VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP557/2018

CATCHWORDS

Rental determination under *Retail Leases Act 2003* (Vic), application to set aside, whether inconsistency between lease provisions and s 37 (2) of the Act; whether determination vitiated by error, whether tenant obtaining gaming machine licence and extended hours on liquor licence are matters for Valuer to take into account in assessing market rent.

APPLICANT	The Bay And Bridge Hotel Pty Ltd
RESPONDENT	Ventofond Pty Ltd (ACN: 006 381 648)
WHERE HELD	Melbourne
BEFORE	Senior Member L. Forde
HEARING TYPE	Hearing
DATE OF HEARING	14 September 2018
DATE OF ORDER	25 September 2018
CITATION	The Bay and Bridge Hotel Pty Ltd v Ventofond Pty Ltd (Building and Property) [2018] VCAT 1489

ORDER

1 The Tribunal finds and declares that the rental determination undertaken by the valuer and issued to the parties on 22 March 2018 is vitiated by error and of no effect.

2 Liberty to apply on the question of costs. Such liberty to be exercised by 26 October 2018.

L. Forde
Senior Member

APPEARANCES:

For Applicant	Mr S. Hopper of counsel
For Respondent	Mr D.P. Lloyd of counsel

REASONS

1 This is an application to set aside a determination of the current market rent for a retail premises lease issued by Peter Grieve of Cropley Commercial on or about 22 March 2018 (**determination**) under the *Retail Leases Act 2003* (Vic) (RLA).

BACKGROUND

2 The applicant is the tenant and the respondent is the landlord of premises known as the Bay and Bridge Hotel located at 316 Bay Street Port Melbourne, Victoria (**premises**).

3 The background facts are not in dispute. The parties agree that: -

i prior to 29 September 2010, the tenant purchased the goodwill of the business trading at the premises. At the time the premises were used as a food and beverage venue with TAB but were not a gaming venue and had no planning permission or premises approval to operate as a gaming venue;

ii the parties entered a lease of the premises for a term of seven years commencing 29 September 2010 with further options;

iii in early 2011, the tenant successfully applied to vary the liquor licence conditions to extend the trading hours;

iv in late 2011, the tenant made an application for planning permission and premises approval to allow the tenant to operate a gaming venue on the premises;

v in late 2012, planning permission and premises approval to allow the tenant to operate a gaming venue at the premises were granted;

vi in early 2013, significant alterations were made to the venue to allow gaming approval post approvals of approximately $100,000;

vii on 2 June 2017, the tenant exercised the option for a further term commencing 29 September 2017;

viii on 15 November 2017, Peter Grieve of Cropley Commercial was appointed to conduct the determination; and

ix on 22 March 2018, the determination was issued.

HEARING

4 As the parties agreed on the facts set out in the preceding paragraph, no oral evidence was called. An agreed Tribunal Book which contained the lease

and the determination was relied upon and detailed written submissions were filed and spoken to at the hearing.

5 The determination is primarily challenged by the tenant on the basis that the valuer did not properly consider, as he was required to do by clause 37 (2) of the RLA, the matters in clause 7006.7 of the lease when making his determination. The landlord's position is that clause 7006.7 is inconsistent with the requirements of section 37 (2) of the RLA and therefore by reason of section 94 of the RLA must be ignored.

Legislative provisions

6 The provisions of the RLA which are relevant to the present proceeding are as follows:

> 37 (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.

7 Section 37 (1) of the RLA has the effect of treating the provisions of sub-ss (2) to (6) as terms of the lease.[1]

8 Section 37 (5) of the RLA provides "*In determining the amount of the rent, the specialist retail valuer must take into account the matters set out in subsection (2)"*.

9 Section 94 of the RLA provides: -

> (1) A provision of a retail premises lease or of an agreement (whether or not the agreement is between parties to a retail premises lease) is void to the extent that it is contrary to or

[1] Epping Hotels Pty Ltd v Serene Hotels Pty Ltd [2015] VSC 104

inconsistent with anything in this Act (including anything that the lease is taken to include or provide because of a provision of this Act).

