

SUPREME COURT OF QUEENSLAND

CITATION: *DA Staal Property Pty Ltd v Commonwealth of Australia*
[2021] QSC 216

PARTIES: **DA STAAL PROPERTY PTY LTD** as trustee for the **DA STAAL PROPERTY TRUST**
(applicant)
v
COMMONWEALTH OF AUSTRALIA
(respondent)

FILE NO/S: BS 8032 of 2020

DIVISION: Trial

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 26 August 2021

DELIVERED AT: Brisbane

HEARING DATE: 29 July 2021

JUDGE: Boddice J

ORDER: **1. The valuer, in reaching the rent determination, undertook a task different to that contractually agreed between the parties. The rent determination is invalid.**
2. I shall hear from the parties as to the form of orders and costs.

CATCHWORDS: LANDLORD AND TENANT – LEASES AND TENANCY AGREEMENTS – CONSTRUCTION AND INTERPRETATION – OTHER MATTERS – where the applicant sought a declaration that a purported rental determination dated 29 May 2019 is invalid pursuant to the lease entered into between the applicant and the respondent – whether the rent determination was made in accordance with the process prescribed by that lease

Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd
(2015) 90 NSWLR 367

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd
(2015) 256 CLR

Strike Australia Pty Ltd v Database Corporate [2019]

NSWCA 205

COUNSEL: M May for the applicant

B O'Brien for the respondent

SOLICITORS: Cooper Grace Ward Lawyers for the applicant

Minter Ellison Lawyers for the respondent

- [1] By originating application, filed 24 July 2020, the applicant sought a declaration that a purported rental determination dated 29 May 2019 is invalid pursuant to the lease entered into between the applicant and the respondent.
- [2] At issue is whether the rent determination was made in accordance with the process prescribed by that lease.

Background

- [3] The applicant is the owner of real property situated at 194 Musgrave Road, Berserker ("the property"). That land is approximately 4,059 square metres in size. Constructed upon it is a two-storey building, offering commercial tenancy space.
- [4] By lease, executed on 13 November 2013, the respondent leased the property for use by Centrelink. The lease had a commencement date of 29 May 2012, with an expiry date of 28 May 2019.
- [5] By amendment dated 29 May 2018, the term of the lease was amended to 11 years, with the same commencement date. There was to be a market review on 29 May 2019. The amended lease also provided for two further terms of four years each, with specified market review dates for each term.
- [6] On 27 March 2019, the respondent issued a market rent review notice to the applicant. The parties were not able to reach agreement on the rental adjustment and, on 14 June 2019, the parties agreed to proceed by way of rental determination.
- [7] On 25 October 2019, a valuer was nominated by the Australian Property Institute, in accordance with the terms of the lease.
- [8] On 19 December 2019, the valuer issued a rent determination. It concluded that the net rent for the property, from the date of review, was \$565,675 plus GST and outgoings per annum. The rent payable prior to that review was \$806,213 plus GST and outgoings per annum.
- [9] Although the lease provided that the valuer's determination is final and binding, the applicant disputed it, contending it was not undertaken in accordance with the requirements of the lease. The respondent did not accept that contention.

Lease

- [10] Relevantly, the lease provided that the market review method was specified in Schedule 7 of the lease, with the rent to be determined in accordance with the market review method.
- [11] The lease further provided:

"5.1. Role of Valuer

5.1.1. The Valuer must

- a. determine the open market rental value of the Premises at the commencement of the Rent Period (the Effective Date);
- b. act as an expert and not as an arbitrator;
- c. give a written determination with reasons within 28 days after the Valuer's appointment; and
- d. in making its determination must consider the written and oral submissions of a Party received within 30 days after the Valuer's appointment.

