Market rent reviews are a sensitive issue in the retail lease context. The retail lease legislation in all jurisdictions regulates these reviews.

In the retail context, market rent reviews are most often encountered when tenants exercise an option to renew: the rent for year 1 of the lease for the further term is to be the market rent as agreed, or failing agreement, as determined by an expert valuer in accordance with the applicable procedure in the relevant State RLA.

Of course there was a time when options to renew were thick on the ground. But that was back in the day before the retail lease legislation muddied the water. Back in those days, the tenant would be required to exercise the option. The parties would then either agree on the rent, or obtain an expert market rent determination. The cards landed where they fell: both parties were bound by the determination, whatever it was.

This is how options to renew still work in Australia in the real world. It is just the retail context that is special.

Under the retail lease legislation, in most jurisdictions, the tenant is now entitled to obtain a market rent determination, before it decides whether or not to exercise the option. This means that if the valuer determines a low rent, the tenant will exercise. If the valuer determines a high rent, the tenant will not exercise: it will negotiate instead.

The effect of this fundamentally unfair legislated structure was to throw the baby out with the bathwater. Retail shop landlords simply stopped granting options. Accordingly, options to renew are now the exception, rather than the rule.

The problem is particularly acute in Victoria, which has recently enacted the most idiotic option protocol known to science: a protocol so complex that landlords have simply decided it is not worth the effort. It is just too hard to manage the array of landlord obligations, and so tenants miss out.

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And this is a shame for tenants. It is even more of a shame since, at least in my experience, those tenants which do have options rarely invoke the early rent determination protocol in any event.

So we have an unfair provision which is rarely used, and which has the effect of depriving tenants of a right they could otherwise enjoy.

Anyway, in those leases which do contain options with market rent review requirements, it is the case that if the parties are unable to agree on the rent, the determination of the market rent is undertaken by a qualified valuer [see Vic RLA, s37].

Surprisingly, the RLA does not include provision to say that the determination of the expert valuer is final and binding on the parties. This is almost invariably a requirement in contractual market rent review provisions in leases. The effect of including provision to this effect is that the valuation cannot be impeached, even if the valuer has made a mistake.

The courts have held that if, as a matter of contract, the parties have agreed that the expert's determination is final and binding, then they are bound by the result. You can't agree that the determination is final and binding, and then challenge the result in the court, because that would mean that the determination was not final and binding.

When I was a young lawyer, I worked on a case called *Jewel Food Stores Pty Ltd v Wamo* [1983] 2BPR[97150][NSW]. In that case, the parties could not agree on the market rent, and so the matter was remitted to valuers to decide.

The valuer obtained the turnover details of the tenant, which he used to extrapolate a notional annual turnover, and went on to reach a market rent determination based on that assumed turnover.

The tenant challenged this determination in the court, on the basis that the valuer had used an incorrect basis of valuation.

The decision of the court [at 9616] was that "*valuations, whether speaking or non speaking, are not open to impeachment on the ground of mistake".*

The tenant lost, on the basis that it was a matter for the expert to make his determination as the valuer thought fit. It did not matter if the valuer made a mistake.

But this is not the end of the story.

Two years later, in *Legal & General Life of Australia v A Hudson Pty Ltd* [1985] 1 NSWLR 314 McHugh JA in the Court of Appeal held [at 335-336] "*While mistake or error on the part of the valuer is not by itself sufficient to invalidate the decision…the mistake may be of a kind which shows that the valuation is not in accordance with the contract".*

An example of this type of mistake would occur if, for example, the valuer valued the wrong premises. In that case, the valuation would not comply with the terms of the contract.

It goes without saying that nowadays, valuations are not challenged on the ground of mistake. The challenge will assert that the valuation was not carried out in accordance with the terms of the contract.

The more complex the directions and requirements given to the valuer in the lease, the easier it is to mount this argument.

And this is a door that has been opened by the retail lease legislation. For example, in Victoria, s37 of the RLA sets out a list of factors to which the valuer must have regard in making the determination, and then requires that the valuation must contain detailed reasons and specify the matters to which the valuer had regard in making the determination.

