothetical tenant could conclude it could utilise the approval of the premises for gaming. The valuer had it was said, correctly applied the "presumption of reality". He was entitled to inform himself as he saw fit, including by inquiring from the VCGLR a method for determining the value of the landlord's or tenant's works or the rate at which they were amortised and was neither prescribed nor prohibited. The valuer had regard to a report from Napier and Blakeley. It was open to the valuer to conclude that the premises were being operated to a standard "consistent with the standards of average competent management". The valuer could inform himself as he saw fit and relied on the location of the premises and on the applicant's trading figures to conclude that the average competent tenant could achieve similar results.

43 It was said that the valuer was required to assume that there was a "hypothetical willing tenant" to bid on the leases. It was not prescribed or prohibited as to the evidence upon which he was able to rely and was not prescribed or prohibited as to any particular treatment of the prohibition in the leases on mortgaging or the Gaming Machine Arrangements Review. The `profits method', it was said, was not prohibited and section 37(2)(b) of the *Retail Leases Act* did not require the valuer to assume that the premises were unoccupied or vacant. His reasons were said to be adequate.

STATUTORY FRAMEWORK

44 It was common ground that the Epping Plaza Hotel constitutes "retail premises" within the meaning of the *Retail Leases Act 2003* and that the applicant's tenancy is regulated by that statute. Section 37 of the Act deals with rent reviews based on current market rent and provides:

> **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) to (6).
>
> (2) The current market rent is taken to be the rent obtainable at the time of the review in a free and open market between a willing landlord and willing tenant in an arm's length transaction having regard to these matters—

(a) the provisions of the lease;

(b) the rent that would reasonably be expected to be paid for the premises if they were unoccupied and offered for lease for the same, or a substantially similar, use to which the premises may be put under the lease;

(c) the landlord's outgoings to the extent to which the tenant is liable to contribute to those outgoings;

(d) rent concessions and other benefits offered to prospective tenants of unoccupied retail premises—

but the current market rent is not to take into account the value of goodwill created by the tenant's occupation or the value of the tenant's fixtures and fittings.

(3) If the landlord and tenant do not agree on what the amount of that rent is to be, it is to be determined by a valuation carried out by a specialist retail valuer appointed by—

(a) agreement between the landlord and tenant;

or

(b) if there is no agreement, the Small Business Commission—

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

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

Penalty: 50 penalty units.

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

(6) The valuation must—

(a) be in writing; and

(b) contain detailed reasons for the specialist retail valuer's determination; and

(c) specify the matters to which the valuer had regard in making the determination.

(7) The specialist retail valuer—

(a) must carry out the valuation within 45 days after accepting the appointment, or within such longer period as may be agreed between the landlord and

tenant, or if there is no agreement, as determined in writing by the Small Business Commission; and

(b) may seek to enforce under Part 10 (Dispute Resolution) an obligation of the landlord under subsection (4).

45 This section by its terms "covers the field". To the extent that any provision of the leases provides differently, section 94 of the *Retail Leases Act* would have section 37 prevail.

46 As at 2016 gaming in Victoria was governed by the *Gambling Regulation Act 2003*, which required a number of permissions to enable a gaming business to be conducted. Section 3.3.2(1) provided;

3.3.2 Which premises may be approved as suitable for gaming?

(1) An approval of premises as suitable for gaming may be given for any premises to which one of the following applies –

(a) a pub licence;

(b) a club licence;

(c) a racing club licence

…

47 An application for approval of premises might be made by "the owner of premises or a person authorised by the owner": s3.3.4(1). The expression "owner" is not defined in the statute. Notice of the application must be given to the responsible authority under the *Planning and Environment Act* 1987 for the locality in which the premises are situated: s3.3.5. That responsible authority may make submissions to the Commission namely, the Victorian Commission for Gambling and Liquor Regulation. Section 3.3.13 provided for the automatic revocation of a Premises Approval if a licence under the *Liquor Control Reform Act 1998* were cancelled, relocated, surrendered or suspended. Sections 3.3.15 and 3.3.15A provided as follows:

3.3.15 Surrender of approval

The holder of an approval under this Part may surrender the approval by giving notice in writing to the Commission.

3.3.15A One venue operator for an approved venue

Only one venue operator may conduct gaming in each approved venue.

48 A gaming business required its operator to hold what is described as a "venue operator's licence". Such licences might only be held by a body corporate: section 3.4.8. The matters to be considered in determining applications for these licences are set out in section 3.4.11. Included amongst those matters were: section 3.4.11(1)(b) that the Commission must be satisfied that "the applicant, and each associate of the applicant, is a

suitable person to be concerned in or associated with the management and operation of an approved venue". The Commission was required to consider the following matters under section (2):

> …
>
> (a) each applicant and associate of the applicant is of good repute, having regard to character, honesty and integrity;
>
> (ab) the applicant is of sound and stable financial background; and
>
> (b) the applicant has, or has arranged, a satisfactory ownership, trust or corporate structure;
>
> (c) any of those persons has any business association with any person, body or association who or which, in the opinion of the Commission, is not of good repute having regard to character, honesty and integrity or has undesirable or unsatisfactory financial resources;
>
> (d) each director, partner, trustee, executive officer and secretary and any other officer or person determined by the Commission to be associated or connected with the ownership, administration or management of the operations or business of the applicant is a suitable person to act in that capacity.
>
> …