5.2 Fees

5.2.1 The fees and expenses of the Valuer must be paid by the Landlord and the Tenant equally.

5.3 Determination final

5.3.1 The Valuer's determination is final and binding.

5.3.2 The Valuer must determine the open market rental value of the Premises at the Effective Date assuming that:

- a. the Landlord is a willing but not anxious landlord and the Tenant is a willing but not anxious tenant;
- b. the Premises are available with vacant possession;

and taking into account:

- c. the open market rental value (other than rental values which have been escalated to a predetermined amount or in accordance with movements in the consumer price index or any other index) at the Effective Date expressed as a rental rate per square meter, of comparable premises in the suburb or town within which the Building is situated (and where there is insufficient evidence of comparable premises in the relevant suburb or town, then of comparable premises within a comparable suburb or town within the immediate vicinity of that in which the Building is situated) whether that value is determined in respect of new lettings with vacant possession or in respect of occupied premises;
- d. the Permitted Use of the Premises;
- e. the period which will elapse between the Effective Date and that Review Date immediately following the Effective Date, or if there is no Review Date, the end of the Term;
- f. the increased value of the Premises occasioned by the Landlord repainting or recarpeting the Premises

pursuant to this Lease (provided that nothing in this clause will require the Tenant to reimburse the Landlord for the cost of that repainting or recarpeting);

- g. the restriction on user, assignment or sub-letting;
- h. the terms and conditions generally of the Lease;
- i. any rent-free period, financial contribution (including any contribution towards the cost of fitout) or other concession customarily or likely to be offered to new tenants of comparable vacant premises.

but not taking into account:

- j. the adverse effect on the condition or rental value of the Premises of any breach of this Lease by the Tenant;
- k. any Fittings and other improvements or alterations installed in or made to the Premises by or for the Tenant, its sub-tenants or their respective predecessors in title during the Term, the Further Term or any period of prior occupation to the intent that the Premises for the purpose of determining the open market rental value will be regarded as cleared space but otherwise serviced and habitable;
- l. any increase in value in the Premises as a result of any structural alterations or other voluntary improvements made to the Premises or the Building (including installation of equipment) by the Landlord at its discretion for any reason at any time (except any carried out at the prior request of the Tenant to which the Tenant has not contributed either by way of service charge or otherwise);
- m. any special interest of the Tenant, its sub-tenants or their respective predecessors in title including the fact that the Tenant is a sitting tenant;
- n. goodwill occasioned by the Tenant, its sub-tenants or their respective predecessors in title;
- o. any right of the Tenant to use any part of the Building or the Land other than the net lettable area of the Premises and the Car Parking Bays;
- p. any naming rights the Tenant may have in respect of the Building;
- q. the rental value at the Effective Date of premises which have been leased on the basis that they have been purpose built or refurbished for the relevant tenant and for which a market review has not occurred under the relevant lease; or

- r. any area within the Building which is excluded from the Net Lettable Area of the Premises.”

