

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : RE COMMERCIAL REGISTRAR OF THE
COMMERCIAL TRIBUNAL OF WESTERN
AUSTRALIA; EX PARTE PERRON
INVESTMENTS PTY LTD [2003] WASC 198

CORAM : WHEELER J

HEARD : 10 OCTOBER 2003

DELIVERED : 17 OCTOBER 2003

FILE NO/S : CIV 1642 of 2003

MATTER : Application for a Writ of *Certiorari* against the
Commercial Registrar of the Commercial Tribunal
of Western Australia

EX PARTE

PERRON INVESTMENTS PTY LTD
Applicant

Catchwords:

Writ of *Certiorari* - Determination by Commercial Registrar of rent payable upon review - Interaction between s 11 and Pt III of *Commercial Tenancy (Retail Shops) Agreements Act 1985* - Natural justice

Legislation:

Commercial Tenancy (Retail Shops) Agreements Act 1985, s 11, Pt III

Result:

Order *nisi* discharged

Category: A

Representation:

Counsel:

Applicant : Mr M J Watson

Intervenor
(Assignment Holdings Pty Ltd) : Mr A Prime

Solicitors:

Applicant : Hotchkin Hanly

Intervenor
(Assignment Holdings Pty Ltd) : McCallum Donovan Sweeney

Case(s) referred to in judgment(s):

Kioa v West (1985) 159 CLR 550

Public Service Board of New South Wales v Osmond (1986) 159 CLR 657

Case(s) also cited:

Craig v South Australia (1995) 184 CLR 163

WHEELER J

1 **WHEELER J:** This is the return of an order *nisi* for a writ of *certiorari*. The issue arises under the *Commercial Tenancy (Retail Shops) Agreements Act 1985* ("the Act"). The applicant is the lessor of a shop in the Mirrabooka Square Shopping Centre. Assignment Holdings Pty Ltd ("Assignment") is the lessee.

2 The application relates to a decision of the Commercial Registrar of the Commercial Tribunal of Western Australia ("the Registrar"). As is usual in such cases, the Registrar did not seek to appear and be heard. However, Assignment was granted leave to appear and make submissions in support of his decision.

3 The lease between the applicant and Assignment contained a market rent review procedure to be followed once every three years. A dispute arose concerning the rent review. Each party then appointed a valuer to attempt to resolve the issue of market rent payable but the valuers could not agree. On about 14 October 2002, Assignment referred the question of the rent review to the Registrar and on 12 December 2002 the Registrar determined the rent to be paid by Assignment. The rent determined was \$195,000 per annum inclusive of all outgoings and exclusive of GST, which was \$5,000 per annum more than Assignment's valuer's assessment and \$31,000 per annum less than the applicant's valuer's assessment.

4 It appears that the applicant, through the applicant's valuer, was advised by Assignment's valuer that the reference to the Registrar had been made. On receipt of that information, the applicant sent to the Registrar a copy of its valuer's report. The applicant does not appear to have been formally notified by the Registrar that the question of the rent had been referred to him. The applicant did not receive either from Assignment or from the Registrar a copy of the valuation report by Assignment's valuer. There was no invitation from the Registrar to the parties to make any submissions and there was no hearing.

5 Underlying the order *nisi* are two broad contentions. The first is that the Registrar was required in determining the rent to "hear the question with a view to achieving a solution acceptable to the parties", pursuant to s 16 of the Act and, if that could not be achieved, to refer the question to the Commercial Tribunal pursuant to s 22 of the Act. The second contention is that the Registrar was required to accord the applicant natural justice and failed to do so. Further particulars of that failure of natural justice are provided.

6 In order to understand the first broad question, it is necessary to set out some of the provisions of the Act. Section 11 relevantly provides:

"(3) A retail shop lease that provides for review of the amount of rent payable during the currency of the lease shall be taken to provide that where the parties do not agree on the rent payable as a result of the review, the question shall be resolved, subject to subsection (5), by either -

(a) a person licensed under the *Land Valuers Licensing Act 1978* agreed to by each of the parties; or

(b) 2 persons licensed under that Act, one of whom is appointed by the landlord and one of whom is appointed by the tenant.

(3a) ...

(4) A person who acts under subsection (3)(a) or (b) shall, at the request of and on payment of the required fee by a party to the lease, provide reasons for his decision in writing to that party.

(5) Notwithstanding subsection (3), a party to a retail shop lease may refer to the Registrar for determination a question as to the rent payable as a result of the review by the parties where -

(a) the persons acting under subsection (3)(b) fail to reach an agreement on the rent to be paid; or

(b) a person has not acted under subsection (3)(a) or (b) and the leave of the Registrar has been obtained,

but otherwise such a question shall not be referred to the Registrar.

...