49 Section 3.4.13 required the Commission to establish a Register of Venue Operators and Approved Venues containing the following information:

> …
>
> (a) the name and address of the venue operator;
>
> (b) the name and address of every associate of the venue operator;
>
> (ba) details as to whether the venue operator is the holder of a club venue operator's licence or a hotel venue operator's licence;
>
> (c) the address of each approved venue;
>
> (d) the number of gaming machines permitted in each approved venue;
>
> (e) the name and address of the nominee, if any, at each approved venue;
>
> (f) the days (if any) on which 24 hour gaming is permitted at the approved venue;
>
> …

50 Holders of venue operated licenses were required to have a nominee: section 3.4.14.

51 Section 3.4.15 provided: "a venue operator's licence is not transferable to any other person or, subject to section 3.4.17, venue". Section 3.4.17 allowed for the amendment of a venue operator's licence by "the addition or removal of an approved venue": section 3.4.17(1)(a).

52 In addition to requiring a premises approval and a venue operator's licence, a gaming enterprise such as the Epping Plaza Hotel was required to hold "electronic gaming machine entitlements" under Part 4A of the statute section 3.4A.1(1)(a).

53 These entitlements might be created by the Minister: section 3.4A.5. They were transferrable to another venue operator in accordance with section 3.4A.15 and the following sections, subject to the requirements of these provisions.

PARTIES' CONTENTIONS

54 Not every matter raised in the applicant's Points of Claim was pursued at the hearing. At the close of the evidence counsel for the applicant handed up a typescript outline of closing submissions. I have taken that document as being the ultimate expression of the applicant's case. That outline states:

> The Tenant relies upon three principal errors in the rental determination:
>
> (a) first, the conclusion that a hypothetical tenant could utilise the current Premises Approval in respect of the Epping Plaza Hotel to conduct gaming;
>
> (b) secondly, taking into account the value of the goodwill created by the Tenant's occupation;
>
> (c) thirdly, purporting to determine market rent on the basis of the trading profitability that the business of the Epping Plaza Hotel could reasonably be expected to achieve.

55 The outline stated "the errors noted above involve fundamental departures from the contractual stipulations contained in [clause 4.4 of the 2006 Deed of Renewal]. Accordingly, the parties are not bound by the Rental Determination, and the Tenant seeks an order setting it aside."

WHO IS THE "HOLDER" OF THE PREMISES APPROVAL?

56 I turn first to the applicant's contention that the Premises Approval granted to Epping Plaza Hotel would not be available to a hypothetical tenant.

57 In his Rental Determination Mr Grieve referred to a Memorandum of Advice which he received from Mr S R Horgan QC and Mr M D Tehan, abbreviated to the acronym "MOA", stating:

> The MOA forms the view that the Premises Approval is not a fixture or fitting (the value of both must be disregarded under the RLA) and there is no requirement within the RLA or Lease Renewal which would prohibit the valuer from taking the Premises Approval into account. Accordingly, the advice is that an expert valuer may assume that the Premises are being offered for lease with a Premises Approval. (CB Tab 21, page 42, paragraph 6.6.2)

58 Mr Grieve said that whilst section 37(2) of the *Retail Leases Act 2003* does not require a valuer to have regard to a Premises Approval, it does not

prohibit consideration of it. He said, since the premises approval was "not capable of being transferred it remains in force until its surrender or revocation". If the premises were unoccupied, he said, the Premises Approval would not cease to exist, it would "remain in force under the GRA until it is surrendered or revoked". There was nothing in the *Retail Leases Act 2003* or the leases which required "the expert valuer to ignore the circumstances which exist at the time of the review. Those circumstances include the fact that the Premises are currently an Approved Premises for the operation of gaming".

59 Mr Myers QC and Mr Holmes, on behalf of the applicant, said Mr Grieve's conclusion on this point "was wrong". They said the Premises Approval was available for use by Lucky Eights, only, for a number of reasons. The approval, they said:

a is held by the Tenant who is also the venue operator of the premises;

b is included on the Tenant's Venue Operator's Licence (**VOL**);

c permits the Tenant as venue operator to conduct gaming at the premises whilst holding Gaming Machine Entitlements (GME);

d remains in force until revoked by the VCGLR or surrendered by the Tenant;

e whilst in force, does not permit any other venue operator to conduct gaming at the approved venue to which it relates.

60 Before dealing more generally with the applicant's contentions and the counter contentions of the respondent, I can dispose of the last of the applicant's points summarily. It relies on section 3.3.15A of the *Gambling Regulation Act 2003* which is footnoted in the written outline. This section is quoted above and prohibits more than one operator conducting gaming at any one approved venue. Section 37(2) of the *Retail Leases Act 2003* requires a valuer, in making a fixation of market rent for retail premises, to assume that those premises are unoccupied. This hypothetical premise would leave the way clear for a hypothetical tenant, if all else could be resolved, to conduct gaming at the approved venue as the sole incumbent operator.

61 I deal with the balance of the applicant's contentions "from the top", considering, first, the question, who is to be regarded as "the holder" of the premises approval.

