IN THE SUPREME COURT OF VICTORIA
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S CI 2014 01708

BETWEEN:

EPPING HOTELS PTY LTD — Plaintiff

- and -

SERENE HOTELS PTY LTD — Defendant

REASONS FOR DECISION

MUKHTAR AsJ:

For the reasons that follow, the Court will grant leave to appeal on both issues as identified by the plaintiff. I say issues rather than questions of law because the issues came to be well defined in argument but, as frequently happen in these applications, the Court will allow the plaintiff to reconsider and amend its notice of appeal to better articulate the question of law and the grounds of appeal.

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1 This was an intensive and lengthy contest over an application for leave to appeal a decision of the Victorian Civil and Administrative Tribunal. On the application of the tenant, the Tribunal set aside a rental determination made by a specialist valuer under a retail premises lease. The plaintiff as landlord seeks leave to appeal.

2 The rented premises are known as the Epping Hotel at 743 High Street in Epping. The tenant has a 14 year lease which commenced on 1 February 2007. The hotel trades seven days per week with full bar facilities and, more pertinently for present purposes, it has a gaming room with electronic gaming machines.

3 The lease is governed by the *Retail Leases Act*. Under the lease, a market review was to take place as at 1 February 2012, as the lease provided for rent to be adjusted on the fifth anniversary of the lease. For that purpose, an independent specialist valuer,

Mr Peter Grieve, was engaged to determine the current market rent as at that date. The lease states that the valuer's decision is "final and binding". In what is known in the law as a speaking valuation, he determined the current market rental as at 1 February 2012 to be $631,914 per annum plus GST, which equates to $695,106 including GST. The commencement rental was $475,000 plus GST.

4 On the application of the tenant, the Tribunal in effect set aside wholly the rental determination. The precise order was that the parties were not bound by the rental determination. The tenant's attack was manifold, but the Tribunal isolated one aspect of the valuation to reach the conclusion that the valuer had "fundamentally misconstrued" his task.

5 To understand the essential ground of that decision, all attention has to be focussed on s 37 of the *Retail Leases Act*. That has the effect of implying into a lease the way in which a rent review is to be conducted. Section 37(1) states:

> 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).

6 Section 37(2) is crucial. It postulates a hypothetical exercise for the rent determination. Where relevant the section states (with my underlining):

> 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 –
>
> ...
>
> (b) the rent that would reasonably be expected to be paid <u>if they were unoccupied</u> and offered for lease <u>for the same, or a substantially similar, use to which the premises may be put under the lease</u>;
>
> ...
>
> (d) rent concessions and other benefits offered to prospective tenants of unoccupied retail premises –
>
> <u>but the current market rent is not to take into account</u> the value of good will created by the tenant's occupation or <u>the value of the tenant's fixtures and fittings</u>.

7 Section 37(5) dictates that, in determining the rent, the valuer must take into account

the matters set out in subsection (2). Under s 37(6), the valuation must contain detailed reasons for the determination and must "specify the matters to which the valuer had regard in making the determination".

8 This case turns on the statutory directive for the valuation to exclude "the value of the tenant's fixtures and fittings" in reaching a rent determination. Legal writers in the field of rent determination[1] describe the removal of that as a factor to be counter factual or to go against the presumption of reality, but there is a good reason for doing so because:

> It is obviously unjust that a tenant shall be required to pay rent for an improvement which he has himself carried out at his own expense. ... If there is no express provision to the contrary the tenant will be required to pay reviewed rent which includes the value of his own improvements since these improvements are in reality a part of the demised premises to be valued at the review date.

9 The statutory requirement that the valuation exercise be conducted as if the premises were unoccupied is another way of saying the hypothetical lease will be taken to be granted with vacant possession. That is, the valuer must disregard the sitting tenant's occupation of the premises as he must disregard the goodwill built up during the period of occupation. Otherwise in the hypothetical exercise there will be an over bid. But, as has been remarked,[2] the occupation is not to be ignored for all purposes for the way in which the sitting tenant has used the premises may demonstrate the inherent suitability of the premises for a particular purpose. That is consistent with the words "same, or substantially similar" to be found in s 37(2)(b).

10 I shall not examine in detail the rental determination made by Mr Grieve. It is not the Court's function at this stage to analyse in great depth the facts and the legal issues before the Tribunal, for that is a matter for the hearing of the appeal proper, if leave be granted. However, such is the nature of this case I need to go some way into looking into the elements of the case because I think a debateable valuation question, in the context of a question of statutory construction, does arise.

