Retail and Commercial Leasing Conference 2018 – Valuations in Leasing: Renewals, Market Rent Reviews and Valuation Pitfalls

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1. This paper covers the following topics:
   (a) Renewals, market rent reviews and valuations;
   (b) How valuers are valuing vs how this sits overall with the *Retail Leases Act* 2003 ("the RL Act");
   (c) Practical examples and common errors faced by practitioners;
   (d) Practical tips and examples for drafting and disputing market rent reviews; and
   (e) Case review: market rent reviews, where they can go wrong, and what to do about it

2. However, rather than separately dealing with each identified issue, the paper covers the topics by giving examples and referring to cases at the same time.

Option to renew

3. As experienced practitioners know, the exercise of an option to renew requires particular care and attention to detail. The strict requirements set out in the relevant lease and the legislation must be followed carefully.

4. The standard form REIV Commercial Lease (May 2003 version) relevantly provides as follows:

   3 (f) (i) The Lessor must on the written request of the Lessee delivered to the Lessor not more than twelve months and not less than three months prior to the expiration of the Term and so long as:
   (A) There is no unremedied breach of this lease by the Lessee of which the Lessor has given written notice; and
   (B) The Lessee has not persistently committed breaches of this lease of which the Lessor has given written notice during the Term, -
   renew this Lease for the Further Term(s) set out in Item 15 of the Schedule. The latest date for exercising the option for renewal is stated in Item 16 of the Schedule.
   …
   (v) If the Act applies to this Lease then:
   (A) If there is not provision for a Further Term, the Lessor must at least six months and not more than 12 months prior to the expiration of the Term give written notice to the Lessee either offering a renewal of this Lease on terms specified in the notice or informing the Lessee that no renewal is to be offered. Any offer of renewal cannot be revoked for one month and unless accepted by the Lessee during that period, the offer shall be deemed to have been withdrawn;

(B) If there is provision for a Further Term or the Lessor proposes to renew this Lease, the Lessor must give to the Lessee at least 21 days before the end of the Term, a disclosure statement complying with the requirements of the Act.

5. The standard form LIV Lease of Real Estate (Commercial Property) (August 2014 version) relevantly provides as follows:

> 12.1 The **tenant** has an option to renew this lease for the further term or terms stated in **item 18** and the **landlord** must renew this lease for that further term or those further terms if –
>
> 12.1.1 there is no unremedied breach of this lease by the **tenant** of which the **landlord** has given the **tenant** written notice at the time the **tenant** requests renewal as required by clause 12.1.13 (sic).
>
> 12.1.2 the **tenant** has not persistently committed breaches of this lease of which the **landlord** has given written notice during the **term**, and
>
> 12.1.3 the **tenant** has exercised the option for renewal in writing not more than 6 months nor less than 3 months before the end of the **term**. The earliest and latest dates for exercising the option are stated in **item 19**.

The relevant legislation

6. Section 27 of the RL Act provides:

> **Option to renew**
>
> (1) If a retail premises lease contains an option exercisable by the tenant to renew the lease for a further term, the lease must state—
>
> (a) the date until which the option is exercisable; and
>
> (b) how the option is to be exercised; and
>
> (c) the terms and conditions on which the lease is renewable under the option; and
>
> (d) how the rent payable during the term for which the lease is renewed is to be determined.
>
> (2) If a retail premises lease contains an option exercisable by the tenant to renew the lease for a further term, the only circumstances in which the option is not exercisable is if—
>
> (a) the tenant has not remedied any default under the lease about which the landlord has given the tenant written notice; or
>
> (b) the tenant has persistently defaulted under the lease throughout its term and the landlord has given the tenant written notice of the defaults.

7. Section 94 of the RL Act provides:

> **The Act prevails over retail premises leases, agreements etc.**
>
> (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 inconsistent with anything in this Act (including anything that the lease is taken to include or provide because of a provision of this Act).

Cases

8. In the recent VCAT decision of *Leonard Joel Pty Ltd v Australian Technical Approvals Pty Ltd* [2017] VCAT 1781 ("Leonard Joel"), the Tribunal heard an application by a tenant for a declaration that it had validly exercised its option to renew.

9. After reviewing the relevant cases, and the facts in that case, Member Joseph made the declaration that the tenant sought.

10. The background facts are:
    (a) The tenant rented retail premises at 325 – 367 Malvern Road South Yarra;
    (b) The tenant is an auction house and valuer of fine objects, art, furnishings and jewellery. It was established in 1919 and had been trading from the premises since 1994. It employed 36 full -time staff and 13 casual staff. The building at the premises had two storeys and was heritage-listed;
    (c) After the tenant exercised its first option to renew under the original lease, on 19 August 2014 the original landlord and the tenant entered into a further lease until 9 June 2017;
    (d) The Tenant undertook significant, although non-structural, works (at a cost of around $380,000) in 2014;
    (e) The original landlord then sold the premises and on 19 November 2015 it assigned the lease to the landlord;
    (f) The lease provided for three further terms of three years each. The latest date for exercising the first option was 9 March 2017;
    (g) The further term provision was as set out in paragraph 5 above;
    (h) The permitted use of the premises was auction rooms and associated storage, offices and showrooms trading as Leonard Joel;
    (i) The tenant claimed that it had complied with all reasonable requests from the landlord in a timely manner and that it had validly exercised the option on 8 February 2017 for a further term of three years as per its letter of that date to the landlord sent by email and post;
    (j) The landlord disputed both that the tenant had complied with all reasonable requests from the landlord in a timely manner and that the option for a further three years had been validly exercised by the tenant;
    (k) The landlord claimed that the tenant was in breach of its obligations under the lease as it has not complied with the relevant provision in relation to the works undertaken by the tenant in 2014 and completed in 2015 as it had not provided to the landlord "as built plans" relating to the premises;
    (l) The tenant had provided "as built plans" as to the works that it had completed. The landlord's complaint was that the tenant was obliged

to provide "as built plans" for the entire premises, not just the area in which the tenant had completed works;

(m) The tenant maintained that if it was found to have been in default of its obligations under the lease (which it denied), the landlord had not given it written notice about the default prior to it exercising the option.