Rent determination

- [12] The valuer observed that the property was located approximately two kilometres north of the Rockhampton Central Business District and Berserker was predominantly a suburban locality, with commercial and retail uses mainly located on Musgrave, High, Dean and Berserker Streets. The surrounding developments included single and double level commercial retail uses.
- [13] The property was described as having a two-street frontage, with exposure to large volumes of vehicular traffic. The building on the property comprised two levels of accommodation, with lift access between the ground and the first floor. There was onsite car parking for 52 vehicles, including 10 car parking bays situated within a lock up garage, which formed part of the licensed area of the lease.
- [14] The valuer observed that the applicant relied on a cross section of recent leasing transactions for Centrelink/Medicare tenancies throughout Queensland, in addition to other leasing transactions within Rockhampton and Gladstone. These properties were of varying sizes, locations and lease terms. Some were regional and others were located in Brisbane. The valuer did not consider that a comparison with Brisbane was appropriate as it was not a comparable suburb or town. He further observed that the four properties in Rockhampton and Gladstone demonstrated vastly inferior benchmarks within the market.
- [15] The valuer observed that the respondent relied on premises located in Rockhampton and other regional areas, being Mackay, Townsville and Cairns. Again, those tenancies were for varying sizes, locations and lease terms. The valuer observed that the premises in Mackay may not be the result of a market review and that the lease directed him not to consider such rental values.
- [16] The valuer had regard to premises located at 189 Musgrave Street, Berserker, and 307-311 Ross River Road, Aitkenvale (Townsville). The Berserker property was noted to be a corner site, fronting a major arterial road, providing the property with a good profile and exposure, with a single storey building, currently configured for two tenancies and grade parking for 23 cars. The Aitkenvale property was also a corner property. It contained a commercial building constructed over two levels, with a much larger gross floor area, and a basement car park for approximately 53 vehicles. There were also 19 open parking bays. The whole of that property was occupied by Centrelink as a combined customer service and call centre.
- [17] The valuer noted that both the applicant and the respondent had independently concluded that the gross rent, plus recovered outgoings, for the year ended 28 May 2019 for the property was above market. After noting each party’s submissions as to what ought to be the gross market rent, the valuer observed that as there was no known recent rental evidence of office tenancies of similar size to the property in Rockhampton, the valuer considered the evidence of other Centrelink premises and other regional towns/suburbs to be most helpful.
- [18] The valuer considered the most relevant comparable premises to be the Aitkenvale property (although Aitkenvale was a superior regional suburban location, with a significantly larger scale improvement, superior secure basement car park, but slightly inferior overall parking ratio); a property located in Maryborough (although

this was an inferior location, containing a considerably smaller building, with a comparable parking allocation); and a property at Hervey Bay (although it contained a considerably smaller building, with a comparable parking allocation, the valuer did not accept it was in an inferior location).

- [19] The valuer opined that a similar overall rental rate to Aitkenvale was applicable to the applicant's premises, when offsetting its smaller size against its inferior location, whilst a superior overall rental rate to the Maryborough and Hervey Bay properties was applicable to the applicant's property.
- [20] The valuer determined an open market rental value for lease purposes of \$565,675.

Evidence

- [21] Cliff Allard, a registered valuer in Queensland, opined the valuer did not consider a comparable property in the suburb/town in which the premises was located, namely, the property, and considered premises that were not in a comparable suburb or town within the immediate vicinity, being in Townsville, Hervey Bay and Maryborough. Further, the valuer failed to consider comparable premises in a comparable suburb or town in the immediate vicinity, being Gladstone and/or Yeppoon, and used rental evidence of premises that were not comparable premises.
- [22] Mr Allard opined the valuer should have considered the property as leasing evidence for comparable premises in Rockhampton. Whilst the lease commenced in 2012, and was therefore not timely for comparison of open market rental value, all other aspects were comparable. The valuer should have considered the market rental agreed in 2012, with adjustments for general market rental movements in more typical commercial rentals in Rockhampton and the immediate vicinity and general movement of market rents for other Centrelink premises.
- [23] Mr Allard further opined, whilst Centrelink offices in Townsville, Maryborough and Hervey Bay would typically constitute best evidence for comparison purposes, none of those locations met the comparable premises within a comparable suburb or town in the immediate vicinity requirement under the lease. Further, the Townsville property was not comparable, as it was far larger; Townsville had a far greater supply of alternate larger areas available to lease than compared to Rockhampton and the property was far smaller compared to Townsville Centrelink, was located within a locality where there were no comparable premises and the property suited every requirement of the tenant.
- [24] Mr Allard opined that, if the valuer reasonably concluded there was no comparable evidence in Rockhampton, the valuer ought to have considered leasing evidence in Gladstone and Yeppoon. Had the valuer undertaken this task, he would have identified a Centrelink office potential lease renewal transaction in both Gladstone and Yeppoon, providing more relevant rental evidence in the immediate vicinity.
- [25] Mr Allard further opined the premises located across the road from the property was not comparable, being a building of inferior design with inferior amenities, limited car parking and containing premises that would not meet the specific requirements of the limited use clause. The Centrelink premises at Townsville, Hervey Bay and Maryborough also contained lease terms and conditions which potentially impacted upon their market rent.
- [26] Finally, Mr Allard opined that the valuer may not have had adequate regard to the parties' submissions and the relevant terms of the lease.

