

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

RETAIL TENANCIES LIST

VCAT REFERENCE NO. R113/2013

CATCHWORDS

Retail Tenancy rent review. Current market rental determination by independent specialist valuer. Parties not bound by the valuer's rent determination because valuer failed to apply criteria per s37(2) *Retail Leases Act 2003*

**APPLICANT** Serene Hotels Pty Ltd (ACN: 114 040 881)  
**RESPONDENT** Epping Hotels Pty Ltd (ACN: 005 430 991)  
**WHERE HELD** Melbourne  
**BEFORE** Member M. Farrelly  
**HEARING TYPE** Hearing  
**DATE OF HEARING** 18 December 2013  
**DATE OF ORDER** 7 February 2014  
**CITATION**

ORDERS

1. I find and declare that the parties are not bound by the rental determination of Mr Peter Grieve of CBRE Valuations Pty Ltd dated 1 February 2012 in respect of the Epping Hotel, 743 High Street Epping, Victoria.
2. I direct the Principal Registrar to list the proceeding for a directions hearing before Member M. Farrelly, with 2 hours allocated, for the purpose of hearing further submissions as to any further orders sought having regard to the reasons provided herein. The parties are at liberty to seek consent orders.
3. Costs reserved with liberty to apply. Any application for costs to be listed before Member M. Farrelly with 2 hours allocated.

MEMBER M. FARRELLY



**APPEARANCES:**

For the Applicant

Mr P.R. Best of Counsel

For the Respondent

Mr S. Hopper of Counsel

## REASONS

- 1 The issue in this proceeding is whether the parties are bound by a market rental valuation provided by an independent specialist valuer appointed by the parties. The Applicant tenant says the parties should not be so bound because the valuer, in reaching his determination, failed to apply the criteria set out in s37 (2) of the *Retail Leases Act* 2003 (“the Act”).
- 2 By a lease dated 1 February 2007 (“the lease”) the Respondent leased premises in Epping to the Applicant for an initial period of 14 years. The Applicant runs its business, known as the Epping Hotel, from the premises. The lease provides for rent to be adjusted on the fifth anniversary of the lease - 1 February 2012 (“the review date”) - to a sum which, if not agreed by the lessor and lessee, to be the “*then current market rental for the demised premises*” as determined by an independent specialist valuer. The lease provides that the valuer’s decision is “*final and binding*”.
- 3 The review date passed and, the parties being unable to reach agreement on an adjusted rental sum, agreed to the appointment of Mr Grieve of “CBRE Hotels” as the independent specialist valuer (“the Valuer”). The Valuer’s appointment was confirmed in around November 2012.
- 4 The Valuer requested certain information from the Applicant including the Applicant’s trading accounts for the financial years 2009, 2010 and 2011. Although the requested information was provided, the Applicant communicated to the Valuer the Applicant’s view that, having regard to the requirements of s37(2) of the Act, the Valuer should be cautious in using the Applicant’s trading figures and that the Valuer should first consider the rent and conditions of any comparable retail premises. The Applicant also submitted to the Valuer its view that the Valuer should pay no regard to legislative change to the Victorian gaming industry which came into effect on 16 August 2012, six and a half months after the review date.
- 5 In February 2013 the Valuer provided to the parties his report as to his assessment and determination of the current market rental for the premises applicable from the review date (“the valuation report” and “the rent determination”). It is apparent from the valuation report that in reaching the rent determination the Valuer relied on the Applicant’s trading figures and also took into account the legislative changes which came into effect on 16 August 2012.
- 6 The Applicant says that the Valuer has failed to apply the criteria as required under s37(2) of the Act.
- 7 The Respondent says that it is appropriate, and not contrary to the criteria set out in s37(2) of the Act, that the Valuer place reliance on the Applicant’s trading figures. The Respondent says also that it was appropriate that the Valuer consider the effect of the legislative changes effective from 16 August 2012 because, as at the review date, it was

common knowledge within the gaming industry that the legislative change was coming.