Tenant's Submissions

11. The tenant submitted that:

(a) While clause 12 of the lease is in similar terms to section 27 of the RL Act, it is not quite the same, and accordingly by virtue of s 94 of the RL Act, in determining whether the tenant has exercised the option, the Tribunal must consider and apply section 27 of the RL Act.

(b) In *Commonwealth Bank of Australia v Figgins Holdings P/L* (1994) V ConvR 54 -492 ("Figgins"), Hayne J considered an identical provision to s 27 of the RL Act under the former *Retail Tenancies Act 1986* (Vic) and concluded:

> It follows that [s 27 of the *RL Act*] applies and that 'the only circumstances in which the option' in the lease is not exercisable is if the tenant remains in default notwithstanding notice to remedy it or has persistently defaulted under the lease throughout its term and the landlord has given written notice of those defaults.

(c) In *Figgins*, the tenant rented premises in a city retail property. The property was mortgaged to a bank which had taken the mortgage subject to the tenant's lease. The landlord defaulted under the mortgage. Subsequent to the default the tenant exercised its option to renew the lease for a further term. After this, but still within the further term, the mortgagee bank sought to enforce the mortgage and to sell the property. The tenant argued that it remained a tenant at the property. The bank alleged that the tenant had not validly exercised the option because when it had done so, the tenant had been in default under the lease. However, the Court held that the lease was subject to the application of the then *Retail Tenancies Act* 1986, that under that Act the bank was the "landlord" of the property and because it had not given the tenant notice of default under section 14(5) of that Act, the tenant's exercise of the renewal option was good against the bank although it was in substantial default under the lease.

(d) Consequently, the Tribunal was called upon to decide two questions in Leonard Joel:

i. When the option to renew was exercised (on 8 February 2017), was the tenant in default under the lease?

ii. If yes to the first question, had the landlord given the tenant written notice of that default?

(e) If the answer to either question is 'no', the tenant had validly exercised the option.

12. The Member in effect accepted the tenant's submissions (outlined at paragraphs 59 to 65):
    (a) The tenant had only completed part of the works it was allowed to undertake pursuant to the terms of the Lease;
    (b) As a result, the 'works' were not complete, meaning that the landlord was not entitled to "as built plans" at the date that it demanded those plans;
    (c) A part of the dispute was whether the landlord was entitled to "as built plans" of the works only, or of the entire premises;
    (d) The landlord was never entitled to "as built plans" of the entire premises;
    (e) There had been no default by the tenant;
    (f) The structure of the lease was for "as built plans" for the entire premises to be provided only when the entire proposed works were completed. If the works were undertaken in stages, then "as built plans" relating to each stage of alterations had to be provided after the completion of each stage. To the date of the hearing, works had only been performed to the ground floor. Accordingly, the tenant had not breached the lease or been in default at the time it exercised the option.
    (g) It is logical and sensible that only at the completion of the entire Tenant's Works (as defined in the Lease), if and when that occurs, should "as built plans" be provided by the tenant relating to the entire premises.
    (h) However, if the Tribunal finds that the tenant was in default, the option was nevertheless exercised because when the option was exercised the landlord had not given written notice of the default;
    (i) The option was exercised by letter dated 8 February 2017. The landlord did not inform the tenant of any alleged default until 3 April 2017.

13. The tenant's submissions continued:
    (a) At paragraph 75:
    The intention of the *RL Act* is to protect small tenants who cannot match the bargaining strength of large landlords. The RL Act is 'ameliorating or remedial legislation' and should be given a beneficial construction in favour of the tenant [*Peppercorn Nominees P/L v Loizou* (1997) V ConvR 54 – 560, 66,37 ("Peppercorn") and *Fitzroy Dental P/L v Metropole Management P/L* (2013) VSC 344, [42] (Croft J) ("Fitzroy

Dental")]. This does not mean that the Tribunal should not need to look at the words used and give them a reasonable construction based on those words. **However, those parts of s 27(2) that disentitle the tenant from exercising the option should be construed strictly** (emphasis added).

(b) For a notice to constitute 'written notice' of a 'default under the lease' in accordance with s 27, the notice must clearly assert an existing default so that the tenant understands that serious consequences may follow if the default is not remedied promptly. In this regard, such consequences as would befall the tenant would include loss of nine years of the lease, potential loss of the business and employees out of work.

(c) The decision of His Honour Justice Croft in *Whild v GE Mortgage Solutions Ltd* (2012) VSC 212 ("Whild") concerning the content of notices given to mortgagees under s 76 of the TLA is apposite to notices given under s 27. In Whild, the Court examined a number of notices, some of which complied with section 76 and some of which did not so comply. Croft J. at [56] said:

> Although it is the position that the Victorian Legislation, ss 76 and 77 of the TLA, does not specify the form or contents required of a default notice, its provisions do, nevertheless, contemplate that something in the nature of a "notice": (whether styled as a notice or demand) must be served on the mortgagor. As the High Court indicated in *Barns v Queensland National Bank Ltd,* the object of the notice is to guard the rights of the mortgagor. In my opinion, it follows that the "writing" constituting the notice must make it clear that its purpose is not merely to provide information, but that, rather, the mortgagee is taking a step which may result in the exercise of the statutory power of sale under the TLA and that, if the mortgagor wishes to prevent this course being taken, then action needs to be taken to attend to compliance with the notice. This may involve communication with the mortgagee to establish the quantum of any amount or amounts claimed with respect to the default or defaults specified in the notice and, if necessary, the taking of proceedings to enjoin the mortgagee from taking any further steps. Clearly, the exercise of the mortgagee's power of sale is a very drastic remedy; it is a remedy involving a process of notification and execution which significantly affects, or has the

potential to significantly affect, the rights of the mortgagor with respect to his, her or its property the subject of the mortgage. Consequently, although the Victorian legislation does not contain some of the specific requirements with respect to default notices as are contained in s 57 of the *Real Property Act 1900* of New South Wales, it is implicit in the Victorian provision that a notice given under sub-s 76(1) of the TLA be drawn as a "notice" (whether styled as a notice or demand) which meets the objective of guarding the mortgagor's rights by providing a clear indication, and thereby a warning, of the course upon which the mortgagee is embarking (emphasis added in submissions)

(d) In Whild, Croft J held that some of the notices served did not constitute notices under s 76(1) of the TLA because they merely furnished the mortgagor with information about what it was required to do but they did not refer to the consequences if it did not perform the requirements.