- [27] In cross examination, Mr Allard accepted that what are comparable premises in comparable suburbs or towns involves a subjective opinion about which valuers may come to different conclusions. Factors in assessing comparability include size, location, use and the age, condition, amenities and features of buildings located on the land. He also accepted it is preferable to look at leasing transactions at around the same time as the rent review date. There is a necessity to understand what the market is doing and one way to reach that understanding is to see what the market has done. Mr Allard accepted in undertaking that consideration of the marketplace he had referred to the Centrelink premises at Aitkenvale, Hervey Bay and Maryborough, as well as the premises across the road from the property, the same premises which he opined the valuer should not have considered in his determination.
- [28] Dale Doyle, a registered valuer in the State of Queensland, opined that there was a need to practically consider regional Queensland cities, such as Townsville, Mackay, Bundaberg, Maryborough, Hervey Bay and Gympie. Whilst the immediate vicinity component of the lease provisions was a matter that had been overlooked in the submissions of both parties as well as in the determination report, the valuer had considered evidence of premises located opposite the property and had exercised his professional judgment, when seeking evidence in other regional Queensland locations. The Townsville premises, although different, did represent a very good comparison as it was also a two-level tenancy.
- [29] Mr Doyle opined that the applicant's premises were not comparable evidence, as that is a process of comparing the subject premises to itself. Further, whilst the valuer had consideration to premises not in the immediate vicinity, being Townsville, Hervey Bay and Maryborough, a consideration of these locations was fair and reasonable. Whilst there were premises in Gladstone and Yeppoon, the locations of these premises did not fit the definition of immediate vicinity, although they may be considered reasonable as fitting the definition of a nearby town or suburb.
- [30] Mr Doyle opined that a consideration of the property's lease commencement with market adjustments over time was a very unreliable approach in forming a comparison of evidence. Such a process is inconsistent with industry best practice.
- [31] Mr Doyle opined the Townsville premises were comparable. Whilst larger, they were like in nature being two level and in a suburban commercial precinct. Further, Townsville has similar regional locational attributes to Rockhampton, although it is a superior location and commercial market. The Gladstone and Yeppoon premises were not comparable. The premises opposite the property were relevant and comparable.
- [32] Finally, Mr Doyle did not accept that the valuer considered premises that were otherwise not open market rental value or had failed to act as an expert. Whilst the valuer could have better explained his rationale, the valuer genuinely considered comparable premises.
- [33] In cross examination, Mr Doyle accepted in determining whether premises can be considered comparable, the valuer had regard to whether the potential comparable property had similar or near similar uses and whether it had the amenities necessary to accommodate that use, as well as adequate parking and toilet facilities. Mr Doyle accepted that the premises opposite the property comprised a single storey building

divided into two tenancies, with roughly a quarter of the net lettable area of the property. There were no toilet facilities within those premises. Mr Doyle said the balanced judgment for a valuer is to weigh up the attributes and limitations of particular premises, including the quality of build, car parking attributes and access. Smaller and inferior premises will be reflected in the rental level quantum. Such premises can be used to form a pattern or trend. Supply and demand of rental accommodation was also a factor to be taken into consideration indirectly.

