Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Centuria Property Services Pty Ltd v Daniel Lee and Blooms the Chemist [2015] NSWCATCD 66**
Hearing dates:	7 April 2015
Decision date:	16 July 2015
Jurisdiction:	Consumer and Commercial Division
Before:	D Bluth, Senior Member
Decision:	The application for the Joint Report to be set aside under s 32A(12) of the Act is dismissed.
Catchwords:	Retail Leases Act 1994 s 32 A (12) manifest error and s 72 AB appointment of specialist retail valuer
Cases Cited:	Great Tastes of Australia Pty Ltd v Shorty Holdings Pty Ltd [2006] NSWADT 253 Inspire International Holdings Pty Ltd v Heriot Pty Ltd [2013] NSWADT 48 Kokkinidis v Zaharpoulos [2011] NSWADT 153
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Centuria Property Services Pty Ltd (Applicants) v Daniel Lee and Blooms the Chemist (Respondent)
Representation:	Solicitors: Self: (Applicant) CBP Lawyers (Respondent)
File Number(s):	COM 14/59343
Publication restriction:	Nil

REASONS FOR DECISION

1 This is an application under s 32A(12) of the *Retail Leases Act 1994* (the Act) to set

aside a decision of two specialist valuers on two grounds. The initial ground is that the valuers have 'manifestly made a fundamental error warranting such an order'. The second ground is that one of the valuers appointed is not a specialist valuer and such appointment was null and void.

2 The background to this matter is that the applicant is the agent for the current lessor and the respondent is the lessee under a lease of premises known as Shops *** Plaza (the premises), commencing on 1 September 2007 for a period of seven years with an option to renew for a further seven years (the lease). The original lessor, JP Morgan Trust Australia Ltd, transferred its interests in the premises ultimately to BNY Trust Company of Australia Ltd.

3 On or around March 2014, the respondent took an assignment of the lease. At the time of the exercise of the option of the new term under the lease, the current rental being paid by the respondent was $257,877.00 net rental excluding GST ($724.33 per square metre net).

4 The applicant made an application to the Tribunal under s 19(1A) of the Act for the appointment of a specialist valuer. Mr Glen Cremer of Austreal was appointed by the Tribunal as a specialist valuer and provided a report dated 1 August 2014 (the Cremer Report) that determined that the current market rent for the premises was $266,088.00 per annum net excluding GST ($745.30 per square metre net).

5 On 28 August 2014, the respondent applied to the Tribunal under s 32A(1) of the Act to have the Cremer Report set aside and two specialist valuers to review the Cremer Report. On 30 September 2014 Mr Phillip Barlow FAPI (Mr Barlow) and Mr Pierre Dupre FAPI (Mr Dupre) were appointed by the Tribunal to review the Cremer Report. On 17 November 2014, Mr Barlow and Mr Dupre (the joint valuers) delivered their determination (the Joint Report) that the market rent for the premises was $202,644.00 net excluding GST ($567.00 per square metre net).

6 On 9 December 2014, the applicant filed a 'request for order' requesting that the Joint Report be set aside alleging that the joint valuers made 'a manifest error in valuation judgment' (the application). On 15 December 2014, the applicant filed submissions with the Tribunal to support the application.

7 On 19 December 2014, the parties appeared before me at a directions hearing where I made directions for the filing of a revised submission from the applicant and submissions in response from the respondent based on the matters that were raised by the applicant in seeking to have the Joint Report set aside.

8 Subsequently, as a result of the applicant's submissions dated 23 January 2015, at the next directions hearing on 17 February 2015, I asked for further submissions to be made. The applicant submitted that the Joint Report be set aside as Mr Dupre, in accordance with those submissions, was not registered as a speciality retail valuer as at the date of his appointment (source API website, 23 January 2015) and consequently was not a person that the Tribunal could have appointed under s 72AB(2) of the Act.

9 At the directions hearing on 7 April 2014, I asked the applicant to provide evidence regarding the assertions that Mr Dupre was not an appropriate person to be appointed under the Act. The parties were directed to file further submissions and then the matter was reserved on the papers.