(e) The tenant should have been told straight away in any of the purported 'notices' that something serious could happen. The letters from the landlord to the tenant had not contained reference to any default or breach until after the tenant had exercised the option.

14. At paragraph 138, the Member found:

> However, the potential consequences to the tenant of the landlord not being required to grant the option to renew are significant and serious and as such I find that a more narrow interpretation has to be applied to the sufficiency of the notice of any default under the lease 'about' which the landlord has given. **It is necessary therefore that the landlord applies some rigour in its giving of notice which should both make it expressly clear that a breach by the tenant is alleged and should be clear and consistent in its description of the nature of the breach, all of which is alleged to constitute the default** (emphasis added).

15. Further, at paragraph 141, the Member stated:

> Despite the landlord's submissions, the landlord's letters do not in any way refer to the possible consequence of the landlord not granting the renewal option if the alleged default of the tenant is not remedied. In fact, the only consequence mentioned in the letters of the landlord prior to the exercise of the option is a relatively oblique reference to clause 7 of the lease which governs its termination.

16. Finally, at paragraphs 145 – 6, the Member stated:

> Accordingly, I find that the landlord had not given the tenant notice about default prior to the exercise of the option.
> I find and declare that the tenant has validly exercised an option to renew the lease for a further term and orders are made accordingly.

The legislation – rent reviews

17. As experienced practitioners know, at the time of the exercise of an option to renew, the rent in a Retail Lease is usually reviewed to the market rent then applicable for the relevant property.

18. The standard form REIV **Commercial Lease** (May 2003 version) provides as follows:

    3 (g) (i) The rental specified in item 7 of the Schedule and the rental agreed upon or determined for any Further Term must be reviewed on each review date specified in item 17 of the Schedule (the Review Date) in the manner referred to in this clause 3(g).

    (ii) If the parties fail to agree on that new current market rent of the premises 14 days prior to the Review Date, then it must be determined by a qualified valuer who must also be a practising estate agent and if the Act applies, must be a 'Specialist Retail Valuer' (as defined in the Act) and who acts as an expert and not an arbitrator, appointed at the request of either party by the President or other senior office bearer for the time being of the Real Estate Institute of Victoria Ltd (the Institute). The determination of the qualified valuer or Specialised Retail Valuer, as the case may be, shall be binding on the parties. The rental and determined must not be less than the rental payable immediately prior to the Review Date (except with the Act applies).

    (iii) If by the Review Date the reviewed rental has not been determined then the Lessee must continue to pay the previous rental and any necessary adjustment between the parties must be made no later then seven days after the determination has been delivered.

19. The standard form LIV **Lease of Real Estate (Commercial Property)** (August 2014 version) relevantly provides as follows:

    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.

    The review procedure on each **market review date** is -

    11.1.1 each review of **rent** may be initiated by the **landlord** or the **tenant** unless **item** 17 states otherwise but, if the **Act** applies, review is mandatory.

    11.1.2 the **landlord** or the **tenant** entitled to initiate a review does so by giving the other a written notice stating that current market rent which it proposes at the **rent** for the review period. If the **Act** does not apply and the recipient of the notice does not object in writing two pay rent within 14 days the proposed rent become the rent for the review period.

11.1.3 If

(a) The **Act** does not apply and the recipient of the notice serves an objection to the proposed rent within 14 days and the **landlord** and **tenant** do not agree on the **rent** within 14 days after the objection is served, or

(b) The **Act** applies and the **landlord** and **tenant** do not agree on what the **rent** is to be for the review period,

the **landlord** and **tenant** must appoint a **valuer** to determine the current market **rent**.

If the **Act** does not apply and if the **landlord** and **tenant** do not agree on the name of the **valuer** within 28 days after the objection is served, either party may apply to the President of the Australian Property Institute, Victorian Division to nominate the valuer. If the **Act** applies, the **valuer** is to be appointed by agreement of the **landlord** and **tenant**, or failing agreement, by the Small Business Commissioner.

11.1.4 In determining the current market **rent** for the **premises**, the **valuer** must –

(a) consider any written submissions made by the **landlord** and **tenant** within 21 days of their being informed of the **valuer**'s appointment, and

(b) determine the current market **rent** as an expert

and, whether or not the **Act** applies, must make the determination in accordance with the criteria set out in section 37(2) of the **Act**.

11.1.5 The **valuer** must make the determination of the current market rent and inform the **landlord** and **tenant** in writing of the amount of the determination and reasons for it as soon as possible after the end of the 21 days allowed for the submissions by the parties.

11.1.6 If –

(a) no determination has been made with in 45 days (or such longer period as is agreed by the **landlord** and **tenant** or, if the **Act** applies, as is determined in writing by the Small Business Commissioner) of the **landlord** and **tenant**

(i) appointing the **valuer**, or

(ii) being informed of the **valuer's** appointment, or

(b) the **valuer** resigns, dies, or becomes unable to complete the valuation,

the **landlord** and **tenant** made immediately appoint a replacement **valuer** in accordance with sub-clause 11.1.3.

11.2 The **valuer's** determination is binding.

11.3 the **landlord** and **tenant** must bear equally the **valuer's** fee for making the determination and if either pays more than half the fee, may recover the difference from the other.

11.4 Until the determination is made by the **valuer**, the **tenant** must continue to pay the same **rent** as before the **market review date** and within 7 days of being

informed of the **valuer's** determination, the parties must make any necessary adjustments.

11.5 If the Act does not apply, a delay in starting a market review does not prevent the review from taking place and be effective from the **market review date** but if the market review is started more than 12 months after **the market review date,** the review takes effect only from the date on which it is started.

