SUPREME COURT OF QUEENSLAND

CITATION:	*HSH Hotels (Australia) Ltd v State of Queensland* [2011] QSC 29
PARTIES:	**HSH HOTELS (AUSTRALIA) LTD** (applicant) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO/S:	SC No 10919 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2011
JUDGE:	Peter Lyons J
ORDER:	**The application be dismissed** **The applicant pay the respondent's costs, to be assessed on the standard basis**
CATCHWORDS:	LANDLORD AND TENANT - LEASES AND TENANCY AGREEMENTS - CONSTRUCTION AND INTERPRETATION - OTHER MATTERS – where lease and sublease of land - where clause determining current rental makes reference to a statutory valuation – whether rent should be determined by reference to the statutory provisions in force at the commencement of the lease and sublease, or by reference to provisions currently in force LANDLORD AND TENANT - RENT - PROVISIONS AS TO RENT IN AGREEMENT FOR LEASE OR LEASE - DETERMINATION OF RENTAL - where lease and sublease of land - where clause determining current rental makes reference to a statutory valuation – whether rent should be determined by reference to the statutory provisions in force at the commencement of the lease and sublease, or by reference to provisions currently in force *Land Valuation Act* 2010 (Qld), s 297

Valuation of Land Act 1944 (Qld), s 3, s 6, s 12

Bank of Credit and Commerce International SA v Ali & Ors [2002] 1 AC 251, applied

Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269; [2003] HCA 33, cited

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, cited

Newcastle City Council v GIO General Ltd (1997) 195 CLR 85; [1997] HCA 53, cited

COUNSEL: B Walker SC with K Barlow SC for the applicant

M Hinson SC for the respondent

SOLICITORS: Clayton Utz for the applicant

Crown Law for the respondent

[1] The applicant is the current lessee from the respondent under a lease and sublease over parcels of land, on which the Stamford Plaza Brisbane Hotel is constructed and operated. In each case, the clause determining the current rental does so by reference to what might be referred to as a statutory valuation. The applicant seeks a declaration to the effect that rent is to be determined by reference to the statutory provisions in force at the commencement of the lease and sublease, rather than the provisions currently in force.

Background

[2] There is no material difference between the provisions of the lease and the provisions of the sublease. Consistent with the manner in which the application was conducted by the parties, I propose generally to discuss the lease, without separate reference to the sublease.

[3] The lease was registered on 21 May 1991. It is for a term of 75 years, commencing on 1 August 1990.

[4] The rental clause of the lease made provision for the rent in the first two years of the term to be 4 per cent of the sum of $8 million, adjusted in each case for movements in the Consumer Price Index (Brisbane All Groups) 1996. For the next 13 years, the rent was a percentage (different percentages were identified) of "the Valuer-General's unimproved capital value of the land …". The rent thereafter was fixed by the following clause, critical to the application:-

> "2.01.6 Thereafter the rental for each year of the balance of the term shall be a sum equal to 7.5% of the Valuer General's unimproved capital value of the said land at the respective dates that the annual rental becomes due and payable."

[5] Section 1 of the lease, headed "DEFINITIONS AND INTERPRETATIONS" included the following:-

> "1.09 'Statutes and Regulations' – reference to statutes, regulations, ordinances or by-laws shall be deemed to extend to all statutes, regulations, ordinances or by-laws amending, consolidating or replacing the same."

[6] Section 1 was introduced by the following:-

> "1.01 This document shall be construed as provided in this section and the words and phrases set out below shall unless the context otherwise requires have the meanings respectively set opposite."

[7] Clause 2.01 provides that the rent (elsewhere said to be an annual rent) is to be paid monthly in advance. There was no suggestion that this affected the construction of clause 2.01.6.

[8] For completeness, I should mention that clause 13.01 is a broadly drawn clause, making provision for arbitration, including arbitration in respect of any question which should arise concerning anything in the lease.

[9] When the lease first came into existence, the *Valuation of Land Act* 1944 (Qld) (*the 1944 Act*) made provision for the making of valuations by the Valuer-General. These valuations were used for a number of purposes, including the levying of rates, and the imposition of land tax. I shall refer to valuations of this kind as "statutory valuations". Amendments were made subsequently to the relevant provisions of the 1944 Act, and in 2010 it was replaced by the *Land Valuation Act* 2010 (Qld) (*the 2010 Act*). It is convenient to trace a little more carefully some of the history of the Queensland legislation dealing with statutory valuations.

