CITATION:	*Majestic Logistics Pty Ltd v Dowling Holdings Pty Ltd* [2019] NTSC 50
PARTIES:	MAJESTIC LOGISTICS PTY LTD (ACN 084 089 038) v DOWLING HOLDINGS PTY LTD (ACN 009 603 721)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	SCC 100 of 2018 (21840851)
DELIVERED ON:	21 June 2019
HEARING DATE:	28 February 2019
JUDGMENT OF:	Grant CJ

CATCHWORDS:

LANDLORD AND TENANT – FORM AND CONTENTS OF LEASE – RENT REVIEW CLAUSE

Whether lessor and lessee required to attempt to agree rental variation prior to appointment of valuer under rent review clause – whether reasonable time must elapse after the provision of information by lessee before appointment of valuer – categories of information reasonably required to be provided by lessee – whether Court should make declarations concerning valuation exercise – whether proper construction of lease or matter of professional valuation process – whether fixing "fair market rent" requires objective or subjective assessment – whether income generated from installation of additional gaming machines excluded from or included in determination of fair market rent – whether valuer permitted to have regard to associated economic conditions beyond 12 months from the review date.

Alcatel Australia Ltd v Scarcella [2001] NSWCA 401, *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, *ARC Ltd v Schofield* [1990] 2 EGLR 52, *Atkinson v Ebonstone Pty Ltd* (unreported, QCA, 3 March 1992), *Bank of South Australia v SA Health Commission* (1996) 65 SASR 409, *Botany Fork & Crane Pty Ltd v New Zealand Insurance Co Ltd* (1993) 44 FCR 27, *Burns Philp Hardware v Howard Chia Pty Ltd* (1987) 8 NSWLR 642, *Butt v Long* (1953) 88 CLR 476, *Capel Services Ltd v Legal and General Assurance Society Ltd* (1985) ANZ Conv R 37, *Capricorn Inks Pty Ltd v Lawte International (A'asia) Pty Ltd* [1989] 1 Qd R 8, *Carrathool Hotel Pty Ltd v Scutti* [2005] NSWSC 401, *Codelfa Construction Pty Ltd v State Rail Authority* (NSW) (1982) 149 CLR 337, *Cohen & Co v Ockerby & Co Ltd* (1917) 24 CLR 288, *Colin Marg Pty Ltd v Mackay Medical Investment Ltd* [2007] 1 Qd R 303, *Commonwealth of Australia v Wawbe Pty Ltd* [1998] VSC 82, *Edmund Barton Chambers (Level 44) Co-op Ltd v The Mutual Life and Citizens' Assurance Co Ltd* [1984] NSW ConvR 55-177, *Email Ltd v Robert Bray (Langwarrin) Pty Ltd* [1984] VR 16, *EMS Holdings Pty Ltd v The Industrial Lands Development Authority* [1994] ANZ Conv R 479, *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605, *Federal Commissioner of Taxation v Williamson* (1943) 67 CLR 561, *Frank H Wright (Constructions) Ltd v Frodoor Ltd* [1967] 1 WLR 506, *Gold Coast Waterways Authority v Salmead Pty Ltd* [1997] 1 Qd R 346, *Gollin & Company Ltd v Karenlee Nominees Pty Ltd* (1983) 153 CLR 455, *Howie v Crawford* [1990] BCC 330, *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217, *Jefferies v RC Dimock Ltd* [1987] 1 NZLR 419, *Jones v Sherwood Computer Services plc* [1992] 1 WLR 277, *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* (2002) 11 BPR 20,201, *Karenlee Nominees Pty Ltd v Gollin & Co Ltd* [1983] 1 VR 657, *Lambourn v McClellan* [1903] 2 Ch 276, *Lear v Blizzard* [1983] 3 All ER 662, *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314, *Lend Lease (Millers Point) Pty Ltd v Barangaroo Delivery Authority* [2013] NSWSC 848, *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2008] QCA 160, *Parsons v CB Richard Ellis (V) Pty Ltd* [2007] ACTSC 37, *Ponsford v HMS Aerosols Ltd* [1979] AC 63, *R & A Dalley & Co Pty Ltd v Giex Pty Ltd* (1991) 5 BPR 11,554, *Re Jacobson* [1970] VR 180, *Ricciardello v Caltex Oil* (Australia) Ltd (1991) ANZ Conv R 445, *Robinson v Day* (1992) 106 FLR 423, *Santos Pty Ltd v Pipelines Authority (SA)* (1996) 66 SASR 38, *Schenker & Co (Aust) Pty Ltd v Maplas Equipment & Services Pty Ltd* [1990] VR 834, *Shalson v Keepers and Governors of the Free Grammar School of John Lyon* [2003] 3 All ER 975, *Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd* (1993) 32 NSWLR 583, *Wickham Properties Pty Ltd v Astor Motel Pty Ltd* [1994] 1 Qd R 211, *Woolworths Ltd v Merost Pty Ltd* (1988) 14 NSWLR 300, referred to.

WD Duncan and S Christensen, *Commercial Leases in Australia*, (7th edition) Lawbook Co 2014.

REPRESENTATION:

Counsel:

Plaintiff:	M Crawley SC
Defendant:	N Christrup SC with H Baddeley

Solicitors:

Plaintiff:	Piper Ellis Lawyers as town agent for Piper Alderman
Defendant:	Paul Maher Solicitors as town agent for McMahon Clarke

Judgment category classification:	B
Judgment ID Number:	GRA1915
Number of pages:	42

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Majestic Logistics Pty Ltd v Dowling Holdings Pty Ltd [2019] NTSC 50
No 100 of 2018 (21840851)

BETWEEN:

MAJESTIC LOGISTICS PTY LTD (ACN 084 089 038)
Plaintiff

AND:

DOWLING HOLDINGS PTY LTD (ACN 009 603 721)
Defendant

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 21 June 2019)

[1] This application concerns the proper construction of a rent review mechanism in a lease providing for the rent to be adjusted at the end of each ten year term by an amount agreed between the plaintiff (as lessor) and the defendant (as lessee) as a fair variation in the annual rent; or in default of such agreement, for the fixing of the new rent by an independent licensed valuer to be appointed by the President of The Australian Property Institute (Northern Territory Division). The premises are those of the business operating under the name of the Howard Springs Tavern.

Background

[2] In September 2007 the defendant purchased the Howard Springs Tavern business from the plaintiff (**the business**). The plaintiff retained the freehold interest in the land and building from which the business was operated. The plaintiff leased the land and building to the defendant for a term of 10 years commencing on 27 November 2007 with an option for renewal (**the lease**). The defendant then subleased the land and building to NT Pubco Pty Ltd, which is a related entity with the same directors.

[3] NT Pubco has held the liquor licence and gaming machine licence used in the conduct of the business since the commencement of the lease. In 2011, the defendant and NT Pubco carried out authorised works for the improvement of the land and building. In January 2016, NT Pubco applied to the Director-General of Licensing for an additional 10 gaming machines. In June 2016, the Director-General of Licensing approved the application for the additional 10 gaming machines. Between August and September 2016, the defendant and NT Pubco expanded and renovated the gaming room, and purchased and installed the 10 additional gaming machines and furniture for use in the new gaming room. The defendant paid for the works to the building and NT Pubco paid for the plant and equipment.