(6) In determining a question under subsection (5), the Registrar shall act according to equity, good conscience and the substantial merits of the case without regard to

technicalities or legal forms, and shall not be bound by the rules of evidence, but may inform himself or herself on any matter in such manner as the Registrar thinks fit.

- (7) For the purpose of determining a question under subsection (5) the Registrar may require the parties to furnish to the Registrar such valuations, documents or other information as the Registrar thinks fit and the parties shall comply with any such requirement.
- (8) In determining a question under subsection (5) the Registrar, after considering all the circumstances of the case, may determine that any increase or reduction in rent payable as a result of the determination of the Registrar under that subsection is payable over such period as the Registrar thinks fit."

7 It is relevant to note at this time that the word "determination" where it appears in s11(5) was originally the word "resolution", the substitution being effected by the *Commercial Tenancy (Retail Shops) Agreements Amendment Act 1998*.

8 Part III of the Act contains the following provisions, which relevantly read:

"16. Reference of questions to Registrar

- (1) Subject to section 11(5), a party to a retail shop lease may refer to the Registrar any question between the parties which he believes to be a question arising under the lease and the Registrar shall -
- (a) determine whether or not the question referred to him is a question arising under the lease; and
- (b) if it is such a question, hear the question with a view to achieving a solution acceptable to the parties to the lease.
- (2) The matter for determination referred to in subsection (1)(a) -

- (a) may be determined by the Registrar in such manner as he thinks fit, subject to each party being given an opportunity to make a written submission; and
- (b) for the purposes of sections 22(f) and 27, is deemed to be a question referred to the Registrar.

...

19. Reference to Registrar

- (1) A question arising under a retail shop lease is referred to the Registrar by a party to the lease completing the prescribed form and lodging it, together with the prescribed fee, at the office of the Registrar.

...

- (5) The hearing of a reference before the Registrar shall not be open to the public.

...

20. Notice of hearing

- (1) The Registrar shall give or cause to be given to each person appearing to the Registrar to have a sufficient interest in a resolution of the question that has been referred to the Registrar reasonable notice of the time when, and the place where, the Registrar is to conduct a hearing of the reference.
- (2) Every person given notice under subsection (1) is a party to the reference and every person who satisfies the Registrar or the Tribunal, as the case may be, that he has a sufficient interest in a resolution of a question before the Registrar or the Tribunal is entitled to be, and shall be, joined as a party.

- (3) The Registrar may by service of a summons in writing require any person who is a party to a reference to attend, at a time and place specified in the summons, at the hearing of the question referred to the Registrar.

...

21. **Mediation agreements**

- (1) Where a question has been referred to the Registrar and a solution in the form of an agreement acceptable to all of the parties to the reference has been attained, particulars of the agreement shall be reduced to writing and signed by or on behalf of the parties, and a copy thereof shall be filed in the records of the Registrar.

...

22. **Reference to Tribunal**

Where under this Act a question is referred to the Registrar and -

- (a) the Registrar is of the opinion that the reference was made frivolously, vexatiously, or for an improper purpose;
- (b) the Registrar is of the opinion that a solution acceptable to all of the parties to the reference cannot be attained by means of a hearing, or any further hearing, under section 16(1)(b);
- (c) a party to the reference, having been duly notified of the hearing of the reference, whether or not he has been served with a summons under section 20(3), fails to attend the hearing;
- (d) a party to the reference who has entered into an agreement a copy of the particulars of which has been filed under section 21(1) breaches the terms of the agreement;

- (e) the question has not been resolved within 90 days after the question was referred to the Registrar; or
- (f) the Registrar is of the opinion that because of the importance or complexity of the question, or for any other reason, the question ought to be determined by the Tribunal,

the Registrar shall, by notice in writing in the prescribed form, forthwith refer the matter to the Tribunal for determination."

9 The question of whether the Registrar is required pursuant to s 16 to attempt to achieve a solution acceptable to the parties, and the question of whether the Registrar is required to refer the question to the Tribunal, appear to be interrelated. The scheme of Pt III is that the Registrar is not permitted to determine any question, save for the question of whether or not the question referred to him is one arising under the lease; rather, he is required to attempt to achieve a solution acceptable to the parties and to refer the question to the Tribunal for determination if such a solution is not attainable. Such a scheme is inconsistent with the words used in s 11(5) which permit referral to the Registrar "for determination" and with s 11(6), which makes it clear that the determination is the determination of the Registrar and not of the Tribunal.

10 If s 22 were read as applicable to all questions, s 11 and s 22 would be inconsistent with each other. The apparent inconsistency should in my view be resolved by resort to the well-known principle that a special provision of a statute dealing with a particular subject matter is intended to prevail over one which is in general terms and which would otherwise encompass that subject matter. That is, s 22 should be read as referring generally to questions referred pursuant to s 16, but not to questions referred pursuant to s 11.