20. Section 37 of the TL Act provides, in part:

> **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)-(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 be reasonably expected to be paid for 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) ...
> >
> > (d) ...
> >
> > 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...
>
> (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

Is a rent review due at all?

21. In the decision of *MD & S Griggs P/L v DWH P/L* [2016] VCAT 1718, Senior Member Riegler had to determine (as a preliminary question) whether the lease in question provided for a market review at the end of each term.

22. The terms of the Lease in question were as set out in paragraphs 5 and 19 above.

23. The problem was that the Schedule to the Lease contained the following words:

Item 16 [2.1.1, 11, 18]	**Review date(s):**	
	Market review:	Not applicable
	CPI review:	Not applicable

	Fixed review:	Not applicable
Item 17 [2.1.1, 11, 18]	**Who may initiate reviews:**	
	Market review:	Not applicable
	CPI review:	Not applicable
	Fixed review:	Not applicable

24. The Landlord contended that the express terms of the Lease provided that at the expiration of each term, rent is to be determined according to market. By contrast, the Tenant submitted 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.

25. The Landlord conceded that the express terms of the Lease did not provide for any rent review during each term of the lease. However, it argued that the lease required a review to market upon renewal of each new term. It drew the Tribunal's 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 or the end of this lease.* The landlord 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.

26. Therefore, it 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.

27. The landlord referred the Tribunal to a decision of Deputy President Macnamara (as he then was) in *Dagles Trading Pty Ltd v Scamper Pty Ltd* [2006] VCAT 1220, where the Tribunal stated:

> 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.

28. The landlord 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.

29. Senior Member Riegler accepted that the provisions of the Lease made it clear that at the commencement of each new term of 5 years, the rent was to be reviewed to market.

Challenging Rental Determinations

30. Challenging Rental Determinations has always been difficult.

31. See for example:

    (a) *Lucky Eights P/L v Bevendale P/L* [2016] VCAT 1600, which confirmed that the Tribunal should not interfere with a valuer's discretion. A party had sought orders directing a valuer about how to conduct its valuation; the application was dismissed, relying on the terms of the section, and among other things, Supreme Court authority (*Commonwealth of Australia v Wawbe P/L and anor* [1998] VSC 82.
    (b) *Keriani P/L v Long* [2015] VCAT 1212, in which the Tribunal found that the parties were bound by the rental determination made by a specialist retail valuer. The landlord had sought orders alleging that the rental determination was vitiated by error and was not binding on the parties. The Tribunal noted that the only issue was whether the valuation complied with the terms of the contract appointing him or her (as modified by s 37 of the RL Act); it concluded that the valuation did comply with that agreement.
    (c) In *Epping Hotels P/L v Serene Hotels P/L* [2015] VSC 104, Croft J heard an appeal from a VCAT decision. Justice Croft determined that the valuer had adopted an acceptable methodology in making the rental determination in that case. An appeal to the Court of Appeal (Weinberg and Tate JJA and Robson AJA) was dismissed (see *Serene Hotels P/L v Epping Hotels P/L* [2015] VSCA 228).

32. However, in the last couple of years there have been at least 3 successful VCAT challenges made to a valuer's rental determination under section 37 of the *RL Act*.

33. **First**, in *Higgins Nine Group P/L v Ladro Greville St Pty Ltd* [2015] VCAT 1687, a valuer's reasons were held to be inadequate because the specialist retail valuer

used the *'profits method'* as an alternative means of determining the rent. When using that method, he looked at the sitting tenant's turnover figures and formed the view that another hypothetical tenant bidding for the lease could generate over $500,000 more revenue than the sitting tenant was currently generating.

34. This method of determining the rent payable was problematic, and the determination was set aside for a number of reasons.

35. One of the reasons was that the valuer did not provide "detailed reasons" that explained how he calculated the higher turnover figures that he projected for the new term.

36. The decision was upheld on appeal before Croft J in *Higgins Nine Group P/L v Ladro Greville Street P/L* [2016] VSC 244.

37. Both the judgment in the initial VCAT decision and the judgment on appeal discuss in depth the principles surrounding "detailed reasons".

38. Some issues of note from Justice Croft's decision are:

    (a) First, Justice Croft listed (in paragraph 25) several uncontroversial matters that raise a question of law (and as such are able to found an appeal on a question of law to the Supreme Court from VCAT). These include (references omitted):
        i. The proper construction of a contract;
        ii. The proper construction of a real estate agent's authority;
        iii. The proper construction of a series of related insurance policies;
        iv. The proper construction of an exclusion clause in a public liability insurance policy;
        v. The proper construction of a provision of an insurance policy and of a similar provision in a Ministerial Order;
        vi. The proper construction of the expression "reasonable legal costs and expenses" in a settlement offer (and in Terms of Settlement);
        vii. The interpretation of the "Guides to the Evaluation of Permanent Impairment"; and
        viii. The proper characterisation of a planning permit application.
    (b) Next, Croft J noted (in paragraph 26):

> It will be seen from a consideration of these matters that the common thread running through them is the construction of a document or instrument regulating rights and liabilities under which action is or is not to be taken; whether that document is the product of agreement, such as a contract, or some legislative or quasi legislative instrument. In my opinion, a valuer's determination bears no similarity to any of these

> matters. It is not a contract. The contract under which the Valuer's task is undertaken—and under which his or her determination is the result or "product"—is a contract or agreement between the relevant parties. … In any event, however the contractual arrangements are made and from whichever party perspective is applicable—landlord, tenant or valuer—this is nothing inherently contractual in the Valuer's work—the "product"—the determination. Moreover, that a determination—the "product"—has consequences under the Lease or other contract under which it is made—here in respect of rent payable—does not render that product itself contractual. As is clear from *Legal and General Life of Australia Ltd v A Hudson P/L*, the contract under which a valuer is engaged is distinct from the valuation process and the product of that process. Rather, and as distinct from that "product", the contract provides the valuer's "mandate" in a manner which does not render the valuer's work—the "product"—part of the contract or otherwise itself contractual. That work is something to be assessed having regard to the "mandate". It is true that a question of law does or may arise where an issue is raised as to compliance with or breach of the provisions of a contract because this issue, inherently, involves, or may involve, the construction and interpretation of a contract and its terms, and consideration of what has or has not occurred. Issues of this kind are more likely to raise mixed questions of law and fact, but that is not the position or issue with respect to the first question; though, for the reasons which follow, there seems little doubt that the second question, were it relevant, would raise a mixed question of law and fact.