[4] The defendant says that the expansion and renovation of the gaming facilities attracted more customers to the business and increased its

turnover considerably. The defendant also says that up until June 2018 much of that business came from an accommodation village operated by the Inpex corporation located approximately 3.5 km from the Howard Springs Tavern. The village housed fly-in fly-out workers engaged on the Icthys LNG project, and the number of workers patronising the Howard Springs Tavern dwindled as the project wound down. The defendant says in addition that since July 2017 a number of other hotels with gaming facilities have opened in the vicinity of the business.

[5] In March 2017, an amendment to the lease was registered which inserted further provisions in relation to the gaming machine licence. That amendment provided the defendant with a right to decrease the number of gaming machines during the term of the lease to not less than 10. The defendant says that if, prior to the end of the lease term, it is unable to reach agreement with the plaintiff or an incoming lessee to acquire the entitlement to the additional 10 gaming machines for an acceptable price, it intends to surrender the additional entitlement to the Northern Territory Government.

[6] The initial term of the lease was fixed to expire on 26 November 2017. By notice from its solicitor dated 27 July 2017, the defendant exercised its option under cl 3.7 to renew the lease for a further term of 10

years.[1] From May 2017, the plaintiff and defendant have engaged in communications, largely through their solicitors, in relation to the rent to be paid for the new lease term and the proper construction of the rent review clauses in the lease.

The rent review clauses

[7] Clause 3.6(b) of the lease provides:

> The annual rent shall be adjusted at the end of each ten year term and any renewal thereof by an amount which shall be agreed between the Lessor and the Lessee as a fair variation in the annual rent. In default of agreement having been reached not less than 14 days prior to the review date, the new rent shall be fixed by an independent licensed valuer to be appointed by the President (or his nominee) for the time being of The Australian Property Institute (Northern Territory Division) and failing such body being in existence at the relevant time or such President failing to appoint a valuer within a reasonable time then by the President (or his nominee) for the time being of the Law Society of the Northern Territory Inc. Any valuer so appointed must be competent and expert as a valuer of hotel rentals. The valuer shall fix the annual rent at an amount which in the opinion of the valuer is the fair market rent for the Premises. The valuer shall exclude from its consideration the value of any improvements constructed by the Lessee and the goodwill generated by the Lessee's business. The amount so fixed shall be the annual rent payable by the Lessee for the period of one year following the review date. Any such valuer shall be deemed to be acting as an expert and not as an arbitrator. Any such valuation shall be accepted by the parties as a fair and proper valuation provided that under no circumstances shall the rent payable following a rent review be less than the rent payable immediately prior thereto. The Lessor and the Lessee shall equally share the payment of all valuation fees incurred in the determination of the rent hereunder.

[8] Clause 3.6 (e) of the lease provides:

---

1 Clause 3.7 of the lease required written notice to the Lessor of the exercise of the option not less than three months prior to the expiry of the term.

The Lessee agrees to provide to the Lessor and any valuer all information as may be reasonably required to facilitate the rent review under clause 3.6(b). Without limiting the generality thereof, the Lessee shall authorise the release of information relating to turnover on a department by department basis, gaming tax and trading figures for the business conducted at the Premises. The Lessor shall use its best endeavours to ensure that all such information is kept confidential.

The relief sought

[9] The proceedings are brought by Originating Motion seeking declaratory relief in the following terms:

> That the provisions of clause 3.6 of registered Lease number 660645 as amended by dealings numbered 846783 and 883529 and subsequently renewed whereby the Plaintiff is Lessor and the Defendant is Lessee (**the Lease**) are to the effect that: –
>
> (a) Prior to the appointment of a valuer, the Lessor and the Lessee are required to attempt to agree a rental variation within a reasonable time after the provision by the Lessee to the Lessor of the information reasonably required by the Lessor to facilitate the rent review.
>
> (b) The information reasonably required to be provided by the Lessee to the Lessor is:
>
> (i) verified or verifiable figures evidencing EBITDA for each of Dowling Holdings Pty Ltd and NT Pubco Pty Ltd in respect of the Howard Springs Tavern for the three financial years prior to the review date;
>
> (ii) information evidencing expenditure of a capital nature for each of Dowling Holdings Pty Ltd and NT Pubco Pty Ltd in respect of the Howard Springs Tavern for the three financial years prior to the review date; and
>
> (iii) information evidencing expenditure on rent and other outgoings for each of Dowling Holdings Pty Ltd and NT Pubco Pty Ltd in respect of the Howard Springs Tavern for the three financial years prior to the review date.
>
> (c) The installation of the additional 10 gaming machines, the associated variation to the gaming licence and the income generated from such, are neither improvements constructed by the defendant nor goodwill generated by the defendant's

business for the purpose of determining fair market rent, and accordingly their value:

(i) is not to be excluded from the determination of fair market rent; and

(ii) is to be included in the determination of fair market rent.

(d) The appointed valuer in determining the fair market rent is permitted to have regard to associated economic conditions for the period of 12 months from the review date, but is not permitted to have regard to associated economic conditions beyond that time it is not permitted to speculate as to the economic conditions that may be experienced thereafter or as to the impact caused by any possible changes to the Howard Springs Tavern clientele thereafter.

Precondition to the appointment of a valuer

[10] The first declaration sought by the plaintiff relies on the contention that the plaintiff and defendant are required to attempt to agree a rental variation; the period within which that obligation subsists does not commence to run until the defendant has provided the information required under cl 3.6(e) of the lease; and that period does not conclude until a reasonable time after the provision by the defendant to the plaintiff of the information reasonably required by the plaintiff to facilitate the rent review. The contention follows that no appointment of an independent licensed valuer may be made until the expiry of that reasonable time.

[11] The validity of the contention turns on the proper construction of cll 3.6(b) and (e) of the lease. In construing the terms of the lease, there is a presumption that the parties did not intend its terms to operate unreasonably, and that the construction will not be one which

flouts business common sense.[2] Subject to that presumption, determining the intention of the parties is an objective enquiry to be undertaken in the same factual matrix in which the parties were at the time the arrangement was formed.[3] That objective enquiry begins with assigning the words their plain and ordinary meaning in the context of the contractual arrangement.[4]

[12] Clause 3.6(b) of the lease provides for the annual rent to be adjusted as agreed at the end of each 10 year term, or for the new rent to be fixed by an independent licensed valuer "[i]n default of agreement having been reached not less than 14 days prior to the review date". The "review date" for this purpose was the date of the expiration of the 12 month term on 26 November 2017, making the default of agreement date 12 November 2017 (**the default date**). Clause 3.7 of the lease requires written notice to the Lessor of the exercise of the option not less than three months prior to the expiry of the term. In the ordinary course, and assuming three months' notice was given, that would afford the parties two and a half months within which to reach agreement as to a fair variation in the annual rent. In this particular case, notice of the exercise of the option was given on 27 July 2017,

---

2 *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 201.

3 See, for example, *Butt v Long* (1953) 88 CLR 476 at 486-490; *Robinson v Day* (1992) 106 FLR 423; *Botany Fork & Crane Pty Ltd v New Zealand Insurance Co Ltd* (1993) 44 FCR 27 at 30; *Schenker & Co (Aust) Pty Ltd v Maplas Equipment & Services Pty Ltd* [1990] VR 834; *Cohen & Co v Ockerby & Co Ltd* (1917) 24 CLR 288 at 300.

4 *Codelfa Construction Pty Ltd v State Rail Authority* (NSW) (1982) 149 CLR 337 at 348.

which afforded the parties three and a half months within which to reach that agreement.