- 8 For the reasons discussed below, I find that the Valuer has failed to apply the criteria in s37(2) of the Act and, as such, the Valuer has misconceived the task required of him by the terms of the lease. For this reason, the parties are not bound by the rent determination.

### **THE HEARING**

- 9 The matter came before me for hearing on 18 December 2013. Mr Best of Counsel represented the Applicant and Mr Hopper of Counsel represented the Respondent. The facts are not contentious. Prior to the hearing the parties filed an agreed statement of facts and each party filed and served a statement of contentions. The Applicant also filed and served an affidavit of Mr Dennis Galimberti, solicitor for the Applicant, sworn 11 September 2013 which exhibits a number of documents including the lease and the valuation report. The hearing proceeded on the basis of the material filed and the further submissions of Mr Best and Mr Hopper made at the hearing.
- 10 The Respondent sought to tender a brief supplementary letter from the Valuer dated 18 October 2013. For the reasons discussed below, I find that the supplementary letter should be wholly disregarded.

### **THE APPLICANT'S BUSINESS**

- 11 As noted in the valuation report, the trading components of the Applicant's business operated at the premises include:
- A public bar with seating for some 40 patrons, 2 pool tables and several video games;
  - A bistro with approximate seating capacity for 120 patrons and serviced via a bar servery and food counter. The kitchen adjoins the bistro;
  - An outdoor area containing a children's play area, outdoor seating and a marquee for weather protection;
  - A drive-in bottle shop;
  - A TAB room with accompanying betting kiosks, service counters, display boards and monitors;
  - A gaming room containing 40 gaming machines, cashier stall, adjoining bar servery, male and female toilets, a cash room and a designated smoking area adjoining the gaming room.
- 12 The 40 gaming machines are leased by the Applicant and the Applicant holds a gaming "entitlement" for each of the 40 machines. The Applicant owns the various fixtures, fittings and equipment required to operate the

trading components of the business, the bulk of which were included in the purchase of the business from the previous owner.

- 13 Legislative change as to gaming machine entitlements came into effect in Victoria on 16 August 2012. The change is described at paragraphs 19 and 20 of Mr Galimberti's affidavit :

On 16<sup>th</sup> August 2012 the Gaming Regime in Victoria changed whereby the rate of commission to venues increased because Tabcorp and Tattersalls were removed as Gaming Operators and the commission that had previously been paid to them was reallocated and shared between the government and the Venue Operator. Venue operators are required to hold an entitlement to operate each EGM [gaming machine] at their venue. An entitlement is a licence for the venue to operate each EGM for a period of ten (10) years. The Applicant acquired 40 entitlements to operate 40 EGMs at the premises. The entitlements are attached to the Applicant's Venue Operator's Licence and entitle the Applicant to exclusively use the entitlements at the premises. The entitlements are personal to the Applicant.

Whilst the entitlements are owned for a ten year period, they are paid for by the Applicant by quarterly instalments in the first four (4) years of the Contract with the Government. I am informed by the Applicant and verily believe that it purchased the entitlements for \$49,540 each. The entitlements are saleable on the allocation and transfer market operated by the Victorian Commission for Gambling and Liquor Regulation...

- 14 It is not necessary to examine the legislative change in detail. It is not disputed that the change enhanced the value of gaming machine entitlements and the levels of revenue derived from the gaming machines.

#### **VALUATION TO BE IN ACCORDANCE WITH THE TERMS OF THE CONTRACT**

- 15 The guiding principle in respect of specialist valuations is that the valuation will generally be unimpeachable provided it has been carried out in accordance with the terms of the contract, in this case the lease, between the parties. Brereton J, in *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* (2012) NSW SC 4, at [18], describes the principle:

In *Legal & General Life of Aust Ltd v A Hudson Pty Ltd* [(1985) 1 NSWLR 314, McHugh JA recognised, and it has repeatedly been accepted, that the fundamental question is whether the exercise performed in fact satisfies the terms of the contract so as to make the determination binding. Absent fraud or collusion, a valuation is binding if it was made in accordance with the contract, and if so it is beside the point that it proceeded on the basis of error, or was a gross over or under value, or took into account irrelevant considerations ... This does not mean that a valuation will stand regardless of error; it depends on the terms of the contract ... Accordingly, the question is whether the Expert's determination binds the parties in accordance

with their contract, and that depends on whether the expert has performed the task allocated him by the contract, in a way that the contract makes binding on the parties.