Legislation relating to statutory valuations

[10] When the lease came into existence, the 1944 Act made no provision for the determination of the "unimproved capital value" of land. However, s 11 required the Valuer-General to make a "valuation of the unimproved value" of land. The section included some provisions qualifying the determination of unimproved value, though these generally are of no present interest.

[11] The term "Unimproved value" was defined in s 12 of the 1944 Act, as follows:-

> "(1) For the purposes of this Act, 'Unimproved value' of land means –
>
> (a) In relation to unimproved land, the capital sum which the fee-simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona fide seller would require; and
>
> (b) In relation to improved land, the capital sum which the fee-simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona fide seller would require, assuming that, at the time as at which the value is required to be ascertained for the purposes of this Act, the improvements did not exist:

Provided that the unimproved value shall in no case be less than the sum that would be obtained by deducting the value of improvements from the improved value at the time as at which the value is required to be ascertained for the purposes of this Act:

Provided further that the restrictions and limitations in any deed of grant or certificate of title in respect of any racecourse shall be disregarded in ascertaining the unimproved value of the land of the racecourse concerned.

(1A) Notwithstanding anything contained in this section, in determining the unimproved value of any land it shall be assumed that –

(a) the land may be used, or may continue to be used, for any purpose for which it was being used, or for which it could be used, at the date to which the valuation relates; and

(b) such improvements may be continued or made on the land as may be required in order to enable the land to continue to be so used,

but nothing in this subsection prevents regard being had, in determining that value, to any other purpose for which the land may be used on the assumption that any improvements referred to in subsection (1) of this section had not been made."

[12] Subsection (2) then defined the expressions "Improved value", "The value of improvements" and "Improvements".

[13] These provisions changed prior to the commencement of the 2010 Act. By that time, the definition of "Unimproved value" was found in s 3 of the 1944 Act, as follows:-

"**3 Meaning of *unimproved value***

(1) For the purposes of this Act –

Unimproved value of land means-

(a) in relation to unimproved land – the capital sum which the fee simple of the land might be expected to realise if negotiated as a bona fide sale; and

(b) in relation to improved land – the capital sum that the fee simple of the land might be expected to realise if negotiated as a bona fide sale, assuming the improvements did not exist.

(2) However, the unimproved value of improved land can not be less than the sum that would be obtained by deducting the value of improvements from the improved value on the date of valuation.

(2A) The assumption mentioned in subsection (1)(b) is limited to the instant in time when the valuation is to be made on the date of valuation.

(2B) For subsections (1) and (2), the unimproved value of land includes any increase in the value of the land that has happened in connection with –

(a) a local planning instrument; or

(b) a development approval or other approval or authority under an Act, other than a hotel licence, relating to the land or an improvement of the land; or

(c) the making or use of an improvement to the land.

(2C) Nothing in subsection (1)(b) requires an assumption, in relation to improved land, that the improvements have never been made."

[14] Moreover, by this time, the 1944 Act had been amended to make provision for the determination of the unimproved value of land by the "chief executive". Prior to 1992, s 6 of the 1944 Act made provision for the appointment of a person as the Valuer-General, but that section was then replaced by a provision that a reference in any Act or document to the Valuer-General is a reference to the chief executive.

[15] The 2010 Act repealed the 1944 Act. Section 205 of the 2010 Act established the Office of Valuer-General and makes provision for the appointment of a person to that office. Section 5 of the 2010 Act requires the Valuer-General to decide the value of land, as provided for under the 2010 Act, and for the purposes mentioned in s 6. Those purposes may be described as revenue related. Section 5(2) provides that a decision about the value of land, as provided for under the Act, is a valuation of land. Section 7(a) then provides that the value of land, for non-rural land, is its "site value".