[13] The first issue raised by the plaintiff's contention is whether those provisions require the plaintiff and defendant to attempt to agree a rental variation. The clear purpose of the rent review mechanism is to permit mutual agreement but to require the variation to be determined by a third party valuer acting as an expert in the absence of agreement. A plain and literal reading of the relevant part of cl 3.6(b) of the lease contemplates the possibility that the parties will attempt to agree a rental variation, but does not impose an obligation to do so. It provides for the rent to be adjusted in an amount "which shall be agreed between the Lessor and the Lessee as a fair variation in the annual rent". The use of the word "shall" does not mandate an agreement, or even negotiations towards an agreement. It requires only that the rental adjustment will be in accordance with any agreement that might be reached.

[14] While there is an implied term that the parties will act reasonably to ensure the mechanism for the rent review operates properly and fairly, that obligation is only to do whatever is necessary to give effect to the clause.[5] In practical terms, that would include providing information as required under cl 3.6(e) and facilitating the appointment of a valuer

5 *Gollin & Company Ltd v Karenlee Nominees Pty Ltd* (1983) 153 CLR 455 at 467.

in accordance with the review mechanism in default of agreement. There is no general law or statutory obligation, or implied term, to negotiate in good faith in the context of a rent review clause in a commercial lease.[6] Nor is this a case in which the clause itself contains an express term requiring the parties to negotiate in good faith. So far as there is a general duty to act in good faith, that would operate only to prevent the parties misleading or deceiving one another or engaging in unconscionable conduct. There was no obligation on either party to attempt to agree a rental variation in order for the default mechanism to come into operation. As White J observed in *Carrathool Hotel Pty Ltd v Scutti*:[7]

> The rent for each year of the term is not to be less that the rent for the preceding year, but is otherwise to be the rental agreed to by the parties. It is open to either party to seek to reach agreement upon the rental for each new year of the term. The expression "failing agreement" deals with all cases in which the parties have not reached agreement upon the rental for a new year. They may have failed to reach agreement because one party made an offer which the other rejected. They may have failed to reach an agreement because one party made an offer and the other did not respond. They may have failed to reach agreement because neither party made an offer. In all such cases, they would have failed to agree on the rental for the new year of the term. In that event, the rental is increased by the movements in the Consumer Price Index.

[15] The same observation may be made in relation to the circumstances in which there will be default of an agreement under the present lease.

---

6 Cf *Competition and Consumer Act 2010* (Cth), Schedule 2, 'Australian Consumer Law', ss 22(1)(l) and (2)(l).

7 *Carrathool Hotel Pty Ltd v Scutti* [2005] NSWSC 401 at [59].

[16] The second issue raised by the plaintiff's contention is whether the reasonable time does not commence to run until the defendant has provided the information required under cl 3.6(e) of the lease. For the reasons described above, the rent review mechanism does not cast an obligation on the parties to attempt agreement. However, cl 3.6(e) of the lease does impose an obligation on the defendant "to provide to the [plaintiff] and any valuer all information as may be reasonably required to facilitate the rent review under clause 3.6(b)". On proper construction, that obligation on the defendant is contingent on a request from the plaintiff. It cannot be rationally construed as placing an obligation on the defendant to provide information unbidden and on an assumption of what the plaintiff might require. It was for the plaintiff to identify the information it required to facilitate its consideration of what would constitute a fair variation in the annual rent, subject to the constraint of reasonableness.

[17] The plaintiff cannot by request made after the default date displace the express words and intendment of the rent review clause so as to defer the requirement that an independent licensed valuer be appointed to fix the new rent. Even where the request for information is made before the default date, there might be circumstances in which it is made too close in time to the date to allow the provision of the information before the expiry. Even where the request for information is made in timely fashion, and the information provided, it would remain open to

the defendant (or the plaintiff) to withhold agreement and thereby force the variation to be determined by an expert. No practical commercial purpose is served by construing the clause to require the postponement of the appointment of the expert until after the information has been provided.[8] The parties could no doubt agree to such a deferral, but that is not the case here.

[18] The third issue raised by the plaintiff's contention is whether the period within which the parties are to attempt agreement continues until a reasonable time after the provision by the defendant to the plaintiff of the information required to facilitate the rent review. Again, for the reasons described above, the rent review mechanism does not cast an obligation on the parties to attempt agreement. Nor is there any express provision in the lease (or statute)[9] for the extension of either the period for agreement or the date for the exercise of the option until a stipulated time or event after the information is provided. That being so, and in the absence of any agreement as to the amount of the adjustment by 12 November 2017, cl 3.6(b) operates such that the

8 The question whether the plaintiff's entitlement to request and be provided information ceases at the default date is discussed in the context of the second declaration sought.

9 See, in relation to a different type of lease, *Business Tenancies (Fair Dealings) Act 2003* (NT), s 30(1)(c)(ii).

new rent shall be fixed by an independent licensed valuer to be appointed in accordance with the mechanism specified in the lease.[10]

[19] The fourth and ultimate issue raised by the plaintiff's contention is that no appointment of an independent licensed valuer may be made until the expiry of a reasonable time after the provision by the defendant to the plaintiff of the information reasonably required by the plaintiff to facilitate the rent review. As that ultimate contention is contingent on establishing a requirement that the parties attempt to agree a rental variation before the provision for appointment is triggered, and that the appointment must be deferred until the provision of the information, the contention must fail. Moreover, neither the provision of information nor the conduct of negotiations is expressed to be a precondition to the appointment of the valuer. The only precondition is the absence of agreement by the default date.

[20] The grant of a declaration in the terms sought in paragraph 1(a) of the Amended Originating Motion is refused.

The information reasonably required

[21] Clause 3.6(e) of the lease provides for the defendant "to provide to the [plaintiff] and any valuer all information as may be reasonably required to facilitate the rent review under clause 3.6(b)". Although the second

10 This is not a case in which the exercise of the option (or, by analogy, the appointment of a valuer) was contingent on the provision by the lessor of financial information to the lessee: see, for example, *Gold Coast Waterways Authority v Salmead Pty Ltd* [1997] 1 Qd R 346 at 351, 359.

declaration sought by the plaintiff is directed in part to the relief sought in the first, it does stand independently if the obligation on the defendant to provide information to the plaintiff subsists beyond the default date.

[22] The defendant contends that its obligation to provide information to the plaintiff necessarily ceased on 12 November 2017. That is based on a construction of cll 3.6(b) and (e) which would limit the plaintiff's involvement in the facilitation of the rent review to that period within which agreement might be reached between the parties, after which only the provision of information to the valuer would be facilitative of that review. That submission should not be accepted. There is nothing in the express words or necessary intendment of the clauses which requires that construction. In particular, there is nothing which would limit the plaintiff's entitlement and the defendant's obligation in that respect to the time prior to the default date. The fact that the selection of the third party to determine the rent is an expert valuer rather than arbitrator does not necessarily lead to a different conclusion.

[23] While it is true that an expert valuer discharging this role is not conducting an arbitral or judicial process,[11] and is not obliged to give the parties an opportunity to tender evidence or make submissions, that does not preclude the parties presenting material to the valuer to

11 *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* (2002) 11 BPR 20,201 at 20,208-20,209.

inform the determination.[12] During the course of the valuation process it may conceivably be necessary or desirable for the Lessor to make submissions or put information to the valuer in relation to matters which inform the valuation task.[13] The Lessor might reasonably require information from the Lessee for that purpose. The Lessor will also have an interest in ensuring that the information considered by the expert is both complete and correct in fact. It is not apparent from the terms of the lease or the commercial context that the Lessor's involvement in the facilitation of the rent review, and its need for and entitlement to information, must necessarily end at the default date.