10 The relevant sections of the Act are as follows:

> **Section 32A – review of current market rent determinations**
>
> (1) Application for review
>
> A party to a lease may apply to the Tribunal for the appointment of two specialist retail valuers to conduct a review of a determination of the current market rent made by a specialist retail valuer made under section 19 or 31.
>
> (12) The Tribunal:
>
> (a) may, on application made by a party to the lease within 21 days after the decision of the specialist retail valuers is given, order that the decision be set aside, if satisfied that the valuers have manifestly made a fundamental error warranting such an order, and
>
> (b) may also order that the costs of the review are not payable by the parties or, if paid, are to be refunded.
>
> The decision is not otherwise reviewable by or appellable to the Tribunal.
>
> **Section 72AB - Powers of the Tribunal relating to appointment of specialist retail valuers**
>
> (1) The Tribunal may appoint:
>
> (a) a specialist retail valuer, on application under section 19 or 31, or
>
> (b) two specialist retail valuers, on application under section 32A.
>
> (2) The appointment of a specialist retail valuer is to be made from separate lists of nominees prepared separately by the persons for the time being holding or acting in the Offices of President of the Australian Property Institute (NSW) and President of the Real Estate Institute (NSW).
>
> A specialist retail valuer is defined under section 3 of the Act as follows:
>
> Specialist retail valuer means:
>
> (a) for the purposes of a valuation under this Act relating to a retail speciality shop in a retail shopping centre having both:
>
> (i) 20 or more retail speciality shops, and
>
> (ii) a total of lettable areas of retail speciality shops that exceed 1,000 square metres,
>
> a valuer having not less than 5 years' experience in valuing retail speciality shops in shopping centres of that kind, or
>
> (b) for the purposes of a valuation under this Act relating to any other retail speciality shop or any other retail shop, a valuer having not less than 5 years' experience in valuing retail shops.

JOINT REPORT

11 The Joint Report is dated 17 November 2014 and is on the letterhead of Dupre Property Valuations and Consultancy. It recites the appointment of the two valuers Mr Dupre and Mr Barlow. It refers to the Cremer Report, it sets out the terms of the lease, notes the relevant sections of the Act, provides analysis of similar premises, sets out the lettable area of the premises, discusses the procedures undertaken by the valuers

and looks at the rental evidence together with commentary. Most importantly the Joint Report is signed by the two valuers Mr Barlow and Mr Dupre notwithstanding that it appears on the letterhead of Mr Dupre.

SUBMISSION BY THE APPLICANT REGARDING THE APPOINTMENT OF MR DUPRE

12 The applicant's submission is that Mr Dupre was not registered as a specialist retail valuer as at the time of his appointment. The applicant provided a list from the API website dated 22 January 2015 which indicated that Mr Dupre was not on that list of specialist retail valuers. The Tribunal notes that Mr Barlow is so listed. The submission continues that historically, the Australian Property Institute (NSW) (API) has provided the Office of Fair Trading (now provided to the Tribunal) a list of specialist retail valuers for appointment. Each year, valuers have been asked to submit to self-evaluation to remain on the list published on the API website and made available to the Tribunal.

13 The submission continues that in June 2014, as part of the ongoing review of the Act by the Office of Small Business Commissioner (OSBC), members of the API were all removed from the list and advised that they should complete a course conducted by the API in specialist retail valuation as part of an ongoing professional development programme and consequently to be able to continue to be appointed as specialist retail valuers (SRV course).

14 Subsequently, according to the applicant's submission, in July 2014, the API provided to the Tribunal the details of the specialist retail valuers that had completed the SRV course and the list of specialist retail valuers was updated. In October 2014, the list of specialist retail valuers was published on the API website and an additional column 'APCSRV completed' was added. Mr Dupre was not on that list. Further, Mr Dupre, according to the submission, has admitted not completing the SRV course. On 2 March 2015, the API list was further updated and Mr Dupre is on that list.

15 Accordingly, the applicant's submission is that Mr Dupre was not a specialist retail valuer at the time of his appointment by the Tribunal and accordingly the Joint Report should be overturned and presumably, although it is not stated in the submissions, a new joint appointment should be made.

16 There was no evidence provided by the applicant to support the allegations made in its submissions.

RESPONDENT'S EVIDENCE AND SUBMISSIONS

17 The respondent filed an affidavit of Alannah Louise Barlow, Solicitor, dated 7 April 2015. Ms Barlow works for the solicitors employed by the respondent. She deposes that she accessed the website of the API on 6 April 2015 and encloses a copy of that website showing that Mr Dupre appears as a specialist retail valuer on that list. Ms Barlow then utilised the wonderful communications technology that is available today, called a way-back machine website, and conducted a search for the webpage

accessing a snapshot of the webpage as at 11 July 2014. A copy of that snapshot is annexed to her Affidavit and it shows that Mr Dupre is listed as a specialist retail valuer.