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1 See Barnes QC, *Hill & Redman's Guide to Rent Review* (Butterworths Lexus Nexus) at 2.20.

2 Barnes, above, at 3.112.

11 From what I have seen or been taken to, I am not at all sure it is manifestly the case that the valuer "fundamentally misconstrued his task". I fear that the Tribunal was allowed to possibly misunderstand the valuer's approach when it came to the tenant's fixtures and fittings. But I wish to say immediately that I can see why the Tribunal member was attracted to the view that the determination was not in accordance with that part of the statute. It was I think to do with the way the determination was expressed, and because that part of the methodology was not fully explained.

12 But I have come to the view that underlying the valuation methodology of Mr Grieve, in which he avowedly gave recognition to s 37(2), there is a question to be considered on appeal whether, properly understood, he truly did have regard to the value of the tenant's fittings, contrary to the prohibition in s 37(2) as properly construed. That is the central question on this leave application.

13 The valuer's approach was to regard hotel premises, largely by their nature, as being specialist property with specialist improvements. It is a specific asset class. The industry, he said, measures value and rental on the basis of trading propensity and operational profitability, assuming good average standard of management. His view was to apply that market norm and look to assess the current market rent for the Epping Hotel on the same basis. Therefore, in his approach, a significant component of this rental determination is the assessment of a reasonable trading level for the Epping Hotel.

14 The valuer sought and received from the tenant, amongst other documents, detailed trading information for the financial years 2009, 2010 and 2011. He explicitly acknowledged the provisions of s 37(2) including the prohibition against taking into account the value of the tenant's fixtures and fittings. One particular issue which does not find its way into this leave application (but which appears to have been a major issue) was a submission put by the tenant to the valuer that in making a rent review as at 1 February 2012 there was what was called a temporal limitation that required the valuer to disregard the enhanced levels of revenue that might be

derived from electronic gaming machines attributable to legislative changes that were to come into effect after the rental adjustment date. The valuer disagreed with that view. He took the view that those expected changes were common knowledge in the gaming industry and would have been part of the bargaining process between the hypothetical landlord and tenant. Ultimately, the Tribunal too rejected the tenant's submission on this point. That is, the Tribunal accepted that market knowledge of a possible future event has a bearing on the rent obtainable in an open market.[3]

15 The valuer applied, he said in accordance with long established valuation practice within the hotel industry, the "doctrine" of EBIDTAR that looks to the earnings before interest, depreciation, taxation, amortisation and rent. The valuer stated that rental for the hotel premises was to be 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." He then made explicit reference to s 37(2) and the matters to be excluded, including the value of the tenant's fixtures and fittings. He stated: "It is usual industry practice that the fixtures and fitting 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."

16 Then there are these statements in the valuation on which it appears the Tribunal's decision may have turned (with my underlining) –

> 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. My review of transactional evidence suggests the following broad industry parameters have been applied in assessment of rental [table omitted].
>
> <u>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.</u>

17 Following the text of the rent determination which is concerned with the

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3 See Tribunal's reasons at pars 50-54.

hypothetical bargain, I think it fair to assume that "Tenant" in that passage means hypothetical tenant.

18 The Tribunal's discussion of the question appears in these three paragraphs which ought be stated in full, with my underlining:

> 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 include 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.
>
> 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 s 37(2) of the Act.
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> 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 s 37(2) of the Act allows the methodology employed by the Valuer. I am satisfied that the Valuer has, contrary to the requirement in s 37(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.

19 The Tribunal's statement "I do not accept that s 37(2) of the Act allows the methodology employed by the valuer" is important. The methodology or rationale was to look at the tenant's turnover figures and perceived EBIDTAR levels because capacity to pay is the major rental consideration. Yet going past that statement, the Tribunal then made the finding that the valuer did not, contrary to the statute, ignore the sitting tenant's fixtures and fittings.