[24] Accepting that to be so, the defendant's obligation to provide information is at all times limited to that which may be reasonably required to facilitate the rent review. The subsequent reference in cl 3.6(e) to information relating to turnover on a department by department basis, gaming tax and trading figures for the business does not limit the categories of information which might be required, but does point to the general type of information contemplated by the clause. The plaintiff contends that the defendant is required to provide:

---

12 The authorities canvassed during the hearing of this matter indicate that it is not unusual for expert valuers to receive submissions from the parties in these circumstances.

13 In doing so, however, care would need to be taken not to bring pressure to bear on the expert valuer which might have the tendency to displace the application of his or her expertise and experience: *Capel Services Ltd v Legal and General Assurance Society Ltd* (1985) ANZ Conv R 37 at 42-43.

(a) verified or verifiable figures evidencing EBITDA for each of Dowling Holdings Pty Ltd and NT Pubco Pty Ltd in respect of the Howard Springs Tavern for the three financial years prior to the review date;

(b) information evidencing expenditure of a capital nature for each of Dowling Holdings Pty Ltd and NT Pubco Pty Ltd in respect of the Howard Springs Tavern for the three financial years prior to the review date; and

(c) information evidencing expenditure on rent and other outgoings for each of Dowling Holdings Pty Ltd and NT Pubco Pty Ltd in respect of the Howard Springs Tavern for the three financial years prior to the review date.

[25] It is necessary to put that contention into context by reference to the requests previously made and the information previously provided. The first request was made by the solicitors for the plaintiff to the solicitors for the defendant on 23 May 2017. That request sought the profit and loss statements for the business from the financial year ending 30 June 2014 to date, and a department by department turnover up to and including 31 March 2017. The defendant's solicitors replied by letter dated 7 June 2017, in which it was advised that the defendant had engaged an independent valuer who had requested certain information to assist in an assessment of the current market rental

(presumably with a view to informing the defendant's position on any agreement).

[26] That same information was provided to the plaintiff's solicitors under cover of the letter dated 7 June 2017. It included trading figures for the past five years by department; projected trading figures for the following 12 months; capital expenditure since inception; a spreadsheet detailing capital improvements during the course of the lease; turnover figures for the previous 12 years; and information concerning gaming tax rates. That letter also declined to provide copies of profit and loss statements, purportedly on the basis that cl 3.6(e) of the lease did not specifically require the provision of that information. As already observed, the reference to the specific categories of information in cl 3.6(e) of the lease does not limit the categories of information which might be required, subject to the overarching constraints of legitimate purpose and reasonableness. The letter from the defendant's solicitors also sought notification of the plaintiff's position on the annual rent to be paid on renewal. On 27 September 2017, the defendant's solicitors also provided the plaintiff with a copy of a valuation report undertaken by the defendant's expert.

[27] The plaintiff's solicitors did not reply until 20 November 2017. That response was made almost four months after the defendant gave notice of the exercise of its option to renew, appropriately one week after the default date, and approximately one week before the expiry of the first

10 year term. The letter repeated the request for copies of profit and loss statements for the business for the last three financial years and "your client [sic] verification of the turnover information which has been provided". That request was put on the basis that profit and loss statements prepared by an external accountant are the most reliable form of data (apart from audit) to verify turnover information. The letter went on to seek the defendant's authorisation for the plaintiff to access gaming information from the Director-General of Licensing.

[28] The letter also advised that the plaintiff had been contemplating making an offer to agree the rental variation in order to minimise fees and expenses, but had determined not to do so in response to the defendant's position[14] that there should be no increase in the rental. By way of response to that suggestion, the plaintiff's solicitors attached a copy of a preliminary assessment by valuers it had engaged providing comment on the defendant's valuation report.

[29] The parties engaged in a course of without prejudice communications between December 2017 and March 2018. The plaintiff's solicitors then wrote again to the defendant's solicitors on 29 June 2018. The correspondence noted that the parties were presently of the view that there would need to be an expert determination of any rental variation. For that purpose, the letter reiterated the plaintiff's request for copies

14 This position was presumably put on the basis of the valuation report it had commissioned.

of the profit and loss statements for the business for the three financial years ending 30 June 2017 on the basis that they were critical to the assessment of market rent. The letter also reiterated the request for authorisation to access gaming information from the licensing authority. The letter then adverted to the determination of what were characterised as "legal questions" which were "not well suited" to resolution by an expert valuer, and which are now the subject of the third and fourth declarations sought in these proceedings.

[30] The plaintiff commenced these proceedings on 27 September 2018. The Originating Motion as originally filed sought a declaration that cl 3.6(e) of the lease required the defendant to provide to the plaintiff "the trading figures for the business conducted at the Premises for the last three financial years ending 30 June"; and required the defendant to authorise the release to the plaintiff of gaming information held by the licensing authority. By letter dated 11 October 2018, the defendant's solicitors sought particulars of the "trading figures" beyond what had already been provided under cover of the letter dated 7 June 2017. By reply dated 18 October 2018, the plaintiff's solicitors, while not accepting that the request was properly one for particulars, stated that "trading figures" included profit and loss statements. That was, in essence, a reiteration of the request previously made for profit and loss statements.

[31] So far as the profit and loss statements are concerned, under cover of letter dated 3 December 2018 the defendant's solicitors provided the plaintiff's solicitors with copies of the profit and loss statements for the business for the financial years ending 30 June 2015 to 2018, and an interim profit and loss statement for the period July to October 2018. So far as the gaming information is concerned, that letter invited the plaintiff's solicitors to provide a proposed form of authorisation. After some negotiation as to its terms, the plaintiff's solicitors provided that document by email dated 5 December 2018. An executed copy of that authority was returned by email the following day.

[32] The plaintiff's first request for verified or verifiable trading figures evidencing earnings before interest, taxation, depreciation and amortisation (**EBITDA**) appeared in written submissions made in these proceedings on 17 December 2018. That request appears to derive from an expert valuation report filed by the defendant on 15 November 2018.[15] One part of that report made the comment that hotel valuers typically compare and analyse profitability by adjusting net profit to reflect EBITBA.

[33] To the extent that request for information requires the existing trading figures to be subjected to some external verification process,[16] it goes

15 Expert witness report of Peter Grieve dated 15 November 2018.

16 That would appear to be the plaintiff's purpose, reflecting as it does the contention put in the letter of 20 November 2017 to the effect that, apart from an external audit process, statements prepared by an external accountant are the most reliable form of data in order to verify turnover information.

beyond the ambit of the obligations reasonably imposed on the defendant under cl 3.6(e) of the lease. The same may be said of the requirement that the information be rendered in a form which shows earnings before EBITDA. While it would be open to the plaintiff to request information from which that adjustment may be calculated, it is not incumbent on the defendant to conduct that calculation in order to comply with a request for information under the lease. It would also be open to the plaintiff to request any profit and loss statements for the business which have already been prepared by an external accountant and are within the possession, custody or control of the defendant.

[34] The second and third limbs of the declaration sought relate to capital expenditure and expenditure on rent and other outgoings by the defendant and NT Pubco in respect of the Howard Springs Tavern for the three financial years prior to the review date. The defendant provided information on the business's capital expenditure under cover of the letter dated 7 June 2017. The defendant provided information on the business's rent and other outgoings as part of the profit and loss statements provided under cover of letter dated 3 December 2018. In effect then, these limbs seek information which distinguishes between the expenditure by the defendant and NT Pubco in respect of the Howard Springs Tavern.

