**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST** VCAT REFERENCE NO BP1617/2015

## CATCHWORDS

RETAIL TENANCY DISPUTE - Interpretation of Clauses 11 and 12.2.2 of the Law Institute of Victoria standard form lease (2006 revision) - whether rent is to be reviewed upon renewal of lease.

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|---|---|
| **APPLICANT** | MD & S Griggs Pty Ltd (ACN 162 638 280) |
| **RESPONDENT** | DWH Pty Ltd (ACN 150 372 802) |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Senior Member E. Riegler |
| **HEARING TYPE** | Preliminary Hearing |
| **DATE OF HEARING** | 27 September 2016 |
| **DATE OF ORDER** | 11 October 2016 |
| **CITATION** | MD & S Griggs Pty Ltd v DWH Pty Ltd (Building and Property) [2016] 1718 |

## ORDER

1. In answer to the preliminary question, I find and declare that the lease between the parties provides for a market review at the expiration of each term and upon renewal.
2. **This proceeding is listed for a further directions hearing before Senior Member E Riegler at 12:00pm on 28 October 2016 at 55 King Street, Melbourne, 3000, at which time further orders will be made as to the future conduct of the proceeding**.
3. Costs reserved.

**SENIOR MEMBER E. RIEGLER**

**APPEARANCES:**

| | |
|---|---|
| For the Applicant | Mr P Miller of counsel |
| For the Respondent | Mr W Stark of counsel |

## REASONS

### INTRODUCTION

1. The Applicant is the current tenant of retail premises known as the Landsborough Hotel (**'the Tenant'**), located in Landsborough, Victoria (**'the Property'**). The Respondent is the registered proprietor and landlord of that Property (**'the Landlord'**).

2. The proceeding concerns an application by the Tenant seeking an order compelling the Landlord to consent to the transfer of the lease to another entity, which has agreed to purchase the hotel business currently operated by the Tenant. That aspect of the Tenant's application is yet to be heard because a preliminary question has arisen for determination, which concerns the terms of the lease between the Tenant and the Landlord. Consequently, by order dated 29 April 2016, the Tribunal listed the proceeding for a preliminary hearing to determine the following question:

   > Does the lease between the parties provide for a market review at the expiration of each term?

3. The Landlord contends that the express terms of the lease provide that at the expiration of each term, rent is to be determined according to market. By contrast, the Tenant submits that the express terms of the lease stipulate that there is to be no market review of the rent at the expiration of each term. Consequently, rent is to remain constant upon renewal, notwithstanding that if all options for renewal are exercised, rent will remain fixed at $18,200 per annum from the commencement date of 1 October 2009 until 30 September 2029.

4. Clearly, the interpretation of this aspect of the lease impacts significantly on the Tenant's ability to sell the hotel business.

### EXPRESS TERMS OF THE LEASE

5. The lease document is in the form of a Law Institute of Victoria standard form lease (*2006 Revision*). Clauses 11 and 12 concern rent reviews. They state, in part:

   > **11. RENT REVIEWS TO MARKET**
   >
   > 11.1 In this clause "review period" means the period following each **market review date** until the next **review date** or the end of this lease.
   >
   > <u>The review procedure on each **market review date** is</u>
   >
   > 11.1.1 each review of **rent** may be initiated by either party unless **item 17** states otherwise but, if the **Act** applies, review is compulsory.

11.1.2 a party may initiate a review by giving the other party a written notice stating the current market **rent** which it proposes as the rent for the review period. Unless the **Act** applies, if the party receiving the notice does not object in writing to the proposed **rent** within 14 days, it becomes the **rent** for the review period.

…

[underlining added]

**12. FURTHER TERM(S)**

…

12.2 The renewed lease –

12.2.1 starts on the date after this lease ends,

12.2.2 has a starting **rent** determined in accordance with clause 11, and

12.2.3 must contain the same terms as this lease but with no options for renewal after the last option for a further term stated in **item** 18 has been exercised.

[underlining added]

6. It is common ground that the *Retail Leases Act 2003* applies to the lease. The reference to *the Act* in the above clauses is a reference to that Act (**'the Act'**).

7. The discourse over the question of rent review stems from what the parties have inserted in Items 16 and 17 of the lease schedule. In particular:

| | | |
|---|---|---|
| **Item 16**<br>[2.1.1, 11, 18] | **Review date(s):** | |
| | Market review: | Not applicable |
| | CPI review: | Not applicable |
| | Fixed review: | Not applicable |
| **Item 17**<br>[2.1.1, 11, 18] | **Who may initiate reviews:** | |
| | Market review: | Not applicable |
| | CPI review: | Not applicable |
| | Fixed review: | Not applicable |

[underlining added]

## THE TENANT'S SUBMISSIONS

8. Mr Miller of counsel appeared on behalf of the Tenant. He submitted that the lease does not provide for any review of rental, either during each term or upon renewal. He argued that this situation arises because Clause 11 of the lease is predicated on a *market review date* being specified in the lease. Therefore, if the parties have not specified a *market review date*, Clause 11 has no work to do. The *market review date* is defined in the lease to be the date specified in Item 16 of the lease schedule. As indicated above, Item 16 of the lease schedule does not specify a *market review date*. It states that the *market review date* is *Not applicable*.

