SUPREME COURT OF QUEENSLAND

CITATION:	*Century Developments (Qld) Pty Ltd v Ex parte Glenn Donald Ballard* [2011] QSC 117
PARTIES:	**CENTURY DEVELOPMENT (QLD) PTY LTD** (applicant) **v** **EX PARTE GLENN DONALD BALLARD** (respondent)
FILE NO/S:	2626 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED EX TEMPORE ON:	18 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	18 April 2011
JUDGE:	Daubney J
ORDER:	**1. The application is dismissed** **2. The applicant pay the respondent's costs of and incidental to the application on the standard basis.**
CATCHWORDS:	LANDLORD AND TENANT – RETAIL AND COMMERCIAL TENANCIES LEGISLATION – OBLIGATIONS, PROHIBITED TERMS AND PROTECTION FOR LESSEES – RENT AND RENT REVIEW CLAUSE - where a valuer was appointed under s 28 of the *Retail Shop Leases Act* 1994 (Qld) – where the applicant and respondent made submissions to the valuer – where the valuer made a determination of market rental – where the applicant seeks to avoid the valuer's determination of the market rental – whether there was a tripartite agreement between the valuer, applicant and respondent that required the applicant and respondent to provide to one another copies of their submissions. *Retail Shop Leases Act* 1994 (Qld), ss 28, 29
COUNSEL:	N Thompson for the applicant A B Fraser for the respondent

SOLICITORS: Hatzis Lawyers for the applicant
Woods Prince for the respondent

HIS HONOUR: The applicant, Century Development (Qld) Pty Ltd, is the lessor to the respondent, Mr Ballard, under a lease which was originally entered into between the parties in August 2004. The initial term of that lease was 1 July 2004 and expired on 30 June 2009.

The respondent exercised his option to renew under the lease. In about March 2009 a dispute arose between the applicant and the respondent as to the rent to be paid under the renewed lease.

The lease provided that the rent upon renewal would be determined by reference to market and further provided relevantly that determination of current market rent under, and for the purposes of, the lease "shall take place under" the Retail Shop Leases Act 1994 ("RSLA").

Section 28 of the RSLA relevantly provides:

28 Rent review on basis of current market rent

(1) This section applies if—

(a) rent under a retail shop lease is to be reviewed on the basis of the current market rent of the leased shop; and

(b) the lessor and lessee can not agree on the current market rent within 1 month after the review date.

(2) The current market rent is to be determined by a specialist retail valuer agreed by the lessor and lessee, or failing agreement, nominated by the chief executive.

(3) The valuer may carry out the determination only if the valuer is independent of the interests of the lessor and lessee.

The Chief Executive of the Retail Shop Leases Registry nominated Mr Bremner of Chestertons to be the valuer appointed under section 28 to determine current market rent.

On 19 November 2009 Mr Bremner wrote to the applicant by its director, Mr Vann, and the respondent saying:

"I confirm I have been nominated by the Registrar, Retail Shop Leases Registry, to offer my services to you to act as an expert to determine the rental of the above premises in accordance with the lease and the Retail Shop Leases Act ("RSLA")."

Mr Bremner then set out a list of some 12 matters in respect of which he asked the recipients of the letter to "please respond as appropriate". Number 12 in that list of matters on which he asked for a response was as follows:

"11. In accordance with section 29(c)(ii) "RSLA" I will have regard to any submission provided by you. This submission ideally will address the market evidence, from which you have formed your opinion as to the market

rental of the property. It should also address any other matter which you believe to be relevant. Please provide a copy of this submission to the lessor."

Mr Bremner's letter then went on to say that "the terms and conditions of my appointment include" the matters that he then articulated under paragraphs A, B and C. The "terms and conditions of [his] appointment" included in paragraph B acknowledgement by the parties that "[b]y committing to this appointment the parties agree to the following release and indemnity in relation to any claims".

It seems that each of the applicant and the respondent signed off on the appointment of Mr Bremner as the valuer for the purposes of conducting the ascertainment of current market rent. It also appears that each of the applicant and the respondent made submissions to Mr Bremner, but neither provided copies of their submissions to one another.

Mr Bremner then on 13 May 2010 made his determination of market rental. He commenced his determination saying:

"I refer to my nomination by the Registrar, Retail Shop Leases Registry and to my subsequent appointment by the lessor and lessee of the above property to determine the rental as at 1 July 2009 in accordance with Clause A3 of the lease and in accordance with The Retail Shop Leases Act. The determined rental is to apply from the commencement of the option being 1 July 2009.

Both Lessor and Lessee have provided submissions and where necessary I have sought further information and clarification. It is my standard practice, when making a determination to address all submissions made. This approach is intended to satisfy the person making the submission that I have considered all matters of concern irrespective of whether I agree with the submission."

Mr Bremner then set out details of the property and referred to the submissions that had been made to him by each of the applicant and the respondent. From the applicant's point of view the submission contained a tenancy schedule and included some seven points relating to the tenancies within the particular shopping centre. Mr Bremner provided his comments in relation to the points that were raised in that regard.

He then turned to consider the contents of the submission that had been made on behalf of the respondent by a lease and property consultant company. That submission included, amongst other things, benchmarking and other comparative small business statistical data and information and also comparable rental evidence in a number of other properties.

Again, after setting out in summary form the contents of the submission made on behalf of the respondent, Mr Bremner went on to comment briefly on his acceptance or otherwise of the various matters that had been referred to him on behalf of the respondent.