10 In deciding whether a determination should be set aside Gillard J in Commonwealth of Australia v Wawbe Pty Ltd & Anor[2] stated

> 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?

11 The tenant submitted that what the parties agreed to remit to the valuer or in other words the valuer's charter, was to be derived from two relevant parts being sub-s37 (2) of the RLA and clause 7006.7 of the Lease.

12 The lease contains the following relevant clauses: –

> 7001. The annual rental shall be reviewed at the commencement of each further term of the lease (called "the new lease review date" in this lease) in accordance with the provisions of CLAUSES 7001 to 7015 (both inclusive).
>
> …
>
> 7006. In determining the current market rental for the hotel the valuer must:
>
> …
>
> 7006.7 ignore the tenant's installations and all improvements made by the tenant to the hotel and to its business;

13 In the determination, the valuer concluded that clause 7006.7 of the lease places no additional requirements onto those described in section 37 (2) of the RLA. The valuer stated that he was obliged to or alternatively it was open to him to determine the rent on the basis that the hypothetical tenant would be able to trade in accordance with the current permitted licensing hours and that the hypothetical tenant is leasing the premises which includes approval for the operation of gaming machines.

14 The valuer also concluded that the phrase "*Tenant's installations and all improvements made by the tenant"* in clause *7006.7* has the same meaning as "*tenant's fixtures and fittings*" in s37 (2) of the RLA and on that basis clause 7006.7 places no additional requirements to those in s37 (2) of the RLA.

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[2] [1998] VSC 82

15 The tenant submits that the valuer was not entitled to consider the extension in the liquor licence trading hours or the planning and premises approval for the gaming machines because they are expressly excluded by clause 7006.7 of the lease and not inconsistent with clause 37 (2) of the RLA. Furthermore, tenant's installations and improvements are not the same as tenant's fixtures and fittings.

16 The landlord submits that clause 7006.7 is rendered void by reason of section 94 of the RLA as it is inconsistent with the RLA. On that basis it should not have been considered by the valuer. Section 94 refers to provisions being "*contrary to or inconsistent with*" the RLA. The landlord does not submit that clause 7006.7 of the lease is contrary to the RLA.

ISSUES

17 The questions I must decide are whether

i the extension in the liquor licence trading hours or the planning and premises approval for the gaming machines and associated revenue can be classified as goodwill or part of tenant's fixtures and fittings under s37 (2) of the RLA;

ii the extension in the liquor licence trading hours or the planning and premises approval for the gaming machines can be classified as "*Tenant's installations and all improvements made by the tenant to the hotel and its business*" as provided for in clause 7006.7 of the lease; and

iii if yes to the preceding question, whether clause 7006.7 of the lease is inconsistent with s 37 (2) of the RLA.

18 The tenant submits that the valuer is obliged to ignore the extended hours to the liquor licence because

i the tenant brought about the extension at its own expense when it was not obliged to do so:

ii the changes are properly classified as *"improvements made by the tenant to the hotel and its business;"*

iii alternatively changes to the licence are properly characterised as tenant's fittings for the purpose of s37 (2) or part of the tenant's goodwill, the value of which must be disregarded by the valuer.

19 The tenant submits that the valuer is obliged to ignore the revenue generated by gaming at the venue because the tenant did not lease a gaming venue from the landlord. Further while the planning permission and alterations to the premises required to obtain Premises approval and possibly the premises approval itself may merge into the building and revert

to the landlord at the expiry of the lease, the revenue is properly characterised as resulting from "*Tenant's installations and all improvements made by the tenant to the hotel and its business."*

20 The landlord submits that the extended liquor licence cannot be categorised as an improvement to the premises as it is not connected to the fabric of the building. Further it is not in the nature of tenant's fixtures or fittings. Fixture being furniture, plant and equipment in the hotel context in the sense of something being affixed to the land and fittings being goods or chattels brought into the premises but not affixed in any way.