[35] As described at the outset, NT Pubco has held a sublease over the land and building and has held the liquor licence and gaming machine

licence used in the conduct of the business since the commencement of the lease. NT Pubco has paid for some of the improvements to the business. The defendant and NT Pubco have the same directors and shareholders. The expenses of the business are met partly by the defendant and partly by NT Pubco.

[36] As the defendant has identified, many of these were matters known to the plaintiff since prior to the commencement of the lease. The plaintiff was aware from August 2007 that the premises were to be subleased to NT Pubco. The plaintiff was aware from October 2007 that the liquor licence would be transferred from the plaintiff to NT Pubco as part of the sale agreement. However, the relevant question is whether the information sought is reasonably required to facilitate the rent review. The plaintiff contends that the financial information of each individual entity needs to be provided in order to ascertain such matters as the rent paid by NT Pubco to the defendant under the sublease, whether the arrangements between the defendant and NT Pubco otherwise impact on the reported profitability of the business, and which of the entities paid for the improvements and additional gaming machines and in what proportions.

[37] The defendant makes complaint about the description of the information sought, and particularly the use of the word “evidencing”. Without conceding that the plaintiff has a subsisting right to request information, it says that if the plaintiff wants information from which

EBITDA may be calculated, or information concerning capital expenditure and expenditure on rent and outgoings, it should ask for it, rather than for "information evidencing" those matters. This is a matter of form. The Court can mould an appropriate grant of declaratory relief where required. Subject to that question of form, the plaintiff is entitled under cl 3.6(e) of the lease to any profit and loss statements for the business which have already been prepared by an external accountant, information from which earnings before EBITDA for the business may be calculated, and information which distinguishes between the defendant and NT Pubco for capital expenditure and expenditure on rent and outgoings made in relation to the business.

Additional gaming machines and improvements

[38] The third declaration sought by the plaintiff is in effect that the installation of the additional 10 gaming machines, the associated variation to the gaming licence, and the income generated from those matters are not improvements constructed by the defendant or goodwill generated by the defendant's business, and their value is both not excluded and to be included for the purpose of determining fair market rent under the rent review clause. That prayer for relief is directed to the part of cl 3.6(b) of the lease which provides:

> The valuer shall fix the annual rent at an amount which in the opinion of the valuer is the fair market rent for the Premises. The valuer shall exclude from its consideration the value of any

> improvements constructed by the Lessee and the goodwill generated by the Lessee's business.

[39] That requires some consideration of the valuer's function under the rent review clause and the extent to which a court can and should intervene in the performance of that function. As already stated, the valuer is appointed as an expert rather than an arbitrator, and the process of determining and fixing the fair market rent is not judicial in nature.[17] The process is as determined by the expert, subject only to the requirements in the contractual document providing for the appointment. If the expert carries out the instructions in the lease,[18] and gives a valuation honestly and in good faith, it will not be set aside on the grounds that the valuer has made a mistake in the application of valuation principles.[19] The distinction was described by McHugh JA in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* in the following terms:[20]

> While mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision or the certificate of valuation,

---

17 There is nothing in the terms of the lease to suggest that the process by which the valuer must reach his or her determination is judicial (or quasi-judicial) in nature such that the role is that of an arbitrator and not an expert. See, for example, *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2008] QCA 160 at [78]–[96]; *Capricorn Inks Pty Ltd v Lawte International (A'asia) Pty Ltd* [1989] 1 Qd R 8 at 15*; Edmund Barton Chambers (Level 44) Co-op Ltd v The Mutual Life and Citizens' Assurance Co Ltd* [1984] NSW ConvR 55-177 at 546; *Santos Pty Ltd v Pipelines Authority (SA)* (1996) 66 SASR 38 at 46–48.

18 *Karenlee Nominees Pty Ltd v Gollin & Co Ltd* [1983] 1 VR 657; *R & A Dalley & Co Pty Ltd v Giex Pty Ltd* (1991) 5 BPR 11,554.

19 *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 336; *Atkinson v Ebonstone Pty Ltd* (unreported, QCA, 3 March 1992); *Woolworths Ltd v Merost Pty Ltd* (1988) 14 NSWLR 300.

20 *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 335-336. That statement has subsequently been endorsed in *Commonwealth of Australia v Wawbe Pty Ltd* [1998] VSC 82 and *Parsons v CB Richard Ellis (V) Pty Ltd* [2007] ACTSC 37 at [32].

> nevertheless, the mistake may be of a kind which shows that the valuation is not in accordance with the contract. A mistake concerning the identity of the premises to be valued could seldom, if ever, comply with the terms of the agreement between the parties. But a valuation which is the result of the mistaken application of the principles of valuation may still be made in accordance with the terms of the agreement. In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor it is relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract.

[40] Where the contract specifies that the valuer is to use a particular method of valuation, a failure by the valuer to employ that method will constitute a failure to comply with the terms of the contractual document. Similarly, a failure to give effect to a valuation instruction contained in the contractual document will constitute a failure to comply with its terms.[21] However, to the extent that the valuation methodology is left to the judgment of the valuer, a mistake in the application of valuation principles will not.[22]

[41] The sole valuation instructions contained in the lease are that the "valuer shall fix the annual rent at an amount which in the opinion of the valuer is the fair market rent"; and the "valuer shall exclude from its consideration the value of any improvements constructed by the

---

21 *Jones v Sherwood Computer Services plc* [1992] 1 WLR 277 at 287-288; *Frank H Wright (Constructions) Ltd v Frodoor Ltd* [1967] 1 WLR 506 at 529.

22 *Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd* (1993) 32 NSWLR 583 at 592.

Lessee and the goodwill generated by the Lessee's business". The meaning of those instructions is a matter of construction of the lease, and gives rise to the question whether a court may make a declaration as to the proper construction of the terms on the application of one of the parties made in advance of the valuation exercise.

[42] A similar situation was considered by the Supreme Court of South Australia in *Bank of South Australia v SA Health Commission* (1996) 65 SASR 409.[23] There, the rent renewal clause was in terms similar to the present matter, and provided that in default of agreement "the rent to be paid during the term of the renewal shall be fixed by a licensed valuer nominated on the written request of either party by the President or Acting President for the time being of the Real Estate Institute of South Australia". The valuer was expressed to be appointed as an expert rather than an arbitrator. There was no explicit valuation instruction contained in the lease. Once appointed, the valuer took submissions from the parties which indicated disagreement as to the proper approach to the question of fixing rent under the terms of the lease.

[43] The lessee argued that the clear intendment of the lease was that the rental for the renewed term was to be a ground rental only, disregarding the value of improvements erected by it. The lessor

23 *Bank of South Australia v SA Health Commission* (1996) 65 SASR 409.

argued that the rental for the renewed term was to be a fair market rent for the premises as improved. The valuer advised the parties that he would proceed on the basis that the improvements on the land were to be taken into account when assessing the rental for the renewed term unless within 21 days one of the parties had commenced proceedings seeking a construction of the lease. The lessee commenced proceedings for that purpose. The lessor ran an argument similar to the submission put by the defendant in this matter, the basis for which Olsson J described as follows:[24]

> That contention was based upon dicta to be found in authorities such as *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 (*Legal & General*); *James McEwan & Co Pty Ltd v Dilettante Pty Ltd* (1992) 163 LSJS 162; *Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd* (1993) 32 NSWLR 583 (*Strang Patrick*) and *Woolworths Ltd v Merost Pty Ltd* (1988) 14 NSWLR 300 (*Woolworths*) - in which it has been held that, where a rental has been fixed by a valuer, acting as an expert, pursuant to a clause in a lease, then, absent some vitiating factor such as fraud, collusion or a mistake or error which is of such a nature that a resultant valuation is not in accordance with the contract, the court will not interfere. This is because the parties to the lease have bound themselves to accept the professional judgment of the independent expert - even if it may fairly be argued that there is a demonstrable error in the discretionary judgment of the valuer.