His Honour went on to say (at [23]):

It is not in doubt that there will be an error of law, and that the determination will not be binding, if the expert misconceived his function, asked himself the wrong question or applied the wrong test ... as in that event, he would not have addressed himself to, nor performed, the task required of him by the contract.

16 The lease simply provides that the Valuer is to determine the *then* [as at the review date] *current market rental for the demised premises*. The lease provides no further prescription as to how the Valuer is to perform the task.

17 It is not disputed that the Act applies to the lease. Sections 37(1) and (2) of the Act provide:

- (1) A retail premises lease that provides for a rent review to be made on the basis of the current market rent of the premises is taken to provide as set out in 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.

18 It is not disputed that the Valuer was bound by the provisions of s37(2) of the Act. The Valuer acknowledges this requirement in the valuation report. Clause 2.2 in the report provides as follows:

**Basis of Determination**

The Landlord and Tenant pursuant to the provisions of the lease agreement have agreed to my appointment as the determining valuer.

In my opinion, this property falls within the provisions of the Retail Leases Act 2003...

Accordingly the provisions therein relating to a market review of retail premises have been applied in this determination, briefly stated these

provisions are as follows and are contained in Section 37(2) of the said Act:

[the report then sets out the provisions of s37(2) of the Act in full]

- 19 Although the valuer states that he applied the provisions contained in s37(2) of the Act, for the reasons discussed later I find otherwise.

## THE VALUATION REPORT

### Section 1

- 20 In section 1 of the valuation report, the Valuer notes his appointment, qualifications and a brief description of material provided to him by the parties. He also confirms his task to determine the current market rent of the premises as at the review date. He confirms the application of the Act to the lease.

### Section 2

- 21 In section 2 the Valuer sets out relevant terms of the lease and, as noted above, in section 2.2 the Valuer recites 37(2) of the Act and makes the statement that he has applied the provisions contained in s37(2) in reaching the rent determination.

### Section 3

- 22 In section 3 the Valuer briefly sets out details as to the location of the leased premises.

### Section 4

- 23 In section 4 the Valuer provides photographs of the premises, identifies the abovementioned trading components of the Applicant's business and produces a copy of the Applicant's liquor licence.

### Section 5

- 24 In section 5 the Valuer refers to submissions put to him by the Applicant and the Respondent. In respect of the Respondent's submission, the Valuer says that it "*comprises an extract of a preliminary valuation, the document is undated, I am advised that it was obtained in May 2012*". The Valuer then briefly notes points raised in the preliminary valuation document including:

- Improvements made to the premises;
- That a nearby Dan Murphy's liquor store, recently completed, had affected margins;
- That the Footscray Market is being located to Epping and expected to be operational in 2014;
- That the leased premises appear adequately fitted and appointed in

terms of plant, equipment, fittings and furnishings;

- That certain security issues in respect of the premises had been addressed;
- A comparison of net gaming revenue for the pre and post 16 August 2012 periods.

25 In respect of the Applicant Tenant's submissions, the Valuer notes the following:

- The Applicant's provision of a Memorandum of Advice from Senior Counsel in respect of s37(2) of the Act. The Valuer quotes a section of the advice where the Senior Counsel opines that s37(2) imports *a temporal requirement to the matters that the Valuer can legitimately take into account. Such a temporal limitation excludes consideration of future legislative changes that may result in increased revenue streams to the operators of electronic gaming machines.*
- The Gaming Services Agreement between the Applicant and Tabcorp;
- The Small Business Commission guidelines to the Act;
- The profit and loss statements of the Applicant for the financial years 2009, 2010 and 2011.
- The Applicant's submission that the Valuer should not take into account the enhanced levels of revenue that may be derived from the electronic gaming machines due to the legislative changes which came into effect after the review date.