21 The landlord submits that the gaming machine entitlements are personal to the tenant although at the time attaching to the premises. They are not a tenant's fixtures or fittings or improvements to the premises, nor are they part of the tenant's goodwill.

22 I find that the extended liquor licence hours and the gaming machine entitlements are not fixtures or fittings as they intangible. I accept the landlord's submissions in relation to the definition of fixtures and fittings under s37 (2) of the RLA.

23 I find that the extended liquor licence hours and the gaming machine entitlements are "*improvements"* as that word is used in clause 7006.7 of the lease. They are intangible improvements made to the hotel business which cannot be described as either goodwill or fixtures and fittings.

24 I must now decide whether clause 7006.7 of the lease is inconsistent with s37 (2) of the RLA.

25 The tenant relies upon the advisory opinion Garde J sitting as the President of VCAT in *Small Business Commissioner reference for advisory opinion (Building and Property)*[3] where he considered the operation of s94 of the and expressed the view that the following test of "*inconsistency*" (derived from *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516 should be applied:-

> An express statutory prohibition against contracting out renders void or inoperative contractual provisions which are inconsistent with the statute. Inconsistency between contract and statute is not confined to literal conflicts or collisions between the contractual provisions and the statutory provisions. Inconsistency in this context arises whenever there is a conflict between a contractual provision or the operation of such a provision and the purpose or policy of the statute. So, if the operation of a contractual provision defeats or circumvents the statutory purpose or policy, then the provision is inconsistent with the relevant sense and falls within the injunction against contracting out.

[3] [2015] VCAT 478

> The principle that it is not permissible to do indirectly what is prohibited directly, which is expressed in the maximum quando aliquid prohibetur, prohibetur et omne per quad devenitur ad illud, is a more traditional general statement of the same proposition. It has been acknowledged that, in conformity with this principle, the adoption of a circuitous device with a view to avoiding the need to comply with the constitutional requirement will be of no avail.[4]

26 I accept Justice Garde's approach that inconsistency in this context arises whenever there is a conflict between a contractual provision or the operation of such a provision and the purpose or policy of the statute.

27 Both parties referred to the main purpose of the RLA set out in section 1 of the RLA to "*enhance certainty and fairness of retail leasing arrangements*" amongst other matters.

28 The tenant relies upon clause 205 of the lease as being consistent with the tenant only paying rents for those parts of the premises that the landlord provided.

29 The tenant submits that the landlord ought not get the benefit of the tenant's improvements at the end of the lease term and from increased rent during the term of the lease.

30 The objective of s37 (2) has been recognised to be that of ensuring a tenant does not suffer a rent increase by reason of its own improvements.[5]

31 The tenant brought about at its own expense and without being obligated to do so, the extended liquor licence hours and the gaming machine revenue. They were improvements to the tenant's business.

32 Section 37 (5) of the RLA does not limit the valuer to the matters set out in s37 (2). It simply mandates that the valuer must take into account the matters in s37 (2). It does not state that those matters are to the exclusion of all other matters.

33 A provision in a lease which narrows the operation of s37 (2) of the RLA is likely to be inconsistent with that section. A provision in a lease such as clause 7006.7 which expands the operation of s37 (2) is not in my opinion inconsistent with s37 (2). The requirements of s37 (2) are not inconsistent with the requirements of clause 6007.7 of the lease. Both requirements can be met, and only then will there be a valid determination of the market rent review in accordance with the agreement struck by the parties.

34 Considering the policy of the RLA, the wording in s37 (2) and (5) and clauses in the lease such as clause 205, I find that clause 7006.7 of the lease is not inconsistent with s37 (2) of the RLA.

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[4] Ibid 522-3
[5] Serene Hotels Pty Ltd v Epping Hotels Pty Ltd [2015] VSCA 228 at paragraph 4.

35 In the circumstances I find that the determination was not made in accordance with the term of the lease and accordingly does not bind the parties. Gaming revenue and the extension of the liquor licence hours are not matters which ought to have been taken into account by the valuer in making the determination as they are excluded by clause 7006.7 of the lease.

L. Forde
Senior Member