Judicial Member Nash in VCAT has had a busy start to the year. In *Storage Depot* Pty *Ltd v Brooklyn Logistics Park Pty Ltd* [2022] VCAT 210 and *AJ Moussi Pty Ltd v Luxor Corporation Pty Ltd* [2022] VCAT 434 he was required to decide whether market rent determinations could be vitiated because of a failure by the valuers to tick these boxes.

In *Storage Depot*, the valuation was impugned because the valuer applied to his valuation the rules that apply to the preparation of an expert report for the Supreme Court. This was found to be a misconception by the valuer, but not a mistake of the kind that would vitiate the determination.

The determination was then attacked on the ground that the valuer failed to provide detailed reasons, in breach of the requirement imposed by s37(6) of the RLA. This took the Tribunal down the slippery slope of deciding how much detail was sufficient. The other line of attack was that the valuer failed to explain the steps taken, and what matters were considered, in arriving at the determination.

Member Nash found [at 72] that "*it is unclear what actual information or transactions the Valuer has had regard to and what he has not*". He went on to hold [at 74]: "*The Valuer does not provide any explanation for his decision not to explain what he had regard to, and what he has not had regard to…*".

I am still trying to understand the criticism that the valuer did not explain his decision not to explain something. And I note that the valuer is not required by the legislation to explain what he or she has <u>not</u> had regard to. This would be like trying to explain how long is a piece of string. The legislated requirement is to "*specify the matters to which the valuer <u>had</u> regard*". But leaving those comments to the side, the failure by the valuer to provide detailed reasons was clearly fatal, having regard to the requirements of s37.

In *Moussi,* the main complaint was that the valuer misinformed himself about the number of patrons who were permitted in the Premises, which in turn produced an inaccurate valuation. Predictably, the tenant also complained that the valuer failed to provide detailed reasons in breach of s37(6).

Member Nash held [at 37] that the mistake about the number of patrons was no mere error. "*If the Valuer determines that the appropriate method for assessing the market rent of premises is directly referable to the maximum number of patrons allowed at the premises, then any significant error in that number will result in the valuation being of a fundamentally different premises*".

To my mind, this error sounds a little like the error made by the valuer in the *Jewel Food Stores* case described above, in which the court held that a valuation cannot be set aside on the ground of mistake.

However, Member Nash also found that the valuer misinformed himself about the repair and maintenance costs for which the tenant was liable under the lease, and did not explain why he had regard to those matters, and also that the valuer failed to set out detailed reasoning to explain how he arrived at his conclusions.

For these reasons, this valuation was also set aside.

Apart from the quibbling above I have no real complaint about these decisions by Member Nash. They appear to me to be solid determinations based on the current law.

But I think the decisions do suggest that we need to have a discussion about how the retail lease legislation deals with market rent reviews.

One curious feature of s37 is that it fails to say that the determination of the expert is final and binding.

If the determination is not final and binding, then it should be possible to challenge the valuation in the court on the ground of any mistake.

What would be the position if the lease said that the determination of the valuer was final and binding, in circumstances where the RLA does not? We know that in the case of conflict, the RLA prevails over the lease, to the extent of any inconsistency [s94].

It could be argued that the RLA fails to mention whether or not the determination of the valuer is final and binding: provision in the lease to say that it is final and binding merely fills that void, there is nothing inconsistent.

However, there is a screaming inconsistency between the two alternatives. If the RLA is applied by itself, a valuation could be challenged on the ground of mere mistake. Provision in the lease to say that the expert determination is final and binding closes that door. It should follow that the provision in the lease is inconsistent with the RLA and is void to that extent.

This argument appears to have been available in *Storage*, but not raised.

If one of the points of the RLA is to provide a cheap and effective machine for the resolution of retail lease disputes, do we achieve that objective by failing to include provision that makes the expert determination final and binding, and by adopting a detailed and technical protocol which makes it easy for either party to challenge the valuation?

And if in a heavily regulated world we decide that we do want to open that door, why do we not regulate the form of the valuation report so that we make it harder for the valuer to stuff it up? I mean everything else is regulated up the hoohaa, why not produce some regulation that might actually be some use? Two expensive cases on the same issue in two months tells us that something is broken. It would be easy to set up a regulated pro forma valuation report which had mandatory headings so that the valuation would have to reflect the legislated requirements.

But like so much of the Victorian RLA, the market rent regulation continues the confusing maze that bewildered industry participants have to try to navigate.

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