20 It is recognised that appellate Courts have to be careful with the use of the "fine toothed comb" in scrutinising a tribunal's reasons, but the first step is to see that the

Tribunal has not made a finding that the methodology of using turnover levels and looking at the business's capacity to pay was contrary to the Act. That is important because the various written submissions filed by the tenant in the Tribunal squarely contended the valuer contravened s 37(2) by taking into account the sitting tenant's turnover and trading.[4] Nor, in terms at least, does the Tribunal reject the traditional use of the perceived EBIDTAR levels as repugnant to the statute. In the way argument proceeded before me, Mr Best of counsel for the tenant resisted leave on the basis that the only question was whether the valuer took into account the value of the tenant's fixtures and fittings, contrary to the prohibition in s 37(2).

21 As I read the three paragraphs of the reasoning, I certainly do not see a rejection of the methodology of using turnover levels and EBIDTAR levels. Rather, the Tribunal has seized on the *ipsissima verba* (the very words) of the rental determination at paragraph 7.1 which say:

> It is pertinent to note that the future application by the Tenant of its own Fixtures & Fittings is included in the rental assessment process ...

From there, the Tribunal concluded that the valuer had manifestly done that which the statute said he could not do, and as that was integral to the methodology, it then infected the whole of the exercise so as to result in the conclusion that he had fundamentally misconstrued his tasks.

22. Making all allowances for the sometimes difficult or esoteric elements of a valuation exercise, particularly an hypothetical one, I think there is a question whether the Tribunal misinterpreted or misunderstood what the valuation was purporting to say about the factoring in of tenant's fixtures and fittings. It would be a very strange thing for an experienced valuer to openly acknowledge the prohibition in s 37(2) but then openly disregard it. To my mind (and I emphasise this is not the occasion for me to do an in depth study of the doctrine of EBIDTAR) the valuer was endeavouring to do a number of things. First, he looked to take into account the revenue generating qualities of the venue which is a specialised venue. Secondly,

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4 See exhibit APJ 5 paginated at a pp.337 (par 14) and 350 (par 38).

and for that purpose, he assumed the hypothetical tenant would have to bring or purchase its own fixtures and fittings including gambling machines and licences. They may either be purchased from the existing tenant or acquired under some other arrangement. Either way, the rental determination said costs and expenses incurred for the capital purchases of gaming entitlements or the leasing of gaming equipment, or payments for loans to acquire a new gaming structure are disregarded as capital purchases in the assessment of EBIDTAR.

23. Thus, the landlord's case goes, on a proper understanding of the valuer's methodology, he certainly did disregard the value of the tenant's fixtures and fittings. All he did was assume that a willing tenant would run a hotel and gaming house. He looked to see what the sitting tenant was earning with its fixtures and fittings and assumed the hypothetical tenant would have to bring its own fixtures and fittings. The capital costs of fit out formed no part of the EBIDTAR exercise.

24. So understood, neither was the valuer disregarding the statutory directive for the hypothetical exercise to assume the premises were unoccupied. He was looking at the revenue generating qualities of a specialised venue, and assumed the hypothetical tenant would bring its own gambling machines and licences.

25 The valuer's determination is "dense" (to adopt a term used in argument) in that this was not fully explicated, although I am told the explanation took up much time in the course of submissions in the Tribunal. But the point is this: to my mind there is attended with sufficient doubt the question whether the Tribunal was made to understand the elements of the methodology applied by the valuer; that is, whether it was right, without more, to seize upon the language in his report concerning the future application by the Tenant of its owned fixtures and fittings as manifestly demonstrating an approach in violation of the Act.

26 In part, the question necessarily involved a proper construction of s 37 of the Act. The valuer may have *in one sense* taken into account fixtures and fittings but not in the sense contemplated by the Act having regard to the apparent purpose of s 37.

27 Mr Best for the tenant seeks to meet the possibility that the Tribunal misunderstood the question by contending that a misunderstanding or erroneous conclusion that the valuer did take into account fixtures and fittings was an error of fact which is not reviewable under s 148 of the *VCAT Act*. It was said to be "unfortunate" if the Tribunal got it wrong, but it did not raise a question of law. He submitted that as this was a speaking valuation it was not possible for the valuer to be called as a witness and to be cross-examined so as to obtain an elaboration of his methodology or to ascertain what was and what was not taken into account. He submitted there was nothing in the report to show that he had excluded fixtures and fittings and nothing to demonstrate how the methodology by its nature excluded fixtures and fittings. The submission culminated in this proposition: on the face of this speaking valuation, did the valuer take into account fixtures and fittings? That is a question of fact. The Tribunal held that he did and that is the end of the matter. The Tribunal was entitled to get that matter wrong.