[16] The term "site value" is defined in the 2010 Act by reference to the provisions of Chapter 2, Part 2, Division 3. In particular, s 19 (found within Division 3) provides (subject to qualifications which it is not necessary to mention) that the site value of land is its expected realisation under a bona fide sale, assuming all "non-site improvements" for the land had not been made. Non-site improvements are those other than improvements which are site improvements; and those, in turn, are identified by reference to a number of improvements, which do not generally extend to buildings and other structures on land.[1] The 2010 Act also makes provision for the unimproved value of land, which, in the case of improved land, is its expected realisation under a bona fide sale, assuming that all site improvements and non-site improvements had not been made.[2] The significance of the reference in this Act to unimproved value was not the subject of submissions.

Construction of clause 2.01.6

[17] As has been mentioned, the applicant contends that clause 2.01.6 is to be construed as a reference to the determination of unimproved value under the 1944 Act, as that Act stood when the lease came into existence. For the respondent, it is submitted that the effect of the clause is that rent is to be determined by reference to the relevant statutory provisions relating to the determination of the unimproved value

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1 See ss 23 and 24 of the 2010 Act.

2 See s 26 of the 2010 Act.

of land, as those provisions are in force at the time at which the rent is to be determined.

[18] For the applicant, reference was made to the fact that the parties knew what those provisions were as they were in force when the lease came into existence; the parties' apparent desire for certainty; the fact that the respondent's construction would place it in the power of one party to take steps which would vary the rent; the fact that the lessee was a commercial entity and would accordingly be reluctant to accept a situation where the rent might vary enormously, particularly at the choice of the other party to the lease; and the fact that the clause, interpreted in this fashion, could apply notwithstanding the repeal of the 1944 Act, and the abandonment of a statutory concept of unimproved value (the determination being made by an arbitrator, if necessary). Reference was also made to the length of the term of the lease.

[19] For the respondent, it was said that clause 1.09 of the lease demonstrated that the parties intended that the law be applied as in force from time to time, and negated the imputation to the parties of an intention that the law to be applied was simply the law as it stood at the date of the lease.

[20] It was common ground that clause 2.01.6 was to be construed against the background of the *Valuation of Land Act*, and that the expression "unimproved capital value" in the clause had, at least when the lease came into existence, to be understood by reference to the methodology for determining the unimproved value of land under the 1944 Act.

[21] It seems to me that the starting point for determining the intention of the parties is the language of clause 2.01.6.[3] That language reflects an assumption that on each date when rent becomes payable (annually) there will exist something which answers the description "Valuer General's unimproved … value of the said land".

[22] One purpose of clause 2.01.6 is to provide a mechanism for fixing rent under the lease for each year in which the clause is to operate. Another is to ensure that the rent varies, in a way that bears some relationship to the value of the land itself (as distinct from the improvements on it). Except, perhaps, to the extent that the applicant relied upon an apparent desire on the part of the parties for certainty, the submissions of the parties did not refer to these purposes as an aid to the construction of clause 2.01.6. The identification of these purposes does not appear to assist in answering the question raised by the application.

[23] The language of clause 2.01.6 makes it a little difficult to adopt the construction for which the applicant contends. That language, in my view, referred to the outcome of a process for which provision was made in the 1944 Act, carried out by a person appointed under a statute (or other persons appointed under the Act[4]); the valuation to be carried out at times identified in the 1944 Act; with provision made for the formal recording of that valuation; and for objections and appeals. It is by no means immediately obvious that the language which the parties used was intended to encompass, in the event of some change to the legislative provisions as they were when the lease came into existence, some other exercise.

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3 *Bank of Credit and Commerce International SA v Ali & Ors* [2002] 1 AC 251, 269 per Lord Hoffman.

4 See ss 7 and 7A of the 1944 Act, as it stood in 1980.

[24] The point may be illustrated by reference to the omission of the provisions relating to the office of Valuer-General from the 1944 Act. There remained a statutory process, with rights of objection and appeal, for the determination of the unimproved value of the land, in accordance with the statutory definition as it then stood. If the only change which had been made to the provisions relating to the determination of unimproved value was a formal change in the identity of the person entrusted by statute with this task, it is difficult to think that the parties did not intend that the relevant value would be the value determined by this person.