26 No reference is made in the valuation report to the submission provided by the Applicant to the Valuer in a letter from the Applicant's lawyers to the Valuer dated 10 January 2013 that:

- The Applicant's 2009, 2010 and 2011 financial statements were provided to the Valuer because the Valuer requested them as a pre-condition to his appointment;
- The Valuer should not consider the Applicant's trading figures *"because section 37(2)(b) [of the Act] provides that one of the matters to be taken into account is the rent that would be reasonably expected to be paid for premises if they were unoccupied ... If you were to assume that premises were unoccupied, there would be no trading figures to consider"*

## Section 6

27 Section 6 is headed "*Rental Determination Methodology*". Under the sub-heading "*6.1 Pertinent Matters*" the Valuer states his view in



respect of the Applicant's submission that the Valuer should pay no regard to the legislative changes:

I disagree with this opinion, my basis for this judgement is that these changes as at the date of valuation [the review date] were common knowledge in the gaming industry, indeed the Tenant had committed to purchase 40 gaming entitlements at auction in May 2010 and a 10% deposit had been paid. In my view this opinion is consistent with the definition of market rental which assumes both parties act knowledgeably and prudently. Accordingly I have determined a rental which takes into account that there is a period of 197 days from the 1<sup>st</sup> February 2012 until the introduction of a new gaming structure on 16 August 2012 and the effects of this new structure thereafter until the next market review which is due on 1<sup>st</sup> February 2017.

28 In section 6.1 the Valuer states:

I refer to the long established valuation practice within the hotel industry which measures worth on the basis of net operating profit/capital EBIDTAR (earnings before interest, depreciation, taxation, amortisation & rent) whereby private financial arrangements are disregarded as these are not considered direct operating expenses. As a consequence profit and loss statement inclusions such as interest on loans, depreciation, amortisation, leasing charges, hire purchase costs and taxation are excluded from the calculation of EBIDTAR ..."

In my view, the doctrine of EBIDTAR being the basis of value should continue to be observed and that costs and expenses incurred which relate to payments in respect of capital purchases should be disregarded in the assessment of EBIDTAR, this includes the following items:

- Payments in respect to gaming entitlements;
- Payments relating to the leasing of gaming equipment;
- Payments relating to loans advanced in respect of the new gaming structure.

29 Under the heading "6.3 Overview" the Valuer states:

Hotel premises are, largely by the nature of their design, specialised improvements. It is my observation over many years that the industry measures value and rental on the basis of trading propensity and operational profitability, assuming good average standard of measurement. In my view, given this market norm, the current market rent for Epping Hotel should be assessed on this same basis.

Therefore a significant component of this rental determination is the assessment of a reasonable trading level for the Epping Hotel.

30 Under section 6.2 the Valuer notes that he has taken into account measures aimed at reducing problem gambling which the State Government had signalled would likely to come into effect from 1 July 2012.

- 31 Under section 6.5 the Valuer briefly notes the proximity of a number of competitor licensed venues and liquor supply outlets.
- 32 Under section 6.6 the Valuer produces gaming machine revenue statistics for gaming venues within the general Whittlesea area. The statistics were obtained from the Victorian Commission for Gaming and Licensing Regulation website.
- 33 Under the heading “6.7 Adopted Trading” the Valuer states:

I am aware of my obligation in the assessment of trading to assume a good average standard of management. I advise that my assessment of trading has been undertaken on this basis.

In this respect I have reflected on the following information:

- Actual trading information provided for the venue;
- Comments and information provided within the submissions;
- Comments provided by the Tenant during my inspection of the premises;
- My knowledge of trading outcomes of venues which are considered to have some comparability to the Epping Hotel.

- 34 Although the Valuer refers to his knowledge of trading outcomes of venues comparable to the Epping Hotel, the report does not identify the comparable venues or provide any information as to the valuer’s analysis of the comparable venues or their trading outcomes.