28 I will accept, as I must, that an interpretation of a statute where the words are used in their natural and ordinary meaning is a question of fact: see *S v Crimes Compensation Tribunal*.[5] But no-one here is questioning the meaning of the ordinary term "fixtures and fittings" under s 37(2) of the Act. The question is what was to be understood by the valuer's statement that "it is pertinent to note that the future application by the Tenant of its owned Fixtures and Fittings is included in the rental assessment process". I do not think this is an instance where there was an ordinary exercise of finding facts to see if they met a statutory description. This was about comprehending an expert opinion.

29 I think there were two steps in the legal adjudication. The first was an understanding of what the valuer had done and how and in what way the tenant's fixtures and fittings formed part of the valuation exercise and then to see whether there was any transgression of the statute. That is not fact finding as such. It is interpreting how someone else has gone about a valuation exercise. The second step

5 (1998) 1 VR 83.

was to construe the statute. To say that the Tribunal has made a finding of fact that the valuer did take into account the fixtures and fittings, and is therefore beyond review, leaves unattended an underlying question whether in making that finding of fact the Tribunal has been led to misunderstand what the valuer had in truth done.

30 I could not be content with the view that if (arguably) the Tribunal had misunderstood the methodology, then that is an "unfortunate" error of fact and beyond review in this Court. On the well-known *Hulls*[6] test, leave to appeal in the end is governed by what is just. If the decision is attended with sufficient doubt and there is an injustice in leaving it uncorrected, then it my view leave ought ordinarily be granted. If on a proper analysis of the methodology, it was not open to find a breach of the Act, then that is a question of law.

31 Mr Best then submitted leave ought be refused as a matter of discretion because as things stood there was no injustice to the landlord. Setting aside the rent determination was not the end of the matter he said. Another valuation process would now have to be undertaken and the process would start again. All the landlord has lost, he said, was the shared cost of the valuer's fee.

32 I do not accept this. I think there is an injustice if the landlord can show that it has been deprived of the benefit a properly determined valuation, particularly one that has been rejected as fundamentally erroneous. The *Retail Leases Act* has widespread application and rent determinations are just about an everyday event. Whilst the hotel and gaming industry may be only one part of retail trade and commerce, I think there is sufficient to say that there is sufficient here to raise a significant question in this field of trade and commerce, or at least for valuers.

33 I turn now to the second issue, which concerns the landlord's procuration of what was termed a supplementary report.

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6 *Sec to the Dept of Premier and Cabinet v Hulls*[1999] 3 VR 331.

The "supplementary report"

34 I need to recite some procedural facts.[7]

35 The tenant filed its application in the Tribunal on 20 May 2013. Points of claim were filed.[8] The "pleading" alleged only that the valuation was vitiated by mistake because the valuer had regard to matters which did not exist as at 1 February 2012. That concerned the possibility of enhanced levels of revenue as a result of legislative changes. That was a point the tenant eventually lost.

36 Procedural orders were made on 5 July 2013 and later on 5 September 2013, concerning the filing of a statement of agreed facts, and contentions by both parties. The tenant's Statement of Contentions was also confined to the future legislative changes point.[9]

37 Then the tenant filed another "Outline" which raised new points.[10] It contended the valuer wrongly took into account the sitting tenant's turnover and trading which had the effect of introducing the value of the fixtures and fittings. Another Outline from the tenant[11] was enlarged to include a contention that the valuation did not refer at all to s 37(2)(d) which required the valuer to have regard to rent concessions and other benefits offered to prospective tenants of unoccupied retail premises". The tenant submitted that the absence of any reference in the valuation report to rent concessions and other benefits to tenants meant that it could be "surmised" that the valuer wholly ignored this matter as stipulated as something to which he must have regard under s 37(2)(d). It seems to me that was truly a new and different point.

38 Soon after receiving that submission, the landlord's solicitors wrote to the valuer asking him to provide a supplementary report "providing further details of your consideration of rent concessions and other benefits offered to prospective tenants ... as required by s 37(2)(d) of the *Retail Leases Act* ... "

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7 See the affidavit of Anthony Patrick Joyce sworn on behalf of the landlord on 16 April 2014.
8 Exhibit APJ 5 at p 149.
9 Exhibit APJ 5 at p 161.
10 Exhibit APJ 5 at p 335 and p 342.
11 Exhibit APJ 5 at p 342

39 On the following day, a senior member of the Tribunal ordered the landlord to serve a copy of the supplementary report within 72 hours of receiving it, and ordered that if there was to be dispute as to whether the supplementary report should be tendered, the parties would file written submissions relating to the tendering of that report. The hearing was re-fixed for 18 December 2013.