62 According to the applicant tenant, Lucky Eights Pty Ltd is that holder. Mr Myers QC and Mr Holmes said that as from 31 August 1998 Lucky Eights was the holder of the Premises Approval which they described as the "First Premises Approval". They said this was provided for by a transitional provision in the *Gaming Act (Miscellaneous Amendment) Act 1997* which amended the 1991 statute. They referred to section 34(3) of that amending Act which provides as follows:

34. Amendment of transitional provisions

…

In section 163 of the Principal Act, at the end of the section **insert**—

"(5) If, immediately before the commencement of section 7 of the **Gaming Acts (Miscellaneous Amendment) Act 1997**, premises were an approved venue, then on that commencement—

(a) they are deemed to be approved under Part 2A of this Act as suitable for gaming; and

(b) the venue operator at the approved venue immediately before that commencement is deemed to be the holder of the approval under Part 2A; and

(c) the approval is deemed to have been granted on the day on which the venue operator's licence was granted; and

(d) the premises are deemed to be specified in the venue operator's licence as premises that the venue operator is authorised to manage and operate under the licence; and

(e) the number of gaming machines permitted in the approved venue immediately before that commencement is deemed to be specified in the venue operator's licence as the number permitted in those premises; and

(f) the gaming machine areas approved for the approved venue immediately before that commencement are deemed to be specified in the venue operator's licence as the gaming machine areas approved for those premises.

…

63 This amending Act, they said, inserted a new Part 2A under the 1991 statute which provided in section 12I that the approval of premises previously granted under the 1991 Act remained in force until the earlier of (a) the approval being cancelled, revoked or surrendered or (b) the expiration of five years after the approval was granted.

64 According to Mr Myers QC and Mr Holmes, "from 31 August 1998, Lucky Eights was deemed to be the holder of the First Premises Approval, which was deemed to have been granted on 23 April 1996 and to expire on 22 April 2001, being five years after the day the first Venue Operator's Licence was granted".

65 They said in February 2001 Lucky Eights applied for renewal of the First Premises Approval. Section 12J of the *Gaming Machine Control Act* as it

then stood was headed, `Renewal of Approval' and provided that the holder of an approved premises might apply for a new approval prior to the expiration of the "current approval". This led, they said, to the grant of the second Premises Approval which, by virtue of section 12I of the 1991 statute, had a five year term due to expire in April 2006. As it was the *Gambling Regulation Act 2003* repealed the 1991 Act. Transitional provisions in the form of clause 3.3 of schedule 7 to the 2003 Act provided that an approval under Part 2A of the 1991 Act and in force immediately prior to the commencement of the 2003 statute was taken to be an approval under Part 3 of Chapter 3 of the *Gambling Regulation Act 2003* which will remain in force until revoked or surrendered under the 2003 Act.

66 Mr Myers QC and Mr Holmes said:

> In light of the foregoing, [Lucky Eights] submits that it is plainly the holder of the Premises Approval.

67 Mr Morris QC and Mr Hopper, on behalf of the respondent lessor, referred to a decision of the Full Court of the Supreme Court of Victoria in *Park Street Properties Pty Ltd v City of South Melbourne* [1990] VR 545 where the Court, Crockett, O'Bryan and Gray JJ, concluded that there was no rule of abandonment in Victorian planning legislation. In reaching that conclusion following a review of authorities both in Victoria and England, their Honours said:

> A planning permit enures for the benefit of the land and runs with the land as a result of judicial decision. [1990] VR 545, 554

68 As I understand the contention, the Premises Approval should be regarded likewise as enuring for the benefit of the land and running with it. Nevertheless, it was not common to speak of the "holder" of that planning permit. A rare exception was the reference to "the holder of the permit" in section 62(2)(l) of the *Planning and Environment Act* 1987 (T88-9). As far as the reliance by Lucky Eights on the transitional provision was concerned, they said that "the approval of premises that was given under the previous legislation operates as if it is given under the *Gambling Regulation Act 2003*, so it now operates as a creature of the *Gambling Regulation Act 2003*, hence, it's to the *Gambling Regulation Act 2003* we must look in order to characterises the nature of the beast" (T89, L40-5). Mr Morris QC and Mr Hopper said:

> …that the principals that apply to obtaining an approval of premises as suitable for gaming inform the nature of that approval, the character that it has. As does provisions of the Act that deal with the considerations that are relevant in granting the approval. So although it's true that the approval in this case is a deemed approval … that does not mean that the provisions of the Act that deal with obtaining such an approval are irrelevant, because the task is to characterise the nature of the approval, and the – the provisions that apply to obtaining such approval are relevant to that task. (T91, L46 - T92, L6)

69 The approval process, they said, did not refer to any person but rather to the characteristics of the premises (Ibid, L12-15). Therefore, the approval "appertains to the premises" (*Ibid*, L21), that is, the land and buildings (*Ibid*, L30). Next, they noted that applications for approval of premises by virtue of section 3.3.4 could be made only by the owner of premises or a person authorised by the owner (T93, L8-19). Next, they referred to the definition of owner in section 2.1.2 of the *Gambling Regulation Act 2003*:

> ***Owner*** of a house, place, land, building or premises includes every person who is, whether at law or in equity –
>
> (a) entitled thereto for any estate of freehold in possession; or
>
> (b) in actual receipt of or entitled to receive or if the house, place, land, building or premises were let to a tenant would be entitled to receive the rents and profits thereof and if a house, place, land, building or premises is sub-leased includes any lessee or sub0lessee from whom a sub-lessee holds;

Ultimately, however, they conceded that this definition was not applicable in the present circumstances. The provisions relied on in the *Gambling Regulation Act 2003* are to be found in Chapter 3 of the statute the definition of owner applied only to Chapter 2 (T94, L24-6). Accordingly, they said the word "owner" should be treated as the equivalent of "freehold owner" (*Ibid*, L41-2) and would not include a tenant for a term of years except perhaps a long term for say 99 years (T94, L46-T95, L2). They said a consideration of the matters relevant to the grant of a Premises Approval would "suggest that the character of the approval relates to the premises, rather than to an individual" (T95 L8-9). They said section 3.3.7 described `*Matters to be considered in determining applications*' and the focus again they said was upon the premises rather than any individual or corporation who might be an applicant (T96, L42-T97).