18 The respondent also filed an affidavit of James Whealing dated 28 April 2015. Mr Whealing said he was a director of Brady Whealing Pty Limited, property consultants and valuers, and that he was an accredited specialist retail valuer in accordance with the requirement under s 72AB(2) of the Act and appears on the API president's specialist retail valuer list. He confirms that he has had over 35 years experience in both statutory and retail/commercial valuations. He deposes in his affidavit to the arrangements as he understands it with the API with respect to the establishment of the list and in particular, pursuant to meetings with the OSBC, the proposal for an education program with respect to retail valuers. In this regard, a specialist retail valuation course was developed and subsequently implemented by the API, the SRV course.

19 Mr Whealing further deposes that to the best of his knowledge, API members have never been advised by the OSBC or the API that they must complete the SRV course to remain on the list of specialist retail valuers and be eligible for appointment.

20 Finally, the respondent submits firstly that the applicant has served little or no evidence to support the allegations made and secondly, making the obvious submission, that even if Mr Dupre was an inappropriate or invalid appointment, it is nevertheless a joint valuation and consequently the invalid appointment of one valuer should not underpin the Joint Report.

RESOLUTION OF THE FIRST OBJECTION TO THE JOINT REPORT

21 The Tribunal in fact does not have to deliberate too much on the question of a joint appointment and as to whether because one valuer is inappropriately appointed, does that undermine the report from the joint valuers. Firstly, the Tribunal has looked at s 72AB previously in a decision of *Great Tastes of Australia Pty Ltd v Shorty Holdings Pty Ltd* (2006) NSWADT 253. In that case, the Tribunal noted that, as the purpose of s 72AB and sections 19, 31 and 32A of the Act are to provide a simple and cost effective method of resolving the valuation dispute between the parties relating to what is the common market rent, the Tribunal would assume that the persons whose names are included in the relevant lists as set out in s 72AB(2) are persons who are appropriately qualified to carry out the requisite valuations and the Tribunal will not make its own separate enquiries.

22 Accordingly, on one view, notwithstanding the submissions made by the applicant as to the appropriateness of the appointment of Mr Dupre as a person that could be described as a specialist retail valuer within s 72AB, the decision in *Great Tastes* suggests that the Tribunal should not entertain a submission that goes to query the qualification of the valuers on the lists.

23 Even if the Tribunal were to entertain such a submission, the most relevant aspect of this whole issue is that in relation to the two lists compiled by the API and annexed to

the affidavit of Ms Barlow and in fact utilised by the applicant in its submissions, the Tribunal notes that in the list dated 11 July 2014, the covering head note states as follows:

> 'The list below has been prepared by the President of the Australian Property Institute (NSW) in accordance with section 72AB(2) of the Act.
>
> The members of the Institute appearing on the list have advised the Institute that they meet the requirements of the definition of a "specialist retail valuer" as set out in section 3 of the Act.'

24 The head note in the more recent API list dated 6 April 2015 annexed to the affidavit of Ms Barlow has added, after the definition of specialist retail valuers and after a schedule for regional services by the specialist retail valuers, the following statement:

> 'Members who have completed the API NSW Associate Professional Certificate in Specialist Retail Valuer (APCSRV) are shown in the table'.

25 The table then has appearing, in addition to all the information that was contained in the earlier list, an additional column called 'APCSRV completed' and next to the list of names of the valuers is occasionally the word in the column 'Yes' indicating that that particular valuer had completed the course.

26 It is upon this approach that I believe that the applicant has made its submission regarding the inappropriateness of Mr Dupre to be appointed by the Tribunal as a specialist retail valuer to conduct a valuation under s 32A. It is probable that the list used by the Tribunal when making the appointment of Mr Barlow and Mr Dupre on September 2014 may not have had the word 'Yes' next to the name of Mr Dupre as undertaking the APCSRV course. I note, however, nor is the word 'Yes' next to the name of Mr Barlow in this column although no objection was made by the applicant to his appointment.

27 The fact that Mr Dupre’s name does not appear on the list produced by the API of specialist retail valuers dated 22 January 2015 does not of itself indicate that Mr Dupre was not on the list at the relevant time that the appointment was made by the Tribunal. In fact, it is more likely that Mr Dupre's name was on the list because the Tribunal can only work from the list and cannot appoint names that are not on the list. Again, the fact that Mr Dupre's name may have been removed from the list possibly in line with the allegations made in the submissions regarding the undertaking of the APCSRV course is inconsistent with the facts. It appears that Mr Barlow also had not undertaken that course, although the Tribunal only assumes this from its observation of the most recent list produced and nevertheless, the name of Mr Barlow has always remained on the lists from the API.