(c) Thirdly, he decided that the Tribunal's finding as to the nature and effect of the Determination is a finding of fact, and not a finding of law (paragraph 32) (and as a result, not subject to appeal to the Supreme Court under section 148 of the VCAT Act);

(d) If it was necessary to determine whether VCAT was in error in finding that the Profits Methodology was simply an adjunct to corroborate the Determination derived using the Comparables Method, he would find no error and would agree with the conclusion reached by Senior Member Riegler as set out in his reasons (paragraph 35);

(e) At paragraph 38, Justice Croft noted (and accepted):

> In *756 Glenferrie Road P/L v Mountfords Shoes Ltd* [2013] VCAT 640 at [41], Senior Member Riegler said that s 37(6)(b) requires that there "are sufficient reasons that enable the

parties to understand the basis on which the determination has been made". Other authorities are to similar effect, some of which are helpfully the subject of some more particular reference and discussion (see *Adwell Holdings P/L v Bourne* (2007) NSW ConvR 56–188, [26]; (Adwell concerned s 19(1)(e) of the *Retail Leases Act* 1994 (NSW) which is in similar terms to s 37 (6) (b) and (c). See also *Perri v Exego P/L* [2009] NSWADT 170, [53]-[56]). See also *Anthony v Coffee Club Properties P/L* [2000] QSC 198, which concerned s 31(1)(c) and (d) of the *Retail Shop Leases Act* 1994 (QLD) which is in similar terms to s 37 (6) (b) and (c). See also *Kumari v Gao* [2008] RSLT 19, 8; *Silver Jewellery Shop & Piercing Planet v Telado P/L* [2013] QCAT 561, [18]; *Brisbane Comedy P/L v Malisano* [2015] QCAT 340, [41].

(f) Further, he accepted the statement by Senior Member Riegler that:

> It is clear that it is not sufficient for a valuer to "leap to a judgment": the valuation must disclose the steps of reasoning (*Kumari v Gao* [2008] RSLT 19, 8). This position is, in my view, reinforced by the provisions of s 37(6) of the *Retail Leases Act*. Not only does para (b) of this sub-section require "detailed reasons" for the valuer's determination, but in para (c), adds the requirement that the valuer "specify the matters to which the valuer had regard". These provisions are relevantly the same as the New South Wales equivalent provisions considered in *Adwell*. Clearly, both the Victorian and New South Wales provisions eschew and do not entertain any "blinding flash of light" as satisfying their "requirements" (Sir Frank Kitto, 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787 at 792 (referred to in paragraph 32 of Senior Member Riegler's reasons in the VCAT proceedings).

(g) At paragraph 44, Justice Croft found:

> The deficiencies in the reasoning in the Profits Method are … set out accurately and in detail in Senior Member Riegler's reasons, as follows (*Higgins Nine Group P/L v Ladro Greville Street P/L* [2015] VCAT 1687:
>
> > 31. In my view, there is very little detail given in the Valuer's reasons as to how the Valuer was able to conclude that $... was reasonably achievable by way of gross profits. The data, presumably relied upon and which was cited in the Determination report stated that the Tenant had achieved gross sales in the financial year ending 2013 of $... and in the previous financial year of $.... It is difficult if not impossible to discern from the Determination report how the Valuer was then able to conclude that an additional $536,782

was achievable in annual turnover for the business. The only indicator as to how that figure was derived is by the Valuer's supplementary comments:

> Based on the liquor licence in place, and comparable venues in the region which I hold on file

32. In my view, that comment, even if embellished with further narrative as set out in the Determination report, does not provide adequate detail as to how the Valuer was able to say that it was reasonably achievable that projected sales were likely to be 26% higher than actual sales. One might speculate that the Valuer placed considerable emphasis on the fact that the Tenant traded up until 11 pm in circumstances where the 24 hour liquor licence allowed it to trade well beyond that time. However, having to speculate as to how the Valuer formed his opinion is, in my view, contrary to what is required under s 37(6) of the Act. Moreover, no detail was provided as to what other venues were used as a comparator. That, of itself, raises a number of questions: Did those other venues have similar GLAR? Did they have the same type of liquor licence? Were they also being operated as a restaurant/bar? Was their location proximate or did they cater for the same demographic clientele? Without those details, I consider the reasoning to be deficient and not in accordance with the Act. In *Kumari v Goa* [2008] RSLT 19, the Queensland Retail Shop Lease Tribunal (as it then existed) considered a similar case and made the following observations, which I find are apt:

> We are also satisfied the valuer has not complied with s31(1)(d), which requires "detailed reasons" for the determination…

The Valuer's concluding remarks are singularly brief and uninformative. He simply observes:

> Taking into account the attributes both positive and negative, the market evidence available indicates…

and then arrives at the all-important figure.

Nothing in these reasons for decision is meant to encourage a hypercritical approach to the decisions of specialist retail valuers. But due weight must be given to the legislature's demand for "detailed reasons", when not inconsiderable fees are charged for reports of this nature. It seems to us that this requirement is not satisfied by a decision padded with preliminary,

non-contentious material, purportedly based on “a full consideration” of relevant facts, followed by a leap to judgement. We recall the advice of Sir Frank Kitto, former Justice of the High Court, to those called upon to give “detailed reasons”. Such a task, involves more than –

> [recitation of] the facts in a degree of pedestrian detail that scorns to [indicate] those that really bear on the problem ... and then, without carefully worked out steps of reasoning but with a “blinding flash of light” ... produces the answer with all the assurance of the divine revelation (Sir Frank Kitto, ‘Why Write Judgments?’ (1992) 66 *Australian Law Journal* 787 at 792).