70 In this context they said a person "acting with the authority of the owner [the qualification required to entitle one to lodge an application for Premises Approval] is in effect acting as the agent of the owner (T101, L14-15).

71 As to whether in those circumstances it would be competent for someone in the position of Lucky Eights who sought and obtained the Premises Approval with the authority of the owner, Bevendale, to surrender that approval without the authority of, or reference to, Bevendale, they conceded that it depended upon the proper construction of the statute. Nevertheless, they said the position in these circumstances was accurately described by Ms Fitzpatrick, Director Licensing of the Victorian Commission for Gambling and Liquor Regulation in an email to a law firm acting in an unrelated transaction where the Director said:

> The Commission considers that the preferable interpretation of the "holder of the premises approval" is an entity that has consistent

> characteristics with one that can originally apply for the premises approval (i.e. the owner of premises or a person authorised by the owner). There is nothing to indicate that the Act intends to provide the further powers to vary or surrender a premises approval to a party that does not have the right to originally apply for such premises approval. In such circumstances, the Commission considers that a person authorised by the owner to apply for premises approval under section 3.3.4 does so not in its own right, but as agent for the owner. It follows that a premises approval granted by the Commissioner "held" either directed by the freehold owner of the premises to which the approval relates, or on trust by the person authorised by the owner to apply for the premises approval.

Therefore, the Director concluded that approval of the freehold owner would be required for the effective surrender of a Premises Approval.

72 Mr Myers QC and Mr Holmes however submitted that there was nothing in the *Gambling Regulation Act* 2003 which refers to any trustee/beneficiary relationship or principal/agent relationship. They said the plain and ordinary meaning of section 3.3.15 of the 2003 Act would be to entitle Lucky Eights to surrender the Premises Approval without any authorisation from Bevendale.

73 The considerations for the Commission upon granting a Premises Approval under the 2003 Act and the contrast between those and the considerations stated as relevant in other parts of Chapter 3 relative to the grant of venue operators' licences, make good Bevendale's contention that the venue operator's licence "pertains" to the land rather than to the person who made the application, whether that person be the freehold owner or, as in the present case, someone acting with the authority of the freehold owner. The analogy between the Premises Approval and planning permits granted under the *Town and Country Planning Act* 1961 or the *Planning and Environment Act* 1987 is compelling. There would seem to be no reason why the Premises Approval ought not to be regarded as running with the land and available for the advantage of the owner or occupier of the land for the time being.

74 Again, whilst there are obvious policy arguments in favour of the view that a Premises Approval held by a tenant is to be taken as held by the tenant as agent or trustee for the freehold owner, there are no words in the text of the statute supportive of that position. In 1910 Lord Mersey said:

> It is a strong thing to read into an Act of Parliament words which are not these, and in the absence of clear necessity it is a wrong thing to do. (*Thompson v Goold & Co* [1910] AC 409, 420)

75 His Lordship's words have been applied many times since. Had the Premises Approval in this case been granted on or after 2004 under the terms of the 2003 Act, the arguments of Bevendale as to the Premises Approval would have to be accepted.

76 Do the transitional provisions enacted in 1997 and 2003 affect this conclusion?

77 I agree with the contention on behalf of Bevendale that, since the effect of the transitional provisions relative to the Premises Approval is that such approval is deemed to have been granted under the 2003 Act, in general terms it is that statute which must guide the characterisation of the Approval. Section 14 of the *Interpretation of Legislation Act 1984* is however also relevant. The 2003 Act repealed the 1991 statute. Section 14(2)(e) of the *Interpretation of Legislation Act 1984* provides that the amendment "shall not, unless the contrary intention expressly appears … (e) affect any right, privilege, obligation or liability acquired, accrued or incurred under that Act [*viz* the repealed Act] or provision …".

78 The Premises Approval may be classified as a right or a privilege. Mr Myers QC and Mr Holmes also relied on sub-section (2A) which provides, generally, that the repeal of an Act "unless the contrary intention expressly appears, [does not] affect the operation of the savings or transitional provisions or end the validating effect of the provisions or affect the construction of that reference …". The contention therefore is that first, no contrary intention appears and secondly, that the effect of this sub-section is to preserve the original regime in which the tenant Lucky Eights held the Premises Approval on its own behalf legally and beneficially to the exclusion of any right on behalf of Bevendale.

79 Lucky Eights, by virtue of section 34(3) of the 1991 Act as amended is deemed to be the holder of the Premises Approval. This approval was deemed to have been given under Part 2A of the 1991 Act as amended. This was a right or privilege enjoyed by Lucky Eights at the time of the 2003 statute's repeal of the 1991 Act. As such, it was a right or privilege preserved by section 14 of the *Interpretation of Legislation Act 1984*.