[25] No doubt the language of the contract is to be construed as it would be understood by "a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".[5] Background knowledge reasonably available to the parties would include the fact that a legislative regime for the determination of the unimproved value of land under the *Valuation of Land Act* might change over time. However, it seems to me that this consideration does not directly affect the interpretation of the rental clause. It simply means that, when the lease was drafted, the parties faced a choice, either to fix rent by reference to the legislation as it then stood; or to rely on a procedure for the determination of a specified value, which, with amendments to the legislation, might vary over time. The language chosen by the parties indicates the latter.

[26] The submissions made on behalf of the applicant identify a number of reasons why the parties, and particularly the lessee, may have been reluctant to accept a method for the determination of rent which might change over time. In my view, they are not sufficient to warrant the construction of clause 2.01.6 for which the applicant contends.

[27] I am therefore not prepared to construe clause 2.01.6 as if the reference to the "unimproved capital value" of the land is a reference to the value of the land determined by reference to the definition of "unimproved value" in s 12 of the 1944 Act, as it was when the lease (and sublease) came into existence. While that is sufficient to deal with the relief claimed in the application, in view of the submissions made by the parties, it seems appropriate to consider some other matters.

Changes to the 1944 Act prior to enactment of the 2010 Act

[28] On behalf of the applicant, it was submitted that by the time it was repealed, there had been significant changes to that part of the 1944 Act dealing with unimproved value. Principally, they are to be identified in what had become s 3(2A)-(2C). It will be apparent that at least s 3(2B) and (2C) have the potential to have a significant effect on the determination of the unimproved value of land. For the respondent, it was accepted that there might be such changes to the legislative regime for determining statutory valuations that the latter could then fall outside the scope of clause 2.01.6. It will be apparent that these amendments may have a significant effect on the determination of unimproved value, if such a determination were to be done in accordance with the statutory provision requiring an assumption that improvements on the land did not exist (i.e., in accordance with s 12(1)(b), and

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5 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912 per Lord Hoffman; *Maggbury Pty Ltd v Hafele Aust Pty Ltd* (2001) 210 CLR 181, [11].

later s 3(1)(b)). However, when the lease came into existence, the 1944 Act included (as a proviso to s 12(1)), a provision which required that the unimproved value was not to be less than a sum obtained by deducting the value of improvements from the improved value of the land at the relevant date; and a further provision (s 12(2)(b)), the effect of which was that the value of improvements should not exceed their replacement cost at that date. The application of these provisions is likely to have had the consequence that, at least in some cases, the unimproved value of land might reflect matters dealt with specifically by the amendments to the 1944 Act, identified earlier in these reasons. I am therefore of the opinion that those amendments do not take the statutory process outside the scope of clause 2.01.6.

Applicability of determination of value under the 2010 Act

[29] Submissions were made as to whether the determination of value under the 2010 Act would provide the basis for determining rent under the lease. Those submissions, in part, were concerned with the question whether the changes to the statutory regime for the determination of the value of land were such as to fall outside the scope of clause 2.01.6. The respondent also submitted that the matter was regulated by statute, with reference in particular to s 297 of the 2010 Act. It seems appropriate to note something of the provisions of the 2010 Act.

[30] Section 297 of the 2010 Act is as follows:

> "**297 Leases referring to the term *unimproved value***
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> (1) This section applies to a reference in a lease made before the commencement to the term *unimproved value* under the repealed Act.
>
> (2) From the commencement, the reference is taken to be a reference to a valuation under this Act."

[31] There was no suggestion that the instruments relevant to these proceedings are not leases.

[32] For the applicant, it was submitted that the section did not apply in the present case for a number of reasons. One was based upon the expression "the repealed Act" found in s 297(1). That expression is not defined in the 2010 Act, but, it was submitted, was to be identified by reference to s 14J of the *Acts Interpretation Act* 1954 (Qld) (*Interpretation Act*). That section provides that a reference in an Act to another law as repealed is a reference to the other law as in force immediately before it was repealed. The effect of this provision would be that s 297(1) applies by reference in a lease to the term "unimproved value" under the 1944 Act as it stood immediately prior to its repeal.