40 On 18 October 2013, the valuer wrote to the parties jointly and said:

> I refer to Section 2.2 of the Determination Report, specifically the first paragraph at Page 9 which states that in undertaking the determination the provisions of Section 37(2) had been applied.
>
> Based on my experience in the hotel industry I am of the opinion that 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 tenant.

41 At the ultimate hearing, the landlord sought to tender the valuer's letter dated 18 October 2013. The matter proceeded as a question of admissibility of evidence. Of course, the Tribunal is not bound by the rules of evidence or any practices or procedures applicable to courts of record.[12] But it is bound by the rules of natural justice. It is apparent the Tribunal accepted that a valuer may provide more than one report, but it took a dim view of the means by which the supplementary letter was obtained. It was regarded as productive of prejudice to the tenant. The Tribunal said:

> 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.
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> 64. It is clear from the terms of the supplementary letter itself that the

12 See s 98 of the *VCAT Act*.

> Valuer has provided the letter in response to a specific request from the Respondent [the landlord], 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.
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> 65. Further, the Respondent's request to the Valuer was made some eight months after the Valuer provided the valuation report to the parties and some five months after the Applicant commenced this proceeding. In my view, once the Applicant commenced this proceeding challenging the valuation report, it become untenable for the Valuer to provide any supplementary report.
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> 66. In all the circumstances, I am satisfied that the supplementary letter should be wholly disregarded.

42 It is not clear to me whether that ruling and its consequences was a standalone basis for determining that the rent determination was not binding on the tenant. Paragraph 42 of the Member's reasons makes it clear I think that the findings about the tenant's fixtures and fittings was singularly a basis on which the Tribunal determined that the parties were not bound by the rent determination because the valuer had fundamentally misconstrued his task. The Tribunal then went on to say, "For completeness, I briefly address other issues and submissions." In the statement of conclusions, at paragraph 67 the Tribunal states, "For the reasons set out above, the parties are not bound by the rent determination." Therefore, the Tribunal's determination in the aggregate was based upon the valuer also failing to have regard to rent concessions and other benefits.

43 Mr Hopper of counsel for the landlord submits that the Tribunal had no discretion but to receive the supplementary report. He placed heavy reliance on a decision of the English Court of Appeal in *Homepace Limited v Sita South East Limited.*[13] That was a case concerning the issue of a certificate by an expert under a lease involving the extraction of limestone and backfilling of a quarry. A clause of the lease obliged the parties to refer any dispute to an independent chartered surveyor experienced in mineral matters. An expert was appointed, who subsequently issued a report and certificate. One of the parties did not accept the validity of the certificate. It put questions to the expert in correspondence to which he responded, explaining that the

13 [2008] EWCA Civ 1.

questions raised did not call for any revision of the conclusion reached. More correspondence followed questioning the expert's performance of his task to which the expert responded substantively.

44 One issue in *Homepace* was whether the expert had made a mistake which vitiated his decision. The question arose as to what material could be considered in order to decide whether the expert had made a mistake. Was it legitimate to quiz the expert in correspondence in order to find out the basis of his determination, if it was not apparent on the face of the certificate?

45 In *Homepace* the Court determined that its task was to consider, from all the evidence which was properly before it, what the valuer had done and why he had done it. The less evidence there was available, then the more difficult it would be for any party to mount a challenge to the determination. The Court said:

> [The expert] need not have responded to the requests for clarification of his certificate and his report. If he had done so, he could not have been compelled to explain himself. However, since he did so, and thereby made clear the basis on which he had proceeded, it seems to me that the Court must look at his explanations when considering what was the reasoning which led him to issue his certificate, and whether it was prepared on the correct basis.

46 In that case, the correspondence with the expert had occurred before any court challenge was instituted.

47 The landlord here contends it should not matter whether the clarification was sought before proceedings were commenced or afterwards. If it was a matter of seeking clarification, then the valuer's response was properly a matter for the Tribunal to consider if the task of the Tribunal was to see if the expert had complied with statutory obligations in performing the valuation. Mr Hopper for the landlord submitted there was no discretion on the matter; the Tribunal was bound to treat the supplementary report as part of the whole rental determination. At least for leave to appeal purposes, it was submitted there was a prima facie basis to argue the point.