80 The structure of the 2003 Act relied on by Mr Morris QC and Mr Hopper might be thought to be an implicit manifestation of an intention to the contrary of preserving the Premises Approval as a right or privilege accruing to Lucky Eights, but "contrary intention" required by the two subsections requires it to be manifested expressly. The implicit inconsistency of the regime established by the 2003 statute is therefore insufficient to exclude the preserving effect of section 14.

81 It follows that the contention on behalf of Lucky Eights that it is the holder of the Premises Approval, despite what might have been the situation had the approval actually been granted under the 2003 Act as distinct from merely being taken to have been granted under its term, must be accepted. It follows, therefore, that the hypothetical tenant should not be regarded as able to utilise the existing Premises Approval, first, because it could be surrendered by Lucky Eights under the statutory right in that respect granted by the 2003 Act without reference to Bevendale, and secondly, by

virtue of the transitional provisions, Lucky Eights is the holder for its own benefit and not on behalf of Bevendale of the relevant Premises Approval.

82 I turn, next, to consider the contention that Mr Grieve's Rental Determination offended against the requirements of section 37(2) of the *Retail Leases Act 2003* by taking into account the value of the goodwill created by the tenant's occupation. Mr Myers QC and Mr Holmes contended that "the terms of the contract clearly required the valuer to determine market rental value having regard to the rental values for comparable premises in the same retail shopping centre", rather than by reference to the profitability of Lucky Eights' enterprise. They said that the terms of the lease and the definition of "specialist retail valuer" referred to in section 37(3) of the *Retail Leases Act 2003* required the valuer fixing the rent to have experience in the determination of the market rental of comparable premises in large retail shopping centres.

83 The Deed of Renewal, 6 September 2006 defined the premises the rentals to which were to be fixed as Shops 28 and 28A and the lease required regard to be had to rental values for comparable premises in the same retail shopping centre and in the vicinity. Mr Myers QC and Mr Holmes said that the valuer's obligation "to have regard to" these matters meant that they were "required to be the focal point of his decision making process". They said this mandated the use of the comparable rates method. The rent to be fixed was in accordance with section 37(2) the current market rental. They said, "the concept of a 'market' rent is critical, and is to be achieved by comparing the premises with comparable premises for which rental amounts are available".

84 The valuer, they said, failed to comply. The "comparable premises" referred to by the valuer were resorted to solely for a consideration of "rental ratios" relative to the "EBITDAR" for the enterprises carried out at the relevant premises.

85 The valuer's approach was not justified by the decisions of the Trial Division of the Supreme Court and Court of Appeal in *Epping Hotels Pty Ltd v Serene Hotels Pty Ltd* [2015] VSC 104; [2015] VSCA 228, they said. Guidelines issued by the Small Business Commissioner relative to market rent fixations under the *Retail Leases Act 2003* required that a valuer "first consider any comparable rents for retail premises, which should be the primary consideration when determining market rent". They said the decisions of the Trial Division and Court of Appeal did not indicate that the profits method was always appropriate. Each individual valuation required consideration of the particular circumstances and the terms of the contract. They referred to *Australian Tenancy Law and Practice* [6.2.075]. They said there were no equivalents of clauses 4.4 and 4.5(d) in the Deeds of Renewal to be found in the lease considered in the *Serene Hotels* case. These clauses expressly provided for the comparable rates approach. They quoted from the primary decision in *Serene Hotels* which was made in the Tribunal, which they said rested on "narrower grounds than the Supreme

Court and Court of Appeal proceeded upon". Aside from the provisions in the Deed of Renewal in the present case, requiring a consideration of comparable rent they said the *Serene Hotels* case turned on the statutory direction to disregard the tenant's fittings which was the only issue raised. Further issues relating to gaming were, they said, "no longer in issue once the proceeding came before the Supreme Court".

86 The hotel, the subject of the dispute as to the fixation of market rent in accordance with s37 of the *Retail Leases Act 2003* in *Serene Hotels* case, was a "gaming hotel" like Epping Plaza Hotel [2015] VSCA 228 [18], though there were only 40 electronic gaming machine entitlements at the Epping Hotel. A valuation employing the "profits" method was upheld as being not inconsistent with the requirements of s37 of the *Retail Leases Act 2003* both by Croft J on appeal from a decision to the opposite effect in the Tribunal, and by the Court of Appeal. Tate JA gave the leading judgment in the Court of Appeal which Weinberg JA concurred. Robson AJA delivered a separate concurring judgment. It is perhaps not coincidental that the valuation considered in the *Serene Hotels* case was prepared by the same valuer (Mr Grieve) as the valuation in this case. As to the treatment of tenant's fixtures in that rental valuation Tate JA said:

> [70] In my view, the judge was correct to conclude that the methodology adopted by the Valuer, although it indirectly had regard to the Tenant's fixtures and fittings by taking into account the earnings made by the Tenant, 'cancelled out' that regard. The 'cancelling out' occurred with the adoption of a rental ratio that, as the Landlord submits, 'allows for' a deduction of the value of the market average of fixtures and fittings. As is reflected in the third and final step in making a determination of current market rental described by Hill and Redman, from the available balance of the net earnings remaining after operational expenses it is necessary 'to decide what proportion of the net profit should be taken as that which the willing lessee would be willing to pay as rent'. That proportion is what the Valuer described as the rental ratio; this was based on market norms of what a willing lessee would be willing to pay as rent. Importantly, the rental ratio takes account of the need also for the willing lessee to acquire the fixtures and fittings of the existing tenant. As the Valuer said, '[i]t is also the market norm whereby the negotiation of a new lease agreement would also comprise the Tenant's purchasing the Fixtures & Fittings plus the negotiation of a Rental'. By 'the Tenant' in this extract the Valuer is referring to the hypothetical future tenant. The rental ratio chosen here reflects or allows for a market norm with respect to average fixtures and fittings. [2015] VSCA 228 [70]

87 It would seem that in the *Serene Hotels* valuation, as in the present, there was no mathematical calculation which "cancelled out" the role of the fixtures in generating the profit by reference to which the rental was fixed.

Rather, this process was seen to have been effected by the ratio EBITDAR paid as rental for similar premises. To put it another way, the market reached an "instinctive synthesis" in cancelling out the affect of tenant's fixtures which by definition needed to be provided at the tenant's expense. This seems to me to be a key step in the Court's reasoning in dismissing the appeal, and therefore part of the *ratio decidendi.* Even if I were wrong and the case was seen as turning upon some narrower considerations as contended by Mr Morris QC and Mr Hopper, the quoted statement by her Honour must be regarded as, at the very least, a carefully considered dictum of an intermediate appeal court and the highest court in the state. As such, it should be followed and given effect to by this Tribunal. I reject the contention that the valuer was in error in the treatment of the tenant's fixtures.

88 If the Deed of Renewal or other contractual obligations between the parties is to be regarded as giving some greater force to a requirement to disregard or not have regard to the tenant's fixtures for the purposes of calculating market rent, the reasons of Tate JA quoted above would appear to be equally applicable to any such contractual obligation to exclude. If the considerations referred to by her Honour are apt to "cancel out" the tenant's fixtures for the purposes of the calculation required by section 37(2) of the statute, they will be effective to cancel them out for any other purposes.

89 I next turn to consider whether the valuer has erred in his treatment of "goodwill". Mr Myers QC and Mr Holmes contended that the valuer had "impermissibly valued the goodwill created by the tenant's occupation", contrary to section 31. They said he had "valued … the trading profitability of the business conducted by Lucky Eights … at the Epping Plaza Hotel in its current form". They said that the gaming revenue provided the overwhelming majority of revenue used by the valuer to determine the trade and profitability of the business. In essence, they said that a consideration of trade and profitability of necessity entailed a consideration of the tenant's goodwill.

90 It is necessary to note, first, that the requirement that the rental valuation "not … take into account the value of goodwill" does not apply to goodwill generally but only to that goodwill which is "created by the tenant's occupation or the value of the tenant's fixtures and fittings" (*Serene Hotels*). I have already dealt with the issue of tenant's fixtures and fittings. Lucky Eights filed a statement by Associate Professor Dunn who was the inaugural Chair of the Victorian Commission for Gambling Regulation, serving from 2005 to 2010 in that position. Parts of Professor Dunn's statement were excluded as inadmissible, however in one of the portions which was admitted into evidence the Professor explained the operation of the requirement that for the grant of additional electronic gaming machine entitlements, the Commission needed to find that the grant of the new entitlements would create "no net social detriment". Speaking of these opponents of gambling in opposing the grant of further electronic gaming

machine entitlements he said, "in many cases the issue of `convenience gambling' has been adverted to. It is believed that if gaming venues (usually, although no[t] always, hotels) are situated in shopping centres, perhaps near supermarkets, people who may have set off with no intention of gambling, may nevertheless enter a venue intending to stay for a short time but ultimately spend hours there" [paragraph 49]. He said that this was a consideration weighing on the Commission in rejecting an application for a gaming venue located close to supermarkets [50] see *Pakenham Lakeside* VCGR 26/6/2008. He regarded the Pakenham Plaza Shopping Centre as a "strip shopping centre" with an application for new electronic gaming machine entitlements being unlikely to succeed [52].

91 According to Professor Dunn, the City of Whittlesea, being the municipal district in which the Epping Plaza Shopping Centre is located, "has experienced very high levels of gaming expenditure with a number of the biggest venues in the State … All of the major venues have been at least, historically, in the south of the municipality, in or around Epping". [53]

92 It follows from Professor Dunn's observations as to the siting of this venue that a very considerable portion of goodwill attaching to it for gaming purposes derives from its location in the City of Whittlesea which appears to be a "gambling hot spot" on the Professor's analysis, and also its situation in a shopping centre properly characterised as a "strip shopping centre".