- [34] Mr Doyle opined that Aitkenvale was a comparable suburb to Berserker. Aitkenvale was well removed from the Townsville CBD. Further, whilst the Aitkenvale premises were larger, its attributes in terms of tenant requirements were like for like. The differences between the premises opposite the property and the property itself constituted shortcomings in amenities, but the tenancy itself provided a very good piece of evidence from which to draw some analogy.
- [35] Mr Doyle accepted that, when considering comparable rental transactions, transactions close to the valuation date are preferable. The further away the date of the comparison transaction, the greater the chance it no longer reflects the market in metropolitan areas, although in regional markets when there was a lack of transactional activity, a more consistent trend can be established even if you go further back in time. Mr Doyle would dismiss a transaction older than three years, even in the poorest of trading markets, as you lose contact with relativity to the market at the relevant date. The adjustments the professional valuer would have to make for that older piece of evidence would be flawed with error.
- [36] Mr Doyle opined Gladstone and Yeppoon were entirely different towns although not geographically far in distance. Whilst Townsville was further removed geographically from Rockhampton, the Aitkenvale premises had similar aspects and characteristics and, therefore, was to be given more weight over smaller Centrelink tenancies in Yeppoon or Gladstone.
- [37] Mr Doyle did not accept that a valuer could consider the return on equity that a landlord would wish to receive, and a tenant would agree to pay to determine a market value. A reasonably competent valuer will go to the market and understand supply and demand.

Applicant's submissions

- [38] The applicant submits the valuer was required to take into account the open market rental value of "comparable premises in the suburb or town within which the Building is situated" and "where there is insufficient evidence of comparable premises in the relevant suburb or town, then of comparable premises within a comparable suburb or town within the immediate vicinity of that in which the Building is situated", as well as the permitted use and the terms and conditions of the lease.
- [39] The applicant submits the rent determination undertaken was in non-compliance with those requirements. The valuer took into account properties that no reasonable valuer could conclude were in the immediate vicinity of Rockhampton, namely, properties in Townsville, Hervey Bay and Maryborough; took into account the Hervey Bay and Maryborough properties when the kinds of rents for those properties were not permitted to be taken into account; took into account premises adjacent to the property when no valuer acting reasonably could conclude it was comparable; failed to take into account the market rent for the property itself, which

was a comparable property; failed to consider comparable properties in comparable suburbs and towns in the immediate vicinity of Rockhampton, namely Centrelink offices in Gladstone and Yeppoon, and failed to act as an expert contrary to the terms of the lease.

- [40] The applicant submits that these errors support a conclusion that the valuer did not perform the task he was contractually required to undertake, such that the rent determination is liable to be set aside.

Respondent's submissions

- [41] The respondent submits the rental determination was made in accordance with that lease. Clause 5.3.2(c) to (i) contain a non-exhaustive list of matters the valuer could consider. The valuer considered comparable premises within the suburb of the property; within the town of the property; and in the immediate vicinity. Having taken those matters into account, the valuer was permitted to consider other leasing evidence considered relevant and appropriate. The words "immediate vicinity" are matters within the discretionary judgment of the valuer.
- [42] The respondent submits Aitkenvale was a comparable suburb, being a regional suburban location in Queensland. Further, the Aitkenvale premises were comparable as they contained a two-storey office accommodation with customer service which was being used by Centrelink. Further, the valuer did consider premises in Gladstone and the Gladstone premises said to be comparable were the subject of an agreed market rent.
- [43] Finally, the valuer did not fail to act as an expert. The valuer undertook the task required of him, giving reasons for his rent determination. There was no requirement to detail an exact exposition of reasons for his conclusions.

Consideration

- [44] The parties, by clause 5.3.1 of the lease, contractually agreed that the valuer's rent determination would be final and binding. They are contractually bound by that agreement if the rent determination is valid.
- [45] The lease provides the contractual framework for deciding whether the rent determination was valid. Its validity depends upon whether the determination was made in accordance with the contract.¹ The rental determination is only open to review if the valuer has not carried out the task which he was contractually required to undertake.² If the valuer has undertaken that task, the rent determination is not challengeable even if the valuer made errors or took into account irrelevant matters.
- [46] A consideration of the terms of the lease supports a conclusion that the task the valuer was contractually required to undertake was to determine the open market rental value of the premises at the commencement of the rent period, taking into account a variety of factors.
- [47] Those factors included the open market rental value "of comparable premises in the suburb or town within which the building is situated (and where there is insufficient evidence of comparable premises in the relevant suburb or town, then of

¹ *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd* (2015) 90 NSWLR 367 at [74].