9. Mr Miller submitted that Clause 12.2.2 is expressly tied to Clause 11 of the lease. Therefore, if no market review is required under Clause 11, then no market review is required under Clause 12.2.2. Consequently, he argued that the parties have, by engrossing Item 16 of the lease schedule with the words *Not applicable*, intended Clause 12.2.2 not to do any work.

10. Mr Miller submitted, correctly in my view, that there is established authority for the proposition that in the case of an inconsistency between specifically negotiated terms and printed clauses forming part of a standard form contract, the specifically negotiated terms will prevail.[1] Therefore, to the extent that there is an inconsistency between the requirement under Clause 12.2.2 to determine the starting rent of any renewed term, and what the parties have engrossed under Item 16 of the lease schedule, Item 16 is said to prevail.

11. Similarly, Mr Miller submitted that s 35 of the Act, which regulates how rent reviews are to be performed, has no application to the lease because the lease does not provide for a review of rent.

## LANDLORD'S SUBMISSIONS

12. Mr Stark of counsel appeared on behalf of the Landlord. He conceded that the express terms of the lease did not provide for any rent review during each term of the lease. However, he argued that the lease required a review to market upon renewal of each new term. He drew my attention to the express words of Clause 11.1, which state that *the "review period" means the period following each market review date until the next review date <u>or the end of this lease</u>*. Mr Stark submitted that the words *or the end of this lease* means the end of each term because the renewal of the lease constitutes a fresh lease of itself.

13. Therefore, he argued that it was clear from the words of the lease what the parties had agreed; namely, that there was to be no mid-term rent reviews but that after the expiration of the first term and upon renewal, rent would be set according to market.

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[1] Lewison, *The Interpretation of Contracts* (Thomson Reuters 5th ed, 2012), 501-4, [9.10].

14. Mr Stark referred me to a decision of Deputy President Macnamara (as he then was) in *Dagles Trading Pty Ltd v Scamper Pty Ltd*,[2] where the Tribunal stated:

> 45 All this leads me back to the text of the 1999 lease which I have quoted or summarised above. As Mr Wikrama contends and Mr Golvan and Mr Borsky concede, the special condition at Item 22 of the schedule must prevail to the extent that it is inconsistent with the printed terms of the standard form. I accept the submission by Mr Golvan and Mr Borsky however that there is no inconsistency. Clauses 11 and 12 of the printed form deal with one subject matter, namely the renewal of the lease pursuant to the options to renew and the fixation of rent upon that renewal and special condition 1 deals with rental reviews *'during'* that renewed term. In accordance with the distinction drawn by Phillips JA in the *Ensabella* case, reviews 'during' the term of the lease are mid-term reviews not the process of fixation of the initial rental. The words of special condition 1 have their own work to do. That is, to stipulate what rental reviews are to take place during the renewed term and those reviews are annual CPI indexation. The clause has the effect inter alia as Mr Golvan and Mr Borsky conceded of excluding any provision for a market review at the end of year four for year five of the review term.

15. Mr Stark submitted that Clause 11 read in conjunction with Item 16 and 17 of the lease schedule operated to prevent any rent review during the currency of each term of the lease. However, Items 16 and 17 of the lease schedule had no operation upon renewal, in which case the opening words of Clause 11.1 clearly stipulated that there was to be a review of rent at the end of this lease, being the end of each term.

## CONCLUSION

### How should Clause 11 be construed?

16. In my view, the words *market review date* in Clause 11 refer to a point in time during the currency of the lease. Similarly, Items 16 and 17 of the lease schedule refer to mid-term reviews, not the process of fixing the initial rent at the commencement of each renewal.

17. I am of the view that Clause 12.2.2, which states that the *renewed lease <u>has a starting rent determined in accordance with clause 11</u>,* means that the mechanical provisions of Clause 11 are to be utilised to determine what the starting rent is to be for the renewed lease. This is because the opening words of Clause 11.1 contemplate that the *review period* will cease either at the *next review date* (if there is one) or alternatively, *at the end of this lease.* Therefore, the *market review date* refers to a point of

[2] [2006] VCAT 1220.

time during the currency of the lease. The failure to specify a *market review date* in the lease schedule simply means that there will be no market review during the currency of any specific term. However, it does not therefore follow that there will be no market review to determine the starting rent of any renewal. Such an interpretation would be inconsistent with Clause 12.2.2 which requires that there be a determination of the starting rent of any new term.

18. Mr Miller submitted that there is no inconsistency when clauses 11, 12.2.2 and Items 16 and 17 of the lease schedule are read together. I do not accept that submission. In my view, such an interpretation leaves Clause 12.2.2 in a lacuna. In particular, Clause 12.2.2 contemplates that the starting rent of any new term is to be determined, rather than simply rolled over from the previous term. However, adopting the interpretation advanced by Mr Miller would prevent the procedure described under Clause 11 to operate, which would then frustrate the way in which starting rent was to be determined. This creates a conflict between the two clauses, because on one hand, Clause 12.2.2 requires the starting rent to be determined while on the other hand, the very procedure which would have allowed that to occur is removed from the lease.