48 Mr Best submitted the Tribunal accepted in the landlord's favour that the valuer was

not limited to providing one document on one occasion, but decided that it would be prejudicial to the tenant to pay any regard to it. Thus, he said, it was purely a matter of evidence. The Tribunal was not bound by the rules of evidence and was free to admit or reject evidence as it saw fit subject to affording natural justice, and therefore the refusal to admit the supplementary report raised no question of law. It was open, he submitted, for the Tribunal to decide that the use of the supplementary report was prejudicial, as the valuer could not be subject to cross-examination on his supplementary report. The submission seemed to categorise the decision as a matter of practice or procedure made in the running of a case which appeal courts will rarely revisit on appeal.

49 As I remarked earlier on in this judgment, the Tribunal's reasons are dominated by the principal question concerning the tenant's fixtures and fittings. It is right to say if the appeal fails on that point, then there is no utility in the appeal court considering the question of the supplementary report. But, if the appeal on that point is upheld, then the issue of the supplementary report is real, as that was an ancillary basis for the Tribunal to also set aside the determination.

50 Thus, the question is whether there is a principle of law or a discretionary imperative which required the Tribunal to receive the supplementary report.

51 My own view is that there is an argument to be had whether this was truly an evidentiary point or discretionary point. If the question is whether the determination is vitiated by error on its face then it is of primary significance to know what the determination was. If it be accepted, as the Tribunal was willing to do, that a rental determination can be supplemented, then to my mind a *Homepace* type point does arise whether the Tribunal was bound to receive the supplementary report. For my part, I doubt whether the prejudice to the tenant was self-evident. An examination of the way the case was conducted leading up to the hearing seems to me to show that the tenant's point about rent concessions was belatedly raised.

52 The Tribunal's description of the landlord's means of procuring the supplementary

report as being a "blatant prompt" ascribes to what occurred an element of nakedness in motivation. I am not so sure that is so. What occurred was transparent and in response to the way the tenant had altered its case. I will accept that there would be a natural disquiet or recoil in the mind of any decision-maker when one of the disputants takes that sort of step to agitate something which is perceived as being in that person's interests. But on close analysis, what did the landlord's solicitors do here? The tenant's written submission to the Tribunal, which seemed to prompt the enquiry to the valuer was that it may be "surmised" that the valuer did not take into account rent concessions. "Surmise" is the right word. But surmise is all it was. As I see it, the landlord's solicitors were looking to establish, beyond surmise, whether rent concessions were considered. The tone and content of the valuer's response show there was an element of the obvious here; that is, he had avowedly referred to the matters that s 37(2) required him to consider, had the rent concessions been of any significance they would have been referred to. He then went on to say no such concessions existed.

53 There is a material difference between an exercise of discretion on a point of practice and procedure and an exercise of discretion which determines substantive rights: see *Adam P. Male Fashions v Brown*.[14] If it was an evidentiary question it seems to me to fall into the category of one of those discretionary questions which on the well-known principles in *House v R*[15] can be revisited on appeal where it affects substantive rights and could lead to a substantial injustice. Not only must there be an error of principle but the decision appealed from must work a substantial injustice to other parties. There is no suggestion of anything to interfere or pervert the impartial conduct of the determination. There is nothing to suggest the report was illegally or improperly obtained so as to make it something not "properly before the Court". At least that is the argument.

54 I think there is a question of law on this second point, a point of principle for which it is just to grant leave to appeal.

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14 (1981) 148 CLR 170 at 177.
15 (1936) 55 CLR 499 at 505.

55 Finally, in the way this case was argued and in accordance with these reasons, I think the plaintiff may wish to consider now amending the notice of appeal to more precisely state the questions of law and the grounds of appeal. It is not uncommonly the case that the Court has to require applicants to improve the appeal papers. Presently, I would order that the plaintiff has leave to appeal and direct that it file and serve within 14 days an amended notice of appeal and grounds of appeal.

56 I would ask that the plaintiff in cooperation with the defendant prepare a set of procedural orders in accordance with the Judicial Review and Appeals Practice Note.