² *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] HCA 38; 244 CLR 305 at [26]-[27].

comparable premises within a comparable suburb or town within the immediate vicinity of that in which the building is situated”).

- [48] By its very terms, the parties contractually accepted that the task undertaken by the valuer required discretionary judgments, including what were comparable premises and what was “a comparable suburb and town”.
- [49] However, whilst the parties contemplated and accepted a rental determination which involved discretionary decisions about comparable premises and a comparable suburb or town, the parties expressly agreed a limitation on a comparable suburb or town. That limitation was that it be a comparable suburb or town “within the immediate vicinity of that in which the building is situated”.
- [50] A determination of what is the effect of that limitation requires a consideration of the proper construction of the lease. Such a construction requires this Court to objectively determine the rights and liabilities of the parties under the contract by reference to its context and purpose and asking what a reasonable businessperson would have understood those terms to mean.³
- [51] A consideration of the terms of clause 5.3.2, by reference to the contract as a whole and the purpose of the contract, supports a conclusion that clause 5.3.2(c), properly construed, required that the valuer, when considering comparable premises within a comparable suburb or town, only to take into account a comparable suburb or town within the immediate vicinity of that in which the building is situated. The valuer was not to consider comparable premises in a comparable suburb or town outside that immediate vicinity.
- [52] Whilst the inclusion of “town”, in addition to suburb, is consistent with the parties having recognised that the valuer, in undertaking the task may, where there is insufficient evidence of comparable premises in the relevant town or suburb, have regard to comparable premises within a comparable suburb or town, the parties expressly agreed to words which identified “the permissible boundaries of the types of rent to which the valuer was to have regard”.⁴ Contrary to the respondent’s submissions, those words have a greater significance than being a discretionary judgment of the valuer. They are words of limitation on the exercise of that discretionary judgment.
- [53] The word “immediate” qualifies vicinity and is consistent with the parties agreeing to a geographical limitation on the discretionary judgment of the valuer as to what is a comparable suburb or town. Immediate, in the context of the word vicinity, connotes next or nearest to the suburb or town in which the property is situated. It provides a limitation on the market of rents; that market being central Queensland, not northern Queensland or southern Queensland.
- [54] The permissible boundaries agreed to by the parties was that the suburb or town be within the immediate vicinity of Berserker or Rockhampton. Aitkenvale and Townsville do not satisfy that limitation. Neither could reasonably be considered next or nearest to Berserker or Rockhampton. The valuer, in undertaking the rent determination, had regard to a wider class of rents, namely, comparable premises in Aitkenvale or Townsville. Such premises were not in a comparable suburb or town

³ *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 46-51.

⁴ *Strike Australia Pty Ltd v Database Corporate* [2019] NSWCA 205 at [55] per Baston JA; see also Ward JA at [140]-[145].

“within the immediate vicinity” of the suburb or town in which the property was situated, namely, Rockhampton.

- [55] By having regard to premises in Aitkenvale, the valuer had regard to rents of a different nature to those agreed to by the parties. Consequently, the rent determination contains an error of the kind which satisfies the description that the valuer has not carried out the task he was contractually required to undertake.
- [56] That conclusion is not altered by reason of the fact that the valuer also took into account rents of comparable premises within a comparable suburb or town within the immediate vicinity, and the rents of comparable premises in the suburb or town within which the property is situated.
- [57] These conclusions render it unnecessary to consider the applicant’s remaining contentions. Had it been necessary to do so, I would not have been satisfied that those considerations led to error on the part of the valuer that went to whether the valuer had undertaken the task required of him under the lease. Those considerations were errors falling within the exercise of discretionary judgments, which the parties contemplated and agreed to being undertaken by the valuer in reaching a final and binding rent determination.

Conclusions

- [58] The valuer, in reaching the rent determination, undertook a task different to that contractually agreed between the parties. The rent determination is invalid.
- [59] I shall hear from the parties as to the form of orders and costs.