28 However, the Tribunal is of the opinion that this is totally irrelevant to the consideration of s 72AB of the Act which does not require the valuers to complete any such course, but only requires, pursuant to s 72AB(2), that the Tribunal is to make the appointment of the specialist retail valuer from the separate lists of nominees prepared by the two property institutes. Whilst the information regarding completing the APCSRV course is of use when a Tribunal member considers making an appointment, it is not mandatory

and the fact that a valuer has not completed the course does not deny that valuer the opportunity of being appointed pursuant to s 72AB of the Act.

29 Therefore, the Tribunal determines that the appointment of Mr Dupre was in accordance with the Act.

SUBMISSION BY THE APPLICANT REGARDING MANIFEST ERROR

30 The applicant has made submissions that the Joint Report be set aside on the basis of manifest error. Section 32A(12) of the Act states that the Tribunal may on application order that the review determination be set aside if the Tribunal is satisfied that the valuer has manifestly made a fundamental error warranting such an order.

31 The complaints from the applicant submitting that a manifest error has been made are that the joint valuers failed to use appropriate comparable rentals as the bulk of the rentals were from high street shops and not premises located in a retail shopping centre, that the determination dealt with the marketing levy payable by the lessee as an item that should not be deducted from a gross rental obtained and that the joint valuers had not considered equal and like premises when making the valuation. Subject to the submissions from the respondent, these objections will be expanded upon later in these Reasons.

RESPONDENT'S SUBMISSIONS

32 The respondent submits that the requirement under s 32A(12) is very specific in that the Tribunal must be satisfied that the valuer has manifestly made a fundamental error. For the Tribunal to be so satisfied, the cases indicate that it must be manifestly clear and fundamental to the review and determination of current market rental. The Tribunal is referred to the case of *Kokkinidis v Zaharopoulos* (2011) NSW ADT 153. In that case the valuer's report was set aside because the valuer wrongly assumed that in respect of one of the two comparable properties used the net lettable area was 70 sqm with an annual rental of $44,200.00 or $631.00 per sqm. In fact, the comparable property used had a net lettable area of 190 sqm and the rental was actually $233.00 per sqm. At [41] the Tribunal found:

> This error is manifestly clear and it is fundamental to the review determination of current market rent for the property because it relates to one of the only two properties used in the review to determine comparable market review. This error has in turn led to a review determination of current market rent which is significantly different to the current market rent figure previously determined … such an order to set aside the review determined is warranted.

33 In the Tribunal decision of *Inspire International Holdings Pty Limited v Heriot Pty Ltd* (2013) NSW ADT 48 there was an application to set aside the decision of a specialist valuer for failing to have regard to the matters specified at s 31(1)(a) of the Act. Deputy President Patten went to great lengths in detailing the valuation and then the aspects of the valuation that according to the applicant provided the basis to seek the application to have the valuation set aside for manifest error. Deputy President Patten at [26] stated:

> I am satisfied that the requirements of s31(1)(a) were met by the joint valuers in the sense that they 'had regard to' all the matters specified. That being so, it is unnecessary to consider whether any failure to observe s31(1)(a) constituted a fundamental error.

34 As mentioned above, the actual complaint regarding the Joint Report from the applicant's submission of 21 January 2015 relates to disagreement as to the comparables with respect to the various premises used by the original valuer in the Cremer Report, the joint valuers in the Joint Report, the treatment of the marketing levy by the joint valuers and that the joint valuers had not considered equal and like premises when making the valuation. It is, however, apparent from reading the Cremer Report and then subsequently the Joint Report that all of the valuers have satisfactorily covered the field with respect to assessment of the subject premises and in respect of comparables of various premises (as a schedule annexed to the valuations) and in that regard no manifest error such as was made by the valuers in *Kokkinidis* can be asserted in relation to that aspect of the Joint Report. Further, all of the valuers have adequately had regard to the matters referred to in s 31(1)(a) of the Act and while there might be differences of opinion around the edges, as there often are with respect to valuations as no two experts will always agree on matters, the ultimate integrity of the Joint Report is not challenged and consequently there is no manifest error in the Joint Report in the terms of s 32A(12) as identified in *Kokkinidis*.

35 The application for the Joint Report to be set aside under s 32A(12) of the Act is dismissed.

36 The question as to costs has not been raised but if the respondent wishes to make a submission regarding costs it should do so within 21 days of the publication of these Reasons and the applicant may have a further 21 days to respond and then the question of costs will be dealt with on the papers.

D Bluth

Senior Member

Civil and Administrative Tribunal of NSW

16 July 2015

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

Decision last updated: 28 August 2015