- 35 Under section 6.7 the Valuer also states:

In my view it is prudent that a 5 year trading forecast be undertaken to ensure that the full influence of the new gaming structure be incorporated into the assessment of current market rental.

- 36 The Valuer then produces in the report a table setting out the adopted trading forecasts for the years 2013 to 2017.

## Section 7

- 37 Under section 7, headed “*Rental Determination Rationale*”, the Valuer States, amongst other things:

### “7.1 Overview

Traditionally rental for hotel premises has been assessed in the market on the basis of turnover levels and perceived EBIDTAR levels, it being a basic underlying notion that the business’s capacity to pay is a major rental consideration. The trading cash flows assessed for the Epping Hotel reflect, in my view, a level of revenue and profitability forecast which are reasonable as at the date of this determination.

I refer to s37(2) of the *Retail Leases Act* which directs the determining Valuer as follows:“... 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." It is usual industry practice that the fixtures and fittings used in the operation of the business be held in the ownership of the Tenant and it is the Tenant's responsibility to adequately maintain or if necessary replace such items.

It 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 ...

It is pertinent to note that the future application by the Tenant of its owned Fixtures & Fittings is included in the rental assessment process, the market based rental ratios take this ownership into account so as to avoid double dipping ...

### **Rental Evidence**

Unlike typical retail premises, hotels are looked upon as a specific asset class. In this respect, I am satisfied that market rental evidence supports the rental ratios indicated earlier in respect of the pre 16<sup>th</sup> August 2012 period, and, it is the specific characteristics of the Epping Hotel which must be addressed herein. I have done so in the trading adopted.

In the post 16<sup>th</sup> August 2012 period I restate my view that the rental ratios need to be adjusted to take account of the way that gaming will be operated in hotel venues.

### **Market Rental Calculation**

I have determined to assess the current market rental for the Epping Hotel via the application of a 38.0% rental ratio to the EBIDTAR assessed for the trading period 1st February 2012 to 15th August 2012 and a 34.0% rental ratio to the EBIDTAR assessed for the period post 16th August 2012. My calculations which take into account the annual rental increases are detailed as follows...

[the report than sets out a table showing assessed rental for the years 2013 to 2017].

## **Section 8**

38 In section 8 the Valuer confirms the rent determination.

## **DISCUSSION**

39 In my view, it is very clear from the statements in the valuation report that the rent determination is *founded* on the Applicant's own trading figures, and that the Valuer has taken into account the value of the Applicant's fixtures and fittings. This is borne out in particular by the Valuer's statement in the valuation report, referred to above, that "*It is pertinent to note that the future application by the Tenant of its owned Fixtures & Fittings is included in the rental assessment process...*". Section 37(2) of the Act mandates that the Valuer **not** take into account the value of the Applicant's fixtures and fittings.

- 40 The Respondent submits that the methodology employed by the Valuer is consistent with the evident purpose of the Act to strike a fair balance between the interests of the Landlord and the Tenant and to secure a fair and reasonable estimate of the rent that would be paid if the premises were let on the open market. The Respondent says that it is reasonable that the Valuer consider the profits which a willing lessee would make in the future assuming *average competent management* of the same business by a hypothetical willing lessee. The Respondent says that this “profits method” of determining market rent – where the Valuer takes account of the profits generated by the sitting tenant - is common in the hotel industry and not prohibited by s37(2) of the Act.
- 41 However reasonable the Valuer’s methodology may seem, and whether or not it is a method that has in the past been commonly adopted by valuers in the hotel industry, I do not accept that s37(2) of the Act allows the methodology employed by the Valuer. I am satisfied that the Valuer has, contrary to the requirement in s37(2) of the Act, taken into account the value of the Applicant’s fixtures and fittings, and in so doing the Valuer has fundamentally misconstrued his task. As such, I find that the parties are not bound by the rent determination.

#### **OTHER MATTERS**

- 42 For the reason set out above, I am satisfied that the parties should not be bound by the rent determination. For completeness, I briefly address other issues and submissions.