93 This portion of goodwill cannot be regarded as deriving from Lucky Eights' occupancy of premises rather, it inheres in the location itself. Expert valuer Ms Freeman who gave evidence on behalf of Bevendale contrasted the goodwill inherent in the site itself from "the goodwill peculiar to the tenant, which is …. the special characteristics of trade that it brings. For instance, a football star operating the bar might generate a higher revenue and trade as compared to a conventional or good-average or average-competent manager. Equally, it could be underperforming due to … laziness and incompetence by an ordinary tenant. So in the context of valuation of rent particularly, we try to consider the goodwill peculiar to the tenant as compared to what is created by the use and location and so on." [T234, L27-34]

94 Again, as I understood Ms Freeman, she said that the goodwill attributed to the tenant would be cancelled out of the equation by the rent which the market was prepared to pay for the premises, a particular portion or percentage of profit could be committed to rent in light of the goodwill which could be regarded as pertaining to the premises as distinct from the goodwill which the tenant was obliged to bring to the enterprise itself [T234, L36 - T235, L29]. In this case, Mr Grieve found that the profitability achieved equated with what might be expected from average competent management. Mr Grieve made a similar finding with respect to the Epping Hotel [2015] VSCA 228 [72]. There was no evidence of

goodwill generated by Lucky Eights, itself, such as by having a sporting personality as the "host".

95 It follows that the valuer cannot be regarded as having erred with respect to the treatment of goodwill.

96 Accepting that the *Serene Hotels* case does not state a general proposition that the "profits" method of rent fixing is always appropriate, it does recognise that it may be appropriate and, subject to one matter to which I refer below, there would not seem to be a material distinction to draw between the Epping Hotel considered in the *Serene Hotels* case and the Epping Plaza Hotel in the present case.

Purpose-built structure

97 One matter raised originally on behalf of Lucky Eights but not persisted with in closing submission was the contention that whilst the "profits method" might be an appropriate method of fixing current market rent for a purpose-built hotel, it was not appropriate for a structure such as the Epping Plaza Hotel which was let to Lucky Eights as a bare shell, a generic space, albeit a big one, in a shopping centre, no different, perhaps, from a large "shell" which might be made available for use as a supermarket or a department store. In case this contention is still relied upon by Lucky Eights I should deal with it.

98 The applicant relied on a decision of the English Court of Appeal in *W J Barton v Long Acre Securities Ltd* [1982] 1 All ER 465. In that case the leased premises were in accordance with a clause restricting the use of those premises operated as a bakery and confectionary establishment. Upon renewal of the lease the landlords sought an order for the tenant to disclose all the trading accounts for the past three years for the purpose of fixing the market rent. The orders were made by a judge of the County Court and the tenants appealed to the Court of Appeal constituted by Lawton Brightman and Oliver LJJ. The Court of Appeal reversed the decision below in a joint judgment delivered by Oliver LJ (as he then was). The Court stated:

> It is, we think, clear that there are several types of premises, of which a hotel is only one example, where the ascertainment of an open market rent may depend upon an assessment of the likely profitability of the business for which the premises are peculiarly adapted. Other instances might be a petrol-filling station, a theatre or a racecourse, in all of which the market rent may well depend upon the average takings. It is both unnecessary and would be unwise to seek to define or limit the categories of premises where such evidence would relevant for the limited purpose described in the *Harewood Hotels* case [1958] 1 W.L.R. 108. But that is a far cry from saying that such evidence is always relevant and, in our judgment, considerations of this sort do not apply in the ordinary case of shop premises with no peculiar features in a business area such as that with which the instant case is concerned and where there are plenty of comparable premises from which the open market rents can be deduced.

99 The argument, therefore, was that resort to the profits method of rent fixation could be had only when there were no comparable premises rentals available. This would typically occur in circumstances of purpose-built premises such as the ones described by their Lordships in the passage quoted above. The hotel premises in the *Serene Hotels* case was purpose-built [2015] VSCA 228 [17] in contra distinction to the establishment in question here. In *Serene Hotels* the Court of Appeal mentioned *Barton's case* only as being one of the authorities considered by the judge of the Trial Division, Croft J, whose decision they upheld [2015] VSCA 228 [50]. Croft J at first instance referred to *Barton's case* and some other decisions [2015] VSC 104 [35] – [40] and referred in [38] – [39] to a number of texts, including English texts which suggested this approach "may be too restrictive". The existence or non-existence of a distinction for rent fixing purposes between a "purpose-built" hotel on the one hand and premises such as the present ones on the other did not arise for decision by the Court of Appeal.

100 In the present case the evidence did not disclose that the premises offered any residential accommodation. Accordingly, it is not a hotel in the traditional sense or in the sense used in older licensing legislation in this State which mandated the provision of residential accommodation for premises licensed as "hotels". Ms Freeman, a valuer giving evidence on behalf of Bevendale, referred to the present establishment as a "tavern" which might be thought to be more accurate. Plainly, "the purpose-built" element of an establishment providing multiple pieces of residential accommodation is far stronger than one which merely sells liquor and food and provides gaming facility. An establishment such as the Epping Plaza Hotel erected outside the precincts of a shopping centre would, in broad terms, be little different from the present structure. All in all, the distinction between these premises and a purpose-built, free-standing hotel outside the precincts of a shopping centre is somewhat elusive. In my view, the nature of these premises located as they are within the precincts of the shopping centre and having been fitted out by the tenant from an empty "shell" does not constitute an objection to the use of the profits method.

101 Insofar as the applicant in closing submission made a general contention that, purporting to determine market rent on the basis of trading profitability that the business of the Epping Plaza Hotel could reasonably be expected to achieve "constituted an error on the part of the valuer", it must be rejected on the basis of the matters referred to above.

Nature of error

102 Mr Morris QC and Mr Hopper on behalf of Bevendale contended that even if any of the matters urged on behalf of Lucky Eights were accepted as establishing an error or errors on the part of the valuer, Mr Grieve, neither singly nor collectively could any of those matters constitute such an error as would in law invalidate his rental determination.