In some respects, the most extraordinary piece of evidence in relation to the Valuer’s Determination is contained in the email correspondence where, in relation to the conclusion that an additional $536,782 was achievable in annual turnover for the business, the Valuer said that this was “based on the liquor licence in place, and comparable venues in the region which I hold on file”. Higgins Nine sought to defend this apparent leap of reasoning on the basis that it was the opinion of an expert and, given the Valuer’s expertise, that was sufficient in terms of reasoning for the purpose of s 37(6) of the *Retail Leases Act* and in conformity with the authorities on which reliance had been placed. In my view, this is a position which is actually dispelled by the statement contained in the email correspondence to which I have referred. Rather, the Valuer is saying, in effect, that there is a file of material upon which I have made this assessment and, as is the case, the material is not being disclosed; a position possibly even worse than a mere “blinding flash of light”. In other words, the reasoning process in this respect is entirely opaque, which is at odds with the requirements of s 37(6) of the *Retail Leases Act* which, in effect, requires a “speaking valuation”, to use more traditional common law parlance. One of the reasons, of course, for a “speaking valuation” in accordance with the requirements of s 37(6) is that it would not otherwise be possible to determine whether the requirements of s 37 had been complied with in the valuation process—in which case the legislative purpose would be negated (See *Serene Hotels P/L v*

Epping Hotels P/L [2015] VSCA 228. See also [2015] VSC 104.

(h) In conclusion, at paragraph 45, Justice Croft noted:

> In conclusion on this aspect of these proceedings, I am of the view that the deficiencies in reasoning are both highlighted and accurately stated in the Ladro submissions …
>
> 26. At page 26 of the determination:
>
> (a) the valuer set out in an abbreviated form the gross sales figures for the lessee FYE 2013 and FYE 2012 (derived from trading figures);
>
> (b) gross income had dropped from FYE 2012 ($2,129,000) to FYE 2013 ($2,063,000), that is a 3.13% decrease;
>
> (c) the valuer stated that $2,600,000 was an achievable gross annual turnover (that is an increase of $536,782 or 26%);
>
> (d) the valuer then applied an 8% rental factor to $2,600,000 to arrive at $208,000.
>
> 27. The valuer did not set out the steps in his reasoning. He:
>
> (a) did not state how he calculated or determined a $536,782 or 26% increase in gross annual turnover;
>
> (b) placed great emphasis on the premises having a 24 hour licence (the lessee only trading to 11pm) but does not provide any calculations for income or expenditure with respect to additional trading.
>
> 28. It is submitted that the Tribunal decision was correct because the valuer neither furnished detailed reasons nor specified the things that he had regard to in deciding that an increase in gross annual turnover of $536,782 or 26% was achievable.

Dalmatino Pty Ltd v Creative Laser Pty Ltd

39. In *Dalmatino Pty Ltd v Creative Laser Pty Ltd* [2017] VCAT 875, I appeared for the landlord, and Sam Hopper appeared for the tenant. Unusually, it was the landlord who was unhappy with the valuation in that case.

40. Dalmatino is a well-established restaurant in Bay St, Port Melbourne. One of the 2 brothers that operated the business left the partnership, and the landlord alleged that things went downhill as a result.

41. Several disputes erupted; the most significant related to what the rent was going forward.

42. The landlord alleged that there was an agreement reached about the rent for the second term of the lease, commencing in 2012; the parties jointly appointed a valuer to determine the rent for the period commencing in 2015.

43. The tenant denied the 2102 agreement, and sought to appoint a valuer for 2012 as well, under section 37 of the RTA. The 2012 valuation that was completed concluded that the tenant had been overpaying the rent by thousands of dollars each year.

44. One of the main issues for the Tribunal's determination was whether the 2012 valuation complied with section 37 of the RTA.

45. The Tribunal rejected the contention that there had been an agreement reached about the rent. As a result, the rental valuation became relevant.

46. In the event, Member Kincaid found that the valuation was flawed, as it did not comply with the requirements of section 37 of the RL Act. For the purpose of determining the current market rent in respect of the first year of the third term of the lease, the valuer's written reasons demonstrate that the valuer had regard to premises "...for the same, or a substantially similar, use to which the premises may be put under the lease" within the meaning of the section. However, the rental determination was still set aside for failure to comply with the requirements of section 37 of the RL Act.

Relevant Valuation Principles

47. At paragraphs 43 – 45, Member Kincaid analysed the relevant valuation authorities, in the following terms:

> In *Commonwealth of Australia v Wawbe Pty Ltd and Anor* [1998] VSC 82, Justice Gillard adopted the following statement of McHugh JA in *Legal and General Life of Australia Ltd v A Hudson Pty Ltd* as stating the law concerning challenges to valuation determinations (at [38]-[39]):
>
> > In my opinion the question whether a valuation is binding on the parties depends in the first instance upon the terms of the contract, express or implied...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 a 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 upon the parties". By referring the decision to a valuer, the parties agree to accept his honest 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.
> >
> > While mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or 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 the contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it represents 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. 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 [emphasis of his Honour].

Justice Gillard went on to say (at [45]):

> In my opinion it follows that the court should consider three questions-
>
> 1. What did the parties agree to remit to the expert?
> 2. Did the valuer make a mistake and what was the nature of the mistake?
> 3. Is the mistake of such a kind that demonstrates that the valuation was not made in accordance with the terms of the contract and accordingly does not bind the parties?

The leading authorities on setting aside a rental determination (including the above extract from *Wawbe*) were summarised by Croft J in *Epping Hotels Pty Ltd v Serene Hotels Pty Ltd* [2015] VSC 104*,* when his Honour concluded (at [59]):

> As the authorities make clear, the Tribunal's task was to consider whether the Rental Determination answered the contractual description of what the valuer was required to do. For present purposes, it is sufficient to note that, by virtue of s 37(1) of the Act, sub-s (2) is taken to be a term of the lease, that is, a term of the contract between the parties. Therefore, the valuer was required to make a determination that accorded with the requirements of that sub-section.

48. Member Kincaid then proceeded to analyse whether the rental determination failed to comply with the provisions of section 37(2)(a) and (b) of the RL Act.