#### **ASSUMPTION OF UNOCCUPIED PREMISES**

- 43 It is clear that the Valuer has assumed that a hypothetical willing tenant will acquire the Applicant’s business, inclusive of the fixtures and fittings and gaming machines and gaming entitlements. While that may not be an unreasonable assumption, the Applicant submits that the assumption, taken into account by the Valuer in reaching the rent determination, is offensive to the requirement in s37(2)(b) of the Act that the Valuer must have regard to the rent that would be reasonably expected to be paid *if they* [the premises] *were unoccupied*. The submission has merit.
- 44 The plain meaning of *unoccupied* premises is that the premises are not occupied by the Applicant, or any other tenant. As the Applicant owns the fixtures and fittings and leases the gaming machines the use of which is dependent on the gaming entitlements held by the Applicant, it follows that the premises *unoccupied* will not include the Applicant’s fixtures and fittings or the gaming machines.

#### **PRESUMPTION OF REALITY**

- 45 The Respondent referred me to a number of English authorities which raise a “presumption of reality” when interpreting rent review covenants. The presumption is that, absent of any express direction to the contrary, the

tenant is to pay for what he actually has at the review date. In this case, what the tenant “has” is leased premises from which the tenant runs the business known as the Epping Hotel.

- 46 I was not referred to, and I am not aware of, any Victorian authority on the so called “presumption of reality”. Should any presumption exist, s37(2) of the Act would, in any event, constitute an express contrary direction incorporated into the terms of the lease. In my view there is no “presumption” which operates to displace or override s37(2) of the Act.

#### **EXCLUSIVITY OF SECTION 37(2) OF THE ACT**

- 47 The Applicant says that, as the lease is silent on the matters the Valuer may consider in determining the current market rent, the Valuer is bound by the matters set out in s37(2) of the Act, to the exclusion of any other matters.
- 48 In my view, the criteria set out in s37(2) is, by the terms of s37(2) (b), not an exhaustive, prescriptive list of matters which may be considered.
- 49 By sub-section 37(2)(b), the Valuer must have regard to 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. Save that the Valuer must:
- consider the rent that might be paid for the premises unoccupied and offered for lease for the same or similar use; and
  - not take into account the value of the goodwill created by the sitting tenant’s occupation or the value of the sitting tenant’s fittings and fixtures,

section 37(2)(b) does not, in my view, set a boundary on matters that the Valuer may consider.

#### **CONSIDERATION OF FUTURE LEGISLATIVE CHANGE**

- 50 The Valuer took into account the impact of the legislative change to the gaming industry which came into effect on 16 August 2012, some 6 months after the review date. As noted in the valuation report, the Valuer considered that the forecast legislative change was common knowledge in the gaming industry as at the review date and, in determining obtainable market rent, he should act on the assumption that parties [such as a willing new lessee] would act knowledgeably and prudently.
- 51 The Valuer also took into account forecast measures by the State Government to reduce problem gambling.
- 52 The Applicant submits that, because the Valuer’s task was to determine the current market rent obtainable as at the review date, he was not entitled to take into account future events which may or may not occur. I do not accept the submission.

- 53 One can think of many hypothetical examples where knowledge of a likely or possible future event will undoubtedly have a bearing on the rent obtainable in the open market between a willing Landlord and a willing Tenant. That the forecast future event may or may not occur is beside the point. What is relevant is the effect that market knowledge of a possible future event, as assessed by a valuer, may have on the rent obtainable in an open market. In my view, section 37(2) does not prohibit the consideration of possible future events.
- 54 However, in my view that does not mean that, in reaching the rent determination, the Valuer was permitted to calculate the effect, in dollar terms, that the legislative change had, and would have in the future, on the Applicant's trading figures. As set out above, I have found that the Valuer erred in founding the rent determination on the Applicant's trading figures which necessarily included the value of the Applicant's fixtures and fittings. The Valuer's calculation as to the effect of the legislative change on those trading figures is, in my view, a component of the same error.