19. Mr Miller submitted that because Clause 11 is inoperative (by reason of no *market review date* being specified), Clause 12.2.2 is also to be read as being inoperative. I reject that proposition. Clause 12.2.2 imposes a positive obligation on the parties to determine the starting rent of any renewed term. If the parties had intended for there not to be a review on renewal, Clause 12.2.2 could have been deleted. This has not occurred. The interpretation placed on Clause 12.2.2 by Mr Miller requires me to construe the clause as meaning that there will only be a determination of the starting rent if, and only if, the parties have specified that there is a *market review date*. However, such an interpretation ultimately leads to disharmony between the two clauses. In particular, on one hand, Clause 12.2.2 requires that the starting rent be re-set; while on the other hand, Mr Miller's interpretation of Clause 11 prevents that from occurring.

20. Mr Miller drew my attention to a number of authorities of general application relating to the contractual construction applicable to leases. In particular, he made reference to the judgment of Croft J in *Growthpoint Properties Australia Ltd v Australia Pacific Airports (Melbourne) Pty Ltd*,[3] where his Honour stated:

> The text of a contract should be given its natural and ordinary meaning. The court should only depart from the natural and ordinary meaning so far as necessary to avoid an inconsistency or absurdity. If the language of the instrument is open to two constructions, preference will be given to the one which will avoid the result which is considered inconvenient

[3] [2014] VSC556, [13] (footnotes omitted).

> or unjust. It is well established that individual provisions need to be considered in the context of the instrument as a whole.

21. Further reference was made to the judgment of Gibbs J in *Australian Broadcasting Commission v Australasian Performing Rights Association Ltd*,[4] where his Honour stated:

> Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be resolved by other parts, and the words of every clause must, if possible, be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different.[5]

22. Both of the above authorities reinforce my view that in order to render Clause 12.2.2 harmonious with Clause 11, the *market review date* referred to in Clause 11.1, must be read as being limited to mid-term reviews.

23. Therefore, Clause 11 has two functions. The first is to provide the mechanical provisions for rent review during the currency of a term, subject to Item 16 of the lease schedule stipulating a *market review date*. The second function is to provide mechanical provisions to establish the starting rent of any renewed term.

24. In my view, such an interpretation avoids the apparent disharmony between the two provisions and gives effect to what was intended. I am reinforced in this view by a review of the following authorities, which examine how a conflict between two clauses may be reconciled.[6]

25. In *Australian Guarantee Corp Ltd v Balsing*,[7] Isaacs J stated:

> If a later clause cannot be reconciled with an earlier one creating an obligation, then if it altogether destroys the obligation it must be treated as void, but if it only qualifies the form of the two are to be read together and effect given to the intention of the parties as disclosed by the instrument as a whole.[8]

26. In *Re-Media Entertainment Arts Alliance; Ex Parte Points Corp Pty Ltd (No 1)*,[9] the joint judgment of Mason CJ Brennan, Dawson, Toohey, Gaudron and McHugh JJ said:

> A conflict … involving apparently inconsistent provisions in the one instrument, is to be resolved, if at all possible, on the basis that one

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[4] (1973) 129 CLR 99.
[5] Ibid at 109.
[6] Cited in Lewison and Hughes, *The Interpretation of Contracts in Australia* (Lawbook Co, 2012) at 432-433.
[7] (1930) 43 CLR 140.
[8] Ibid at 151.
[9] (1993) 178 CLR 379.

provision qualifies the other and, hence, that both have meaning and effect … That rule is an aspect of the general rule that an instrument must be read as a whole …[10]

27. Similarly, in *Durbin v Perpetual Trustee Co Ltd*,[11] Kirby P said:

> Where there is apparent disharmony between the provisions of different clauses, unless one effectively destroys the other, it will be assumed that the disharmony involves qualification by one of the other, not incompatibility…
>
> Instead, the Court should bend its efforts to find, from the instrument and permissible surrounding circumstances, the true purpose of the entirety of the document upon the assumption that it was intended to operate in a consistent and coherent way.[12]

28. In my view, Clause 12.2.2 discloses an intention that the starting rent upon renewal was to be re-set. Therefore the reference to *market review date* in Clause 11.1 and Item 16 of the lease schedule is to be qualified by confining it to mid-term reviews. It cannot mean *starting rent* reviews. This is reinforced by the words of Clause 11.1 which contemplate that the *market review date* defines the *review period* from the *market review date* to either the next review date or the *end of the lease*. This assumes that the review period is re-set at the end of the lease.

**SENIOR MEMBER E. RIEGLER**

[10] Ibid at 386-7.
[11] [1995] NSW Conv R 55-725.
[12] Ibid at 55,603-4 (dissenting)