[44] After querying, but not deciding, whether that result only followed where the lease provisions expressly stipulate that the valuer's decision

24 *Bank of South Australia v SA Health Commission* (1996) 65 SASR 409 at 414.

is to be final and binding on the parties,[25] Olsson J made the following observations:[26]

> It is one thing to come to the court and ask it to set aside a decision already made and published within the four comers of the relevant contract; it is an entirely different situation where, as here, a party to a contract seeks a declaration as to its proper construction, prior to the concluded deliberations of the appointed expert and for his guidance - a situation which the instant expert himself has virtually invited.
>
> Moreover, as [counsel for the Bank] also stressed, there is a very clear distinction to be made between an attempt to have a court dictate to an independent expert as to technical and factual aspects going to the professional valuation process, on the one hand, and to ask it to determine fundamental questions of law as to the proper construction of the relevant contract, on the other. There is, in this regard, a clear contrast between situations such as that evidenced in *Email Ltd v Robert Bray (Langwarrin) Pty Ltd* [1984] VR 16 (*Email*) (a classic illustration of the former) and that in the instant case. In *Australian Mutual Provident Society v Overseas Telecommunications Commission (Australia)* [1972] 2 NSWLR 806 the Court of Appeal went to some pains to draw the obvious distinction between the two quite different potential scenarios.

[45] In the first of the cases referred to in that extract, the Full Court of the Supreme Court of Victoria proceeded on the basis that a court may make a declaration as to the meaning of an expression in a rent review clause (in that case, “reasonable rental”), but should desist from

---

25 The provisions of the lease in the present matter do not contain any express clause providing that the expert's valuation is "final and binding", or any other formulation with necessarily privative effect.

26 *Bank of South Australia v SA Health Commission* (1996) 65 SASR 409 at 415. Cf *Strang Patrick Stevedoring Pty Ltd v James Patrick & Co Pty Ltd* (1993) 32 NSWLR 583 at 587-588.

making actual findings of fact or usurping the valuer's role. The Court observed:[27]

> In our opinion, the parties have clearly bestowed upon the valuer the obligation of determining what circumstances are relevant to the question of fixing "a reasonable rental". We do not consider that the Court should make a declaration which delineates the circumstances to which the valuer should have regard. The declaration that we are disposed to make is that "a reasonable rental" means a rental which the valuer considers is reasonable having regard to all the circumstances which the valuer considers are relevant.
>
> Without our seeking to trespass upon the valuer's territory, we think it goes without saying that the valuer may consider that the market rental represents "reasonable rental". But he may wish to take into account the various facts which [the lessor's] counsel submit are relevant. He may take some of them into account and not others. He may have regard to matters which were not mentioned in the discussions before this Court. The matter is entirely within the province of the valuer because the parties have so provided.

[46] As Mahoney JA stated in a similar vein in *Burns Philp Hardware v Howard Chia Pty Ltd*:[28]

> It is a proper use of the declaratory jurisdiction to declare whether a particular factor is or is not to be taken into account in determining such a rent. But the court will not ordinarily attempt to enumerate exhaustively the factors which are or are not relevant.

[47] In *Lend Lease (Millers Point) Pty Ltd v Barangaroo Delivery Authority*,[29] the Supreme Court of New South Wales observed that the

---

27 *Email Ltd v Robert Bray (Langwarrin) Pty Ltd* [1984] VR 16 at 21. See also *Commonwealth of Australia v Wawbe Pty Ltd* [1998] VSC 82 at [17].

28 *Burns Philp Hardware v Howard Chia Pty Ltd* (1987) 8 NSWLR 642 at 644. See also *Alcatel Australia Ltd v Scarcella* [2001] NSWCA 401 at [144F].

29 *Lend Lease (Millers Point) Pty Ltd v Barangaroo Delivery Authority* [2013] NSWSC 848 at [36].

purpose of a construction declaration is that if the parties' dispute is not authoritatively determined by a court, any determination by the expert valuer of a term contained in the contractual document (in that case, "current market value") might be contractually flawed according to the principles enunciated by McHugh JA in *Legal & General Life of Australia Ltd v A Hudson Pty Ltd*[30]. While the Court was prepared to make directions as to the proper construction of the relevant clause, in so doing it reminded itself that "the proceedings cannot be permitted to subvert the valuers' exercise of their professional judgment by an erroneous conversion of "valuation" questions into "legal" ones.[31]

[48] I turn then to the instruction contained in the lease that the "valuer shall fix the annual rent at an amount which in the opinion of the valuer is the fair market rent". While the plaintiff does not seek a declaration in relation to the meaning of that term generally, it is peripheral to the declaration sought in relation to the additional 10 gaming machines, the associated variation to the gaming licence, and the income generated from those matters. The parties have made competing submissions concerning whether that instruction calls for an objective or subjective approach to the valuation exercise, as a matter going to whether the Court should or should not make a construction declaration in the terms sought.

---

30 *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 335-336.

31 *Lend Lease (Millers Point) Pty Ltd v Barangaroo Delivery Authority* [2013] NSWSC 848 at [32].

[49] The adoption of the formulation "fair market rent" is problematic in that determination. There is a well-established distinction between "market rent" on the one hand and a "fair rent" on the other. Market rent is determined on the basis of the rent the premises would bring on the open market having regard to the rent paid for comparable premises in the same or a comparable area. The test is objective. On the other hand, fair rent is determined on the basis of the rent which it would be fair for the particular lessor and the particular lessee to have agreed under the lease in question having regard to all the circumstances relevant to any negotiations between them of a new rent from the review date.[32] That test is subjective and broader in evidentiary and factorial scope than an enquiry into market rent.[33] Where the test is subjective it may also be necessary to take into account, as a matter of fairness, such things as whether the lessee has constructed improvements on the land at its own expense which have become the property of the lessor.[34]

[50] In *Colin Marg Pty Ltd v Mackay Medical Investment Ltd*, the Queensland Supreme Court considered a rent review clause which, like the one in the matter at hand, provided for the rental variation to be

---

32 WD Duncan and S Christensen, *Commercial Leases in Australia*, (7th edition) Lawbook Co 2014, [50.5700].

33 *Ricciardello v Caltex Oil (Australia) Ltd* (1991) ANZ Conv R 445 at 449-450.

34 *Colin Marg Pty Ltd v Mackay Medical Investment Ltd* [2007] 1 Qd R 303 at [9].

determined by a valuer in default of agreement between the parties.[35] The Court considered that to be a "strong indicator" that the valuer was to take into account all the considerations which would affect the minds of the parties when negotiating a new rent. That is, it suggests that a subjective approach is required. Similar conclusions were reached in *Lear v Blizzard*[36] and *Jefferies v RC Dimock Ltd*[37]. None of those cases involved a clause containing any instruction or stipulation as to the basis of the valuation to be undertaken by the expert.