49. At paragraph 67 and following, the Member found:

> I consider that in order for the valuer to have satisfied himself that he has had regard to "the rent that would be reasonably expected to be paid for 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", he need only look to the essential use of the premises under consideration. I find, doing as best I can from the valuer's descriptions given in his table, that the essential use of each of the various premises described in the valuer's table at numbers 16, 21 and 24-27 on pages 15-17 of the rental determination is that of a "restaurant, not being part of a chain of restaurants".

I therefore find that the premises described in premises numbers 16, 21 and 24-27 on pages 15-17 of the rental determination are offered for lease for:

a. the "same" use (to the extent that any of them may have a general liquor license, like the tenant, or even a licence in modified form); or
b. "substantially similar" use (to the extent that any of them may not have a liquor license)

to which the premises may be put under the lease, within the meaning of section 37(2)(b) of the Act.

50. Having found that some of the premises referred to by the valuer were within the requirements of section 37, the Member then considered (at paragraph 69 and following) whether

> … the reasons contained in the rental determination are such as to indicate, when read as whole, that when determining the current market rent, the valuer had regard to "the rent that would reasonably be expected to be paid for premises having the same, or substantially similar, use to which the premises may be put under the lease".
>
> The giving of reasons by an expert serves generally as a means by which a reviewing Court or Tribunal is able to be satisfied that he or she took into account matters required to be taken into account. Section 37(6) of the Act expressly makes it clear that, in the case of a specialist rental valuer appointed under the provisions of the Act, the reasons given by the valuer must not only be "detailed", but they must "specify the matters to which the valuer had regard in making the determination". These are, at least, I consider, the matters set out in section 37(2)(a)-(d) of the Act.

51. Member Kincaid concluded (at paragraph 71) that he could not be satisfied that this was so, and as a result he found that the valuation did not comply with section 37. At paragraph 72, he noted that the extent to which the valuer had regard to the requirement set out in section 37(2)(b) of the RL Act could only gathered from the text of the rental determination. Then, at paragraphs 73 – 75, he noted:

> The above extract from the reasons show, in substance, that the valuer first identified a "rental range" between a "low" of $385pm^2$ per annum (as to which particular premises referred to in the tables contained in the rental

determination, it is not clear) and a "high" of $937pm^2$ per annum. The valuer goes on to state that, in his view, "the most relevant data is in the range of $500 to $570 [psm] per annum net". It is impossible to determine from this statement the extent to which the valuer considered, if at all, premises having the same, or a substantially similar, use to which the premises may be put under the lease. In particular it is not clear, other than perhaps by supposition, that the valuer had regard to premises 16, 21 and 24-27, being premises that I have found have the same, or substantially similar use as that to which the premises may be put under the lease.

Further, having identified "the most relevant data range of $500 to $570 [psm] per annum net", there are no particulars provided by the valuer of how he then arrives at a current market rental of $525 per square metre. Having expressly informed the reader about his use of the *Direct Comparison Technique* which, he states, involves the making of "inevitable adjustments for all factors which influence market rental value", no particulars are provided as to the adjustments that were presumably applied to the rents payable for other relevant premises to take into account factors applicable to the premises that may "influence the market rental value" of the premises, even at a very general level of description.

Section 37(6)(b) of the Act requires the valuer to give "detailed reasons". Section 37(6)(c) of the Act requires the valuer to "specify the matters to which the valuer had regard in making the determination" including, I consider, the matters to which the valuer is required to have regard in section 37(2) of the Act. For the reasons set out above, one is largely left to speculate as to how the valuer formed his opinion. This does not, in my view, sufficiently comply with section 37(6) of the Act.

Josephine Ung Pty Ltd v Jagjit Associates Pty Ltd

52. In *Josephine Ung Pty Ltd v Jagjit Associates Pty Ltd* [2017] VCAT 2111, Rob Hay QC appeared for the respondent tenant, and Sam Hopper appeared for the applicant landlord.

53. In that case, Member Edquist concluded that the rental determination undertaken by the valuer was vitiated by error, and was of no effect. The case concerned a rent determination made in relation to a cafe in South Yarra. The applicant landlord, Josephine Ung Pty Ltd (ACN 158 852 487) owned two shops in Claremont Street which it leased to the respondent tenant Jagjit Associates Pty Ltd (ACN 164 331 480) for a term of 10 years commencing 3 February 2012.

54. The lease provided that the rent should be reviewed on the fourth anniversary of the commencement date. A specialist retail valuer, conducted a market review of the rent under the lease for the year commencing 3 February 2016. The Valuer also issued a determination ("the Determination") on 14 October 2016 and issued a letter supplementing his written reasons in the Determination on 29

November 2016. The Determination of the rental was $87,200 per year excluding GST.

55. The landlord claimed that the Determination was vitiated by error, and alternatively that the Valuer failed to provide detailed reasons. The tenant denied this.

56. The landlord's claim was that there were three related errors:
    a. The Valuer failed to have regard to rent concessions or other concessions as required by s 37 (2)(d) of the RL Act, or, further or alternatively, his reasons failed to adequately disclose that consideration;
    b. The Valuer did not have regard to the provision by the applicant of the items listed in Annexure E to the lease and, in so doing, failed to have regard to the terms of the lease as required by s 37 (2)(a) of the RL Act and valued the wrong premises, or, further or alternatively, his reasons do not adequately disclose the regard given by him to those items; and
    c. The Valuer failed to have regard to the term implied into the lease by s 52(2) of the RL Act.

57. The member discussed several authorities, and then quoted from the decision in *Commonwealth v Wawbe Pty Ltd* [1998] VSC 82, where Gillard J agreed with McHugh JA's statement of the law, and went on to add:

> In my opinion it follows that the court should answer 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 in made in accordance with the terms of the contract and accordingly does not bind the parties?

58. The Member noted that his task was to identify the terms of the contract made between the parties, as this will identify the parameters within which the rental valuation was to be conducted. In other words he was to identify what Croft J described in *Epping Hotels* as the Valuer's "charter".

59. With respect to the requirement contained in s 37(6) of the RLA that the Valuer provide "detailed reasons", both parties referred to the decision of Croft J in *Higgins Nine Group Pty Ltd v Ladro Greville St Pty Ltd* [2016] VSC 244. Relevantly, his Honour said at paragraph 40:

> It is clear that it is not sufficient for a Valuer to "leap to a judgement." The valuation must disclose the steps of reasoning.