[33] For the respondent, it was submitted (a little surprisingly) that the expression "repealed Act" in s 297 was a drafting error, and by comparison with s 298 should be understood as "repealed Valuation Act"; defined in the 2010 Act as the 1944 Act repealed under s 267. That section then describes the Act repealed as the 1944 Act, as originally enacted. It was then submitted, by reference to s 14H of the *Interpretation Act*, that the repeal was thereby extended to the 1944 Act, both as originally made, and as amended from time to time. It was said that this led to the

conclusion that s 297 applied to a reference to unimproved value, under any form which the 1944 Act may have taken at any time.

[34] I earlier rejected the view that clause 2.01.6 called for the determination of rent by a reference to the unimproved value under the 1944 Act, as it stood at the time when the parties entered into the lease. I also concluded that the changes made to the 1944 Act up to the time of its repeal were not such that the rental to be paid under clause 2.01.6 would not be determined by reference to a statutory valuation made under the 1944 Act as it then stood. It is therefore unnecessary for me to resolve the debate about the meaning of "repealed Act" in s 297 of the 2010 Act.

[35] However, the applicant also submitted that s 297 of the 2010 Act did not apply, because the lease did not include "a reference … to the term *unimproved value* …" under the 1944 Act. The submission drew attention to the language of clause 2.01.6.

[36] On one view, s 297 might be thought to operate only when a lease includes the expression "unimproved value", and makes express reference to the 1944 Act. On another view, the section might apply where, on its proper construction, it could be determined that a lease makes a reference to the unimproved value of land determined under the 1944 Act, notwithstanding the absence of the expression "unimproved value", or any mention of the 1944 Act. In such a case, s 297 would operate, even if the reference were oblique, or a matter of implication. While the language of s 297 might be thought to be capable of either interpretation, absent other considerations, one might be disposed to adopt the narrower construction of the provision, because s 297 might otherwise interfere with contractual rights negotiated between parties, or with rights embodied in registered instruments, creating estates, which are capable of being transferred to other parties.[6] Moreover, as is the case here, arrangements which might otherwise operate for a long time, might be affected.

[37] The respondent drew attention to the Explanatory Notes for the Land Valuation Bill 2010 (which, in due course, became the 2010 Act). The relevant note (*note*) identified the reason for the insertion of s 297, referring to the change in the statutory regime in New South Wales, where statutory valuations resulted in a "land value", instead of an "unimproved value", being determined under the changed statute. The note identified that several decisions of the New South Wales Supreme Court had concluded that, for the purpose of determining rent under a lease where the rent was fixed by reference to the unimproved value determined under the earlier legislation, there was no longer an unimproved value for land. The note continued:

> "There are a number of leases in Queensland that calculate rent, or other charges, by reference to the unimproved value of the land the subject of the lease. This clause is designed to ensure that valuations under the lease will continue to be made under Queensland valuation legislation."

[38] It seems to me that this note (assisted by a reference to the language of the section itself) identifies the purpose of s 297.

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6 See *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, [36] per McHugh J.

[39] Section 14A of the *Interpretation Act* requires that the interpretation which will best achieve the purpose of the Act is to be preferred to any other interpretation. It is difficult to think that s 14A has application only to what may be identified as an Act's main purpose. An Act may have a number of purposes, one of which may be reflected (at least principally) in a single section of the Act. It seems to me that that purpose is the relevant purpose for interpreting the section. This approach is consistent with the approach the courts have taken to the identification of the mischief which a particular provision of an Act addresses.[7]

[40] It seems to me that the note provides strong support for taking a broad view of the intended effect of s 297. In the present case, it is clear that some interference with contractual arrangements is intended by the section; so that any presumption against such interference is of less assistance than it might otherwise be. I therefore conclude that s 297 has the effect that a valuation made under the 2010 Act is that by reference to which rent is now to be assessed under clause 2.01.6.

[41] In those circumstances, it is not necessary to attempt further to construe clause 2.01.6.

Conclusion

[42] The application should be dismissed. I shall hear submissions as to the orders to be made, including any order for costs.

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[7] See for example *Newcastle City Council v GIO General Ltd* (1997) 195 CLR 85, 99-101, 114-115; see also D C Pearce & R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, Australia: 6th ed., 2006), 34, 71-72.