103 Mr Morris QC and Mr Hopper referred to leading authorities on those matters which might invalidate an expert rental determination agreed by the parties to be final and binding subject to judicial review. They referred to the seminal judgment of McHugh JA (as he then was) in *Legal & General Life of Australia Limited v Hudson Pty Ltd* (1985) 1 NSWLR 314, 335-6 and the analysis of Nettle JA in *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173 [51] – [53] and to the judgment of Gillard J (the younger) in *Commonwealth of Australia v Wawbe Pty Ltd & Pinebark Park Pty Ltd* [1998] VSC 82 where his Honour said:

> [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 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?

104 They noted that Croft J proceeded in accordance with the principles in the *Serene Hotels* case.

105 Mr Myers QC and Mr Holmes did not disagree with these principles which are supported by high authority. The judgment of McHugh JA (as he then was) in the *Legal & General* case might be regarded as the *fons et origo* of the modern line of authority on these matters. I take the liberty therefore of quoting the relevant passage in full:

> In my opinion the question whether a valuation is binding upon the parties depends in the first instance upon the terms of the contract, express or implied. This was pointed out by Sir David Cairns in the Court of Appeal in *Baber v Kenwood Manufacturing Co Ltd* (at 181). A valuation obtained by fraud or collusion can usually be disregarded even in an action at law. For in a case of fraud or collusion the correct conclusion to be drawn will almost certainly be that there has been no valuation in accordance with the terms of the contract. As Sir David Cairns pointed out, it is easy to imply a term that a valuation must be made honestly and impartially. It will be difficult, and usually impossible, however, to imply a term that a valuation can be set aside on the ground of the valuer's mistake or because the valuation is unreasonable. The terms of the contract usually provide, as the lease in the present case does, that the decision of the valuer is "final and binding on the parties". By referring the decision to a valuer, the parties agree to accept his honest F and impartial decision as to the appropriate amount of the valuation. They rely on his skill and judgment and agree to be bound by his decision. It is now settled that an action for damages for negligence will lie against a valuer to whom the parties have referred the question of valuation if one of them suffers loss as the result of his negligent valuation: *Sutcliffe v Thackrah* [1974] AC 727; *Arenson v Arenson* [1977] AC 405. But as

> between the parties to the main agreement the valuation can stand even though it was made negligently. While mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or the certificate of valuation, nevertheless, the mistake may be of a kind which shows that the valuation is not in accordance with the contract. A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties. But a valuation which is the result of the mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract. (1985) 1 NSWLR 314, 335-6

106 It follows from these principles that a vast range of errors may be made by an expert valuer in formulating his valuation as an expert appointed by contract to provide a binding determination which do not invalidate his determination. According to his Honour, "a mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties". Here, the error which I have found does not relate to the geographical identity of the premises to be valued, rather, it relates to one of its attributes or appurtenances. Mr Grieve proceeds upon the basis that the Premises Approval for the Epping Plaza Hotel would be available to the hypothetical tenant referred to in section 37(2) of the *Retail Leases Act 2003*. Bevendale, through its counsel, contends that this was appropriate since the Premises Approval should be regarded either as appertaining to the premises, themselves, and therefore "running with the land" like a planning permit, or as being a right held on behalf of the freehold owner, Bevendale, because of what might be regarded as a quirk of the transitional arrangements governing these Premises Approvals. Bevendale's analysis of the situation appears to be incorrect. Is this error of sufficient importance in accordance with the principles just discussed to invalidate the determination?

107 For the period commencing 12 July 2015 the rent payable by Lucky Eights for Shop 28 was $401,145.91 plus GST. Shop 28A commanded a rental in the same period of $55,181.45 (see Mr Grieve's Rent Determination – CB Tab 21, page 22). His determination for the shops for the immediately following period commencing 12 July 2016 was $1,602,043 per annum exclusive of GST for Shop 28 and $213,957.00 per annum exclusive of GST for Shop 28A.

108 This extraordinary jump in rental resulted from the application of the "profits" method as described above in lieu of the comparative rentals

approach previously adopted. Bevendale was no doubt emboldened to seek a Rental Determination on this basis by the outcome of the *Serene Hotels* litigation. Mr Grieve is the same valuer who made the valuation challenged and upheld by Croft J and the Court of Appeal in that case. The crucial difference between Mr Grieve's Determination and the rentals which had previously been adopted for the premises was that Mr Grieve fixed his Rental Determination by reference to the profitability of the hotel which is underpinned by an annual gaming revenue in the relevant period in excess of $21m. Mr Grieve placed the Premises Approval into the equation which has had a dramatic affect. Whether it is proper to regard the Premises Approval as some sort of interest in the nature of an incorporeal hereditament I need not pause to consider. The Premises Approval, however, was of such significance that to include it inappropriately, as I have found Mr Grieve did, amounts in substance to making an error as to the subject matter of the valuation, a matter which, as the passage quoted from the McHugh JA in the *Legal & General* case is sufficient, in itself, to invalidate the valuation.

DISPOSITION

109 I will invite the parties to bring in short minutes to give effect to these reasons. I have heard no submissions on the question of costs, so I will reserve them. It will appear on the face of it that the costs discretion in this proceeding will be constrained by section 92 of the *Retail Leases Act 2003*.