60. The Member also noted that Croft J went on to note that the position is reinforced by the provisions of s 37(6)(c) of the RLA, which requires the Valuer

"to specify the matters to which the Valuer had regard in making the determination".

61. The member accepted the landlord's argument about the first alleged error. The Tribunal noted in paragraph 24:

> Although the Valuer expressly confirmed in his Determination that he had had regard to rent concessions and other benefits offered to prospective tenants of unoccupied retail premises in undertaking his task, this is contradicted by the subsequent correspondence. In particular, in his letter of 29 November 2016 the Valuer stated:
>
> > My deliberations in this regard have not extended to incorporating a rent free period into my Determination.

Is the mistake a vitiating error?

62. The Member then noted that this conclusion opened up a new issue: if the Valuer made a mistake, is there a basis for the Tribunal to find that the mistake was of the kind referred to by McHugh JA in *Legal & General* or Nettle JA in *AGL Victoria* that would entitle the Tribunal to set the Determination aside?

63. At paragraph 32, the Tribunal concluded that the Valuer's error in failing to take into account rent concessions available to prospective tenants in determining current market rent is an error of such magnitude that the Determination has been made outside the Valuer's charter. The error is of such a nature that it vitiates the Determination.

64. For the sake of completeness, and in case the Tribunal was wrong in the conclusion about alleged error 1, the Member proceeded to examine the other alleged errors.

65. The landlord's principal contention was that the Landlord's Installations formed part of the leased premises, and yet, in making his Determination, the Valuer did not have regard to those items. Although the Valuer referred to the landlord's installations in his Determination, the Determination did not identify how the provision of this fitout is taken into account. The Tribunal also accepted these arguments. It found at paragraph 51:

> a. In circumstances where the Valuer merely makes the statement that he has had regard to the "Landlord's provision of installations" but has not given any indication of how he has done this, I think there is a break in his chain of reasoning. It is not apparent that the Valuer has fully appreciated the particular nature of the premises in the present case, that is to say premises already substantially fitted out by the landlord as a commercial kitchen, with associated preparation and service equipment.
>
> b. The landlord's installation … clearly had value. The fact that a value for the installation was not precisely established did not mean that the landlord's argument that the installation had to be taken into account was "misconceived".

c. The landlord's complaint is that the Valuer did not really base his Determination on comparable values appears to be made out because he did not identify any other restaurant/cafe in his table of comparable properties which had a substantial landlord's fit out.

66. The Tribunal specifically found that the Valuer had not demonstrably taken into account the landlord's installations. In this respect, the Valuer fell into error. By failing to adequately explain how he had taken the landlord's installation into account, the Valuer breached s 37(6)(b) and also (c) of the RLA. This error vitiated the Determination as the Valuer had not performed the contract he made with the parties.

67. Finally, the landlord contended that the Valuer failed to have regard to s 52(2) of RLA, and erroneously had regard to a different repair and maintenance obligation expressed in the lease. The central proposition underpinning the landlord's complaint is that clause 4.2.1 of the lease is inconsistent with s 52(2) of RLA.

68. The landlord contended that it was unclear what value had been attributed to the tenant's (non-existent) obligation to maintain the property.

69. The landlord also articulated a separate argument arising out of the particular circumstances of this lease, under which the landlord had provided a substantial amount of the fit out, including refrigerators, and ice maker, dishwashers, and extraction system, all floor coverings and certain light globes. The argument was that because sub-sections 52(2)(b) and 52(2)(c) of the RLA respectively extended the landlord's maintenance obligations to "plant and equipment at the retail premises" and "the appliances, fittings and fixtures provided under the lease by the landlord ..." the hypothetical tenant had been relieved of the cost of maintaining the items. This represented an unusually significant saving to the hypothetical tenant, which would further inflate the rent that he or she would be willing to pay. Accordingly, the landlord argued, either the Valuer did not have regard to the true terms of the lease (as amended by s 52 of the RLA) or his reasons do not disclose the regard to that section that he did have. Either way, it said the Determination is invalid and should be set aside. The Tribunal accepted the landlord's arguments.

70. The Tribunal applied the test articulated by Croft J in *Higgins Nine Group Pty Ltd v Ladro Greville St Pty Ltd* [2016] VSC 244 and noted that the Valuer must disclose the steps of his reasoning. The Tribunal found that there was a failure by the Valuer to give "sufficient" reasons in respect of his consideration of the tenant's and the landlord's repair and maintenance obligations. The nature of these errors was such that the Tribunal was satisfied that the Valuer did not discharge the contract he had made with the parties to apply the terms of the lease, including all the terms implied by the RLA. Accordingly, applying the law as set out by McHugh J in *Legal and General* (1985) 1 NSWLR 314 at 335-336*,* the Tribunal concluded that the rental determination was vitiated.

Other cases

71. Practitioners may also want to read the following case in their spare time: *Fang v Aquatab P/L* [2016] VCAT 2079 (which deals with late exercise of option to renew lease; consideration of s 28 of RL Act; and validity of rental determination).

72. Anecdotally, I have advised on other rental determinations. For example, a real estate agent which was a tenant asserted that the specialist retail valuer had not undertaken his task properly at all in that case. It was asserted that in effect, the valuer had simply trawled through his own filing cabinet and looked at the rentals that his clients had been able to obtain from retail premises in the vicinity of the subject premises.

73. The examples that the valuer did provide were mostly taken from his own rent roll, which made all of the lawyers involved hold concerns about the validity of the rental determination, and forced the parties to resolve their differences at a Small Business Commissioner mediation.

Conclusion

74. In order for a rental determination to comply with section 37 of the RL Act, the valuer undertaking the task must be thorough, and provide detailed reasons for his or her determination.

75. The recent spate of decisions has confirmed that, whilst not onerous, the task requires the valuer to be diligent in meeting the requirements set out in section 37.

Dated 14 November 2018

WG Stark
Hayden Starke Chambers