[51] On the other hand, in *Wickham Properties Pty Ltd v Astor Motel Pty Ltd*[38] the clause specifically required the valuer to determine the rental having regard to "comparable rent in the City of Brisbane for premises of comparable age position and architectural qualification". That was held to require an objective assessment of value. In *Ponsford v HMS Aerosols Ltd*,[39] the House of Lords found by narrow majority that fixing "a reasonable rent for the demised premises" required the valuer to disregard the fact that the lessee had expended £32,000 of his own money on improvements. That result followed from a finding that reference to "the demised premises" indicated that the rental valuation had to take into account the whole of the premises without any discount for the improvements attributable to the lessee.

---

35 *Colin Marg Pty Ltd v Mackay Medical Investment Ltd* [2007] 1 Qd R 303 at [8]-[13].

36 *Lear v Blizzard* [1983] 3 All ER 662.

37 *Jefferies v RC Dimock Ltd* [1987] 1 NZLR 419.

38 *Wickham Properties Pty Ltd v Astor Motel Pty Ltd* [1994] 1 Qd R 211 at 220.

39 *Ponsford v HMS Aerosols Ltd* [1979] AC 63.

[52] In this matter also, cl 3.6(b) of the lease refers to fair market rent "for the Premises". It should be noted in that respect that the result in *Ponsford* derived from the fact that the reference to "the demised premises" was divorced from the requirement that rent should be agreed if possible between the parties and assessed by an independent expert in default of agreement. That is not the case under this lease. Even leaving aside that point of distinction, the preponderance of authority suggests that an instruction to determine "reasonable rent" requires a subjective approach. As has already been seen, the Full Court of the Supreme Court of Victoria in *Email Ltd v Robert Bray (Langwarrin) Pty Ltd*[40] considered that the formulation "reasonable rental" permitted the valuer take into account any and all circumstances which the valuer considered relevant. A similar conclusion was expressed in *Ricciardello v Caltex Oil (Australia) Ltd*[41].

[53] The fact that the valuer under the subject clause is appointed in default of agreement suggests, at least in the *prima facie* sense, that the assessment is to be subjective in nature. However, the matter is ultimately governed by the instruction to fix "fair market rent". In *EMS Holdings Pty Ltd v The Industrial Lands Development Authority*,[42] the Supreme Court of Western Australia considered a rent review

---

40 *Email Ltd v Robert Bray (Langwarrin) Pty Ltd* [1984] VR 16 at 21. See also *Commonwealth of Australia v Wawbe Pty Ltd* [1998] VSC 82 at [17].

41 *Ricciardello v Caltex Oil (Australia) Ltd* (1991) ANZ Conv R 445 at 449-450.

42 *EMS Holdings Pty Ltd v The Industrial Lands Development Authority* [1994] ANZ Conv R 479.

clause which required an arbitrator to determine rent in default of agreement. The valuation task referred to the arbitrator was of "fair market rent". The Court concluded:

> In my view the phrase "fair market rental" means a rent that the lots would bring on the open market having regard to rent paid for comparable premises in the same or a comparable area adjusted to take into account matters made pertinent by the particular relationship of the lessor and the lessee concerning the land the subject of the lease. There is a myriad of factors that might merit consideration in the latter category. It would be inappropriate to try to catalogue them in a decision on any particular fact situation. Looked at in this light the test marries the objective and subjective elements about which the phrase "fair market rental" speaks. The way in which the marriage should be accommodated is very much a matter for expert knowledge and will be essentially a matter of opinion.

[54] The English case of *ARC Ltd v Schofield*[43] came to the diametrically opposite conclusion. The rent review clause there provided for renewal at a "fair and reasonable market rent" agreed between the parties. No agreement was reached and the matter was referred to arbitration. In considering the meaning of the phrase the Court stated:[44]

> But, in my judgment, the meaning of the words "fair and reasonable" depends upon the context in which they are found. They may be used objectively as a synonym for market rent, as in the phrase "fair and reasonable rent for the demised premises" in *Ponsford v HMS Aerosols Ltd*. Or they may be used subjectively as a synonym for the rent which it would be fair and reasonable for the particular parties to agree. But in the phrase "the fair and reasonable market rent" they must take their colour from the word "market". They must be used objectively or introduce a contradiction. In short, the landlords' contention is that the words are used objectively and the contradiction must be resolved. The

43 *ARC Ltd v Schofield* [1990] 2 EGLR 52.

44 *Ibid* at 54.

> tenants' contention is that the words bear one of their two normal meetings and take their particular meaning from the context in which they are part of the composite phrase "a fair and reasonable market rent". I accept the tenants' contention.

[55] I would respectfully concur with the conclusion reached in *EMS Holdings Pty Ltd*. First, the decision in *ARC Ltd v Schofield* pays no regard to the fact that the term "fair rent" has a well-established meaning, at least in the Australian context. Secondly, the reference to both "fair" and "market" in the formulation is apt to incorporate elements of both the subjective and objective assessment. To construe the phrase as requiring a purely objective assessment would be to disregard the incorporation of the concept of fairness. Thirdly, that result is consistent with the conclusions reached in *Colin Marg Pty Ltd v Mackay Medical Investment Ltd*[45] and *Ricciardello v Caltex Oil (Australia) Ltd*[46], although the valuation instructions under consideration in those cases were differently structured. In the former case, the valuer was appointed in default of agreement and was required to have regard to rentals payable for comparable premises in the locality. The Court concluded that the direction did not limit the scope of the task. It was a prescription of only one matter to be taken into account in the broader enquiry into what would be a reasonable rent having regard to all the circumstances.[47] In the latter case, the

---

45 *Colin Marg Pty Ltd v Mackay Medical Investment Ltd* [2007] 1 Qd R 303.

46 *Ricciardello v Caltex Oil (Australia) Ltd* (1991) ANZ Conv R 445 at 449-450.

47 *Colin Marg Pty Ltd v Mackay Medical Investment Ltd* [2007] 1 Qd R 303 at [14].

valuer was required to have regard to market rentals payable for comparable premises in the same or comparable areas in determining a "fair rental increase". As Malcolm CJ observed:[48]

> [The valuer] was, without limiting the scope of his enquiry, required to have regard to the evidence relevant to a determination of a market rent. That evidence is much narrower in scope than an enquiry into what would be a reasonable rent for these two parties to have agreed, having regard to all the circumstances…. [The valuer] was, however, required to go further and determine a fair rental which he did …

[56] The decision in *Howie v Crawford*[49] does not compel any different conclusion. The matter under consideration was a shareholder agreement providing for one member's shares to be purchased by the other members of the company for a "fair market price". The Court held that the market price of shares in a private company is the price they would fetch between a willing vendor and a willing purchaser. That would depend on such matters as the proportion of the shares of the company involved, any special rights or restrictions contained in the articles of association, the value of the net assets of the company, and its profit and dividend record. In that equation, the court found that the addition of the word "fair" added nothing except to remind the valuer that the market value must be ascertained on the assumption that no one would be excluded from bidding in the market. There is an obvious distinction to be drawn between the factors which may operate

48 *Ricciardello v Caltex Oil (Australia) Ltd* (1991) ANZ Conv R 445 at 450.

49 *Howie v Crawford* [1990] BCC 330 at 332-333.

in assessing the rental for commercial premises in the context of a long-standing commercial relationship and those which operate on share values.