#### **RENT CONCESSIONS AND OTHER BENEFITS**

- 55 Pursuant to s37(2)(d), the Valuer must have regard to any rent concessions and other benefits offered to prospective Tenants of unoccupied retail premises.
- 56 The Applicant submits that, as there is no reference to this matter in the valuation report, it may be surmised from the approach taken in the valuation report - a valuation founded on the Applicant's trading figures - that the Valuer wholly ignored this ground.
- 57 Having regard to s 32(6)(c) of the Act, which provides that *the valuation must ... (c) specify the matters to which the valuer had regard in making the determination*, the submission has merit.
- 58 During the hearing the Respondent sought to tender a letter from the Valuer dated 18 October 2013 addressed to the Applicant and the Respondent. Save for introductory matters, the letter states as follows:

I refer to correspondence dated Wednesday, 16 October 2013 from Wisewould Mahony Lawyers who act on behalf of the landlord of the Epping Hotel which in part states:

*We are instructed to request that you provide a supplementary report providing further details of your consideration of rent concessions and other benefits offered to prospective tenants of unoccupied premises as required by s37(2)(d) of the Retail Leases Act 2003 (Vic).*

I provide my response as follows:

I refer to s202 of the Determination Report [the valuation report], specifically the first paragraph of Page 9 which states that in undertaking the determination the provisions of s37(2) had been applied.

Based upon my experience in the hotel industry I am of the opinion the rent concessions and other benefits are not typically offered to prospective tenants of unoccupied premises. The rental evidence considered as part of the determination process was not, so far as I am aware, affected by concessions or other benefits offered to the prospective Tenants.

59 The Applicant submits that the letter should not be admitted into evidence because:

- the parties or the Valuer are not entitled to impugn or supplement the valuation report;
- the Valuer is *functus officio*;
- admitting the letter would be prejudicial to the Applicant and the Valuer.

60 The Respondent submits that the letter is admissible for reasons including the following:

- The letter is a “ supplementary report” and there is nothing in the Act or the Lease to suggest that the Valuer should be confined to providing his determination in one document only;
- If the valuation report is at risk of being set aside because of a minor omission within it, and the supplementary report corrects the minor omission, the Tribunal should accept the report so as to avoid unnecessary further expense to the parties. It is consistent with the objects of the Act to admit the letter into evidence;
- The Tribunal may have regard to supplementary material that a Valuer elects to provide;
- The supplementary report forms part of the valuation report and therefore has the same status as the primary report and need not be tested by cross examination.

61 In my view there is no hard and fast rule as to whether parties, who have appointed an independent specialist valuer and received his valuation report, are bound to accept supplementary reports or material from the valuer. It depends on the circumstances in each case.

62 There is nothing in the Act or the lease to suggest that the Valuer is limited to providing one document on one occasion.

63 However, having regard to the means by which the supplementary letter was obtained, the date the letter was provided and its contents, I find that it would be unfairly prejudicial to the Applicant to pay any regard to it.

64 It is clear from the terms of the supplementary letter itself that the Valuer has provided the letter in response to a specific request from the Respondent, a request which, in my view, is a blatant prompt to the Valuer

to provide further information in respect of a matter which is conspicuously absent in the valuation report.

- 65 Further, the Respondent's request to the Valuer was made some 8 months after the Valuer provided the valuation report to the parties and some 5 months after the Applicant commenced this proceeding. In my view, once the Applicant commenced this proceeding challenging the valuation report, it became untenable for the Valuer to provide any supplementary report.
- 66 In all the circumstances, I am satisfied that the supplementary letter should be wholly disregarded.

### CONCLUSION

- 67 For the reasons set out above, I find that the parties are not bound by the rent determination and I will make an order to that effect.
- 68 I will also direct that the proceeding be listed for directions hearing before me for the purpose of hearing submissions as to any further orders sought in consequence of these reasons. The parties are at liberty to seek consent orders in this regard.
- 69 Finally, I will reserve costs with liberty to apply. I draw the parties' attention to s92 of the Act.

MEMBER M. FARRELLA