Mr Bremner then went on to conduct a valuation, on a basis often seen in valuations of this nature. He adopted two methodologies. The first methodology was a direct comparison; That is, by comparing the subject property with comparable tenancies of comparable businesses in other properties in the area.

The second, and quite different, methodology adopted by him was the "subject business analysis" methodology, which is to approach the question on the basis of analysing the return and appropriate rent payable, having regard to the particular physical characteristics of the property and the nature of the business conducted by an average competent operator in this particular category of business.

On a direct comparison basis Mr Bremner formed the view that the range for the rent was between $26,800 and $33,072 per annum. On the subject business analysis basis the range was between $28,653 and $31,178 per annum.

Having regard to both of those methodologies, Mr Bremner determined that the market rent for the subject premises to apply from 1 July 2009 should be $30,000 per annum.

By the present application the applicant effectively challenges and seeks to avoid the finding as to market rental made by Mr Bremner on the basis that a tripartite agreement was entered into between Mr Bremner, the applicant and the

respondent in about November 2009 when each of the applicant and the respondent accepted the appointment of Mr Bremner and further that this tripartite agreement contained an express condition which required each of the applicant and the respondent not only to provide Mr Bremner with submissions, but also to provide one another with copies of the submissions that they put on.

The case sought to be advanced on behalf of the applicant is that the submissions made to Mr Bremner on behalf of the respondent contained information concerning comparable rentals in comparative properties. So much seems to be a fair inference from the terms of the summary of the respondent's submissions contained in Mr Bremner's determination.

The applicant says that if it had been aware that the respondent was putting up particular properties for the purposes of Mr Bremner making a comparative analysis then it would have investigated those properties and sought to put further information in front of Mr Bremner. And, I suppose, it's said by necessary inference that the placing of this further information in front of Mr Bremner would have made some difference to his ultimate assessment of the market rent payable.

The starting point on this analysis is whether there was a tripartite agreement entered into to which Mr Bremner, the applicant and the respondent were all parties. It seems to me frankly unlikely that such a tripartite agreement existed.

The relevant agreement between the applicant and the respondent is the lease to which they were indubitably parties and the rental review being undertaken was undertaken pursuant to and in accordance with the terms of that lease.

That lease relevantly incorporated certain of the provisions of the Retail Shop Leases Act 1994 (Qld). One of those provisions, to which I've already made reference, permitted or allowed, in the case of the parties not being able to agree on the identity of the relevant expert valuer, for the Registrar to nominate the valuer who was to undertake the exercise of ascertaining the current market rent.

Mr Thompson of counsel, who appeared for the applicant, urged on me in particular that one should infer the existence of the tripartite agreement by reference to the fact that the valuer's letter to each of the parties of the 19th of November 2009 expressed that it was one of the terms and conditions of his appointment that by committing to his appointment "the parties agree to the following release and indemnity in relation to any claims" and further that the wording of the clauses which were supposed to constitute a release and indemnity on their face encompassed both the applicant and the respondent.

A couple of points need to be made. First, it seems to me that the fact that the valuer was one nominated pursuant to the terms of the Retail Shop Leases Act means that the appointment was made pursuant to the Retail Shop Leases Act

for those purposes. I am not at all sure that it is appropriate for the valuer unilaterally to impose the sorts of extensive warranties and purported conditions that were contained in this letter.

But be all that as it may, it is quite understandable that the valuer would seek to be indemnified in respect of the work undertaken by the valuer and it seems to me that the appropriate way contractually to construe the appointment of the valuer is that the valuer was nominated under the legislation but appointed under the lease between the applicant and the respondent.

So much is clear because the task that he was performing was to engage in and ascertain the current market rental for the purposes of the option to renew under the lease. If the valuer sought the benefit and protection of an indemnity from each of the parties then that was a separate contractual arrangement with each of the parties.

Accordingly, I am disinclined to accept the submission that there was a tripartite agreement such as contended for by the applicant. Even if I am wrong about that, however, and the valuer, the applicant and the respondent did enter into some form of tripartite agreement in about November 2009, I find that it was not a condition of that agreement that each of the parties had to provide a copy of their submissions to the other party.

The letter to which reference was made for the purposes of identifying the terms and conditions of this tripartite agreement specifies quite precisely what the "terms and conditions" of the valuer's appointment were to be. It contrasts those terms and conditions with the matters on which the valuer sought a response.

As I've already noted, one of the matters on which the valuer sought a response was with respect to the provision of submissions and the relevant sentence in the letter of 19 November 2009 on which the applicant pinned its hopes for the current application then simply said "Please provide a copy of this submission to [the other party]".
It seems to me that that sort of language is hardly apt for the imposition of a contractual burden on a party. It also seems that it was a burden that was relatively well hidden and not appreciated by the parties, given that neither the applicant nor the respondent seem to have appreciated that either of them were under the contractual obligation now contended for.

As I have said, even if there was a tripartite agreement I do not think that the letter of the 19th of November 2009, properly construed went so far as to contain a contractual obligation on the parties to provide copies of submissions that they made to the valuer to one another.

Adopting that view of the letter of the 19th of November 2009 the basis for the relief today sought by the applicant therefore falls away and the application will be dismissed.

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HIS HONOUR: There will be an order for costs on a standard basis.

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HIS HONOUR: With that amendment there will be an order in terms of the draft.