[57] I turn then to consider the instruction that the "valuer shall exclude from its consideration the value of any improvements constructed by the Lessee and the goodwill generated by the Lessee's business". The expert valuation evidence tendered during the course of the hearing has limited utility to the extent that it purports to address the proper construction of that phrase.

[58] While the term "improvements" may not be defined in the lease, it is a term with an established meaning in the law of landlord and tenant and land law generally. In general terms it means additions or alterations to the land and buildings on that land, but does not include trade fixtures.[50] An improvement may be contrasted with a mere repair or renewal. An improvement is a physical and not an economic concept. It refers to the works themselves and not to the effect, if any, which they have on the value of the premises.[51] For these reasons, the installation of the additional 10 gaming machines, the associated variation to the gaming licence, and the income generated from those matters are not improvements constructed by the defendant.

---

50 *Lambourn v McClellan* [1903] 2 Ch 276.

51 *Shalson v Keepers and Governors of the Free Grammar School of John Lyon* [2003] 3 All ER 975 at [18].

[59] As stated, the value of improvements is a different concept to the improvements themselves. To speak of the value of improvements is to express an immediate causal relationship between the making of the improvement and the value of the premises. The comparison is between the value of the premises after the physical improvements and what their value would have been had the physical improvements not been made.[52] That value for present purposes is represented by the extent to which the rental value of the premises has been increased by reference only to the physical expansion and renovation (to the extent any part of the renovations may be characterised as an improvement) of the gaming room, taking into account in a general sense the manner in which a lessee might profitably use that physical expansion and renovation. That value is not the installation of the additional 10 gaming machines, the associated variation to the gaming licence, and the income generated from those machines. That the value of the premises for rental purposes is contingent in large part on the profitability or earnings of the business conducted from them does not change that analysis.

[60] The term "goodwill" is also not defined in the lease, but it also has an established, although less precise, meaning in land law. In *Federal Commissioner of Taxation v Murry*, the High Court stated that "with the possible exception of a licence to conduct a business exclusive of

52 *Shalson v Keepers and Governors of the Free Grammar School of John Lyon* [2003] 3 All ER 975 at [19].

all competition, a licence that authorises the conduct of a business is not a source of goodwill".[53] It does not necessarily follow that a licence to conduct gaming activity as part of a presently existing business cannot be a source of goodwill. In that same case, the High Court said that "[f]or legal purposes, goodwill is the attractive force that brings in custom and adds to the value of the business. It may be site, personality, service, price or habit that obtains custom". It has been variously described as "the advantage … which a person gets by continuing to carry on and being entitled to represent to the outside world that he is carrying on a business which has been carried on for some time previously"[54]; "the attractive force which brings in custom"[55]; and "the benefit and advantage of the good name, reputation and connection of a business"[56].

[61] For a public house or tavern, goodwill is in one sense simply the probability that clients will continue to patronise the business by reason of its reputation and amenities, and in another more technical sense profitability over that which would be achieved by average management acumen. As the definitions set out above illustrate, goodwill is the composite of features which gives the business attractive force. That composite cannot be broken down in a manner

---

53 *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at 630.

54 *Re Jacobson* [1970] VR 180 at 182-183.

55 *Federal Commissioner of Taxation v Williamson* (1943) 67 CLR 561 at 564.

56 *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 at 223-224.

which attributes a specified portion of it to the existence of 20 rather than 10 gaming machines. However it might be defined or assessed, "the value of … the goodwill generated by the Lessee's business" cannot be attributed in any meaningful way to the installation of the additional 10 gaming machines, the associated variation to the gaming licence, and the income generated from those machines.

[62] On proper construction of the lease, the instruction to the valuer to "exclude from its consideration the value of any improvements constructed by the Lessee and the goodwill generated by the Lessee's business" does not extend to the installation of the additional 10 gaming machines, the associated variation to the gaming licence, and the income generated from those machines. However, that is not to say that on proper construction the value of those matters must be included. The expert valuer's function under the lease is to fix a "fair market rent", subject only to the express exclusions. For the reasons already given, that requires the valuer to have regard to rent paid for comparable premises in the same or a comparable area adjusted to take into account matters made pertinent by the particular relationship of the lessor and the lessee concerning the land the subject of the lease. In so doing, the valuer may take into account any and all circumstances which the valuer considers relevant. That assessment is one going to the technical and factual aspects of the professional valuation process,

rather than the determination of a fundamental question of law as to the proper construction of the lease.[57]

[63] For those reasons, while a declaration may properly be made to the effect that the exclusion does not extend to the installation of the additional 10 gaming machines, the associated variation to the gaming licence, and the income generated from those machines, it would be inappropriate to make a declaration which delineates the circumstances and considerations to which the valuer must have regard in the process.[58]

[64] Those circumstances and considerations may or may not include matters adverted to by the plaintiff such as what it says was the understanding of the parties concerning the defendant's "revamp" of the operation, and NT Pubco's involvement with the additional gaming machines. Equally, those circumstances and considerations may or may not include the matters adverted to by the defendant concerning its liberty to do as it pleases with the additional 10 gaming machines; the personal nature of a gaming machine licence and restrictions on transfer; the facility to decrease the number of gaming machines permitted under a licence; and the fact that the defendant paid for the expansion of the gaming room. That determination is within the province of the expert valuer.

---

57 See, for example, *Bank of South Australia v SA Health Commission* (1996) 65 SASR 409 at 415.

58 See, for example, *Email Ltd v Robert Bray (Langwarrin) Pty Ltd* [1984] VR 16 at 21.

Associated economic conditions

[65] The fourth declaration sought by the plaintiff is that in determining the fair market rent the appointed valuer is permitted to have regard to associated economic conditions for the period of 12 months from the review date, but is not permitted to have regard to associated economic conditions beyond that time and is not permitted to speculate as to the economic conditions that may be experienced thereafter or as to the impact caused by any possible changes to the Howard Springs Tavern clientele thereafter.

[66] The basis for the contention is that under cl 3.6(b) of the lease the amount fixed by the valuer shall be the annual rent payable by the defendant for the period of one year following the review date. That is a clear reference to the operation of cl 3.6(a), which provides that the annual rent shall be reviewed at the expiration of each 12 month period of the term. The mechanism for those annual reviews is the application of the Consumer Price Index for Darwin (All Groups) subject to a cap of 4.5% per annum. The plaintiff's argument is that having regard to that mechanism there is no warrant for the valuer to look at economic conditions beyond the 12 month period for which the rent is being determined.

[67] The nature of the valuation exercise which must be undertaken in this case has already been described. The valuer's function is to fix "fair market rent". The provision that the amount so fixed shall be the

annual rent payable for the period of one year following the review date is not a valuation instruction. It is simply a recognition of the provision for annual review. As the defendant submits, the two types of review serve different functions and the horizon for the fair market review cannot be set by reference to the CPI review. The extent to which economic conditions and forecasts may be taken into account in the performance of that task is a technical and factual aspect of the valuation process falling within the province of the valuer.

[68] The grant of a declaration in the terms sought in paragraph 1(d) of the Amended Originating Motion is refused.

Disposition

[69] The plaintiff's application for declarations in the terms sought in paragraphs 1(a) and (d) of the Amended Originating Motion is dismissed. I will hear the parties further, having regard to these Reasons, in relation to the terms of any declarations to be made concerning the provision of information and the operation of the instruction excluding from consideration the value of any improvements constructed by the defendant and the goodwill generated by the defendant's business.