11 Turning to s 16, some indication of the way in which s 11 and s 16 interact is provided by the opening words of s 16(1): "Subject to section 11(5)", although the application of those words is not as clear as the drafter might have thought. Section 16 is, in broad terms, a provision which appears to permit the reference of certain questions to the Registrar. Section 11(5) has a two-fold aspect; it both permits parties to refer questions (bypassing entirely the need for a determination of whether the questions arise under the lease) and

restricts the ability of parties to refer questions in relation to rent, to preclude the reference of such question where there has not been either the prior attempted resolution provided by s11(3) or leave. Simply looking at the two sections together, one would have been inclined to read the opening words of s 16(1) as doing no more than making it plain that, notwithstanding there was a general power in parties to refer matters to the Registrar, the restrictions set out in s 11(5) were nevertheless to be observed in relation to the questions to which that section applied. So understood, those words would not assist in resolving the question of whether, once the question of rent had been referred to the Registrar, he was required to go on to attempt to achieve a solution acceptable to the parties.

12 In my view, the proper resolution of what would otherwise be an inconsistency between s 11 and s 22 helps to resolve the question of the proper interpretation of s 16. The process envisaged by s 16, of the Registrar's hearing the question with a view to achieving a solution acceptable to the parties, would appear to be the first stage in a process which culminates either in an agreement pursuant to s 21, or a reference to the Tribunal pursuant to s 22. If the final step in that process is one which the Registrar cannot take when a question is referred pursuant to s 11, that provides some indication that it is unlikely that the legislature intended that the first step in the process should be mandatory where questions are referred pursuant to that section.

13 Importantly also, s 11(3), in relation to a dispute about the amount of the rent review provides that the question "shall be resolved" in the way set out by that subsection (emphasis supplied). In the first instance then, the appointment of the valuer, or the discussion between the two valuers, is intended to resolve the dispute. Subsection (4) of s 11 provides that a person acting under that subsection shall on request and on payment of a fee provide reasons for the "decision". Thereafter, as I have noted, the matter can be referred to the Registrar for "determination". It seems to me that the intention of s 11 is that the solution acceptable to both parties, which the Registrar is required to attempt to reach in relation to questions referred pursuant to s 16, is in relation to rent review questions to be achieved wherever possible by the appointment of a mutually agreed valuer or by discussion between valuers. It seems to me unlikely, since no doubt representations and discussions would have taken place at the stage required by s 11(3), that it was then the legislative intention that the Registrar should make further efforts to attempt to achieve a mutually acceptable solution, before proceeding to determine the matter.

WHEELER J

14 Further, it appears to me that subs (6) and (7) of s 11, while they are not expressly inconsistent with other sections contained in Pt III, also suggest a legislative intention that the procedure set out in that Part should not be followed. Most notably, it appears to me that the references to a "hearing" which is to be found in s 18, and the hearing procedure set out in s 20, which obviously contemplate parties and times witnesses appear before the Registrar, are not entirely consistent with s 11(7) which appears to contemplate the Registrar of his own motion requiring parties to provide documents to him. That conclusion is somewhat supported by the legislative history. The same amendment which inserted the word "determination" in s 11(5) inserted subs (6) – (8), which tends to suggest that the legislature saw those as the procedures appropriate and necessary to arrive at such a determination.

15 While none of the matters to which I have referred is conclusive, it appears to me that, taken together, they lead to the conclusion that the procedure prescribed under Pt III was not intended to apply to determinations pursuant to s 11(5).

16 Turning to the question of procedural fairness, it is accepted by both the applicant and the intervenor that, the rules of natural justice having not been expressly excluded by the statute, they will be applicable. It is also accepted that the content of the rules of natural justice will vary depending upon the statutory context. As I understand it, it is conceded by the intervenor that the rules do extend in this case to a party having notice of referral to the Registrar, and the opportunity to be "heard" by the Registrar. In this case, it is submitted that, although the Registrar himself did not notify the applicant of the reference of the question to him, the applicant was notified by the intervenor's valuer. It may be that the Registrar was intending to notify the applicant at some later time; in any event what is important for present purposes is the fact that the applicant was notified. So far as a hearing is concerned, the intervenor contends that the applicant had the opportunity to put any material which it wished before the Registrar and that it did make available to the Registrar its own valuer's report. That, the intervenor contends, is the totality of the content of natural justice required in this case.

17 In an attractively presented argument, the applicant submitted that the rules of natural justice in the present case required also that the applicant have the opportunity to inspect the intervenor's valuer's report and to make representations to the Registrar about its content. The applicant pointed to observations in the cases such as that of Gibbs CJ

in *Kioa v West* (1985) 159 CLR 550 at 569, that "if the rules of natural justice were applicable, the appellants were entitled to a fair opportunity to correct or contradict any relevant material prejudicial to them". That, it was submitted, must necessarily entail an opportunity to see anything in the opposing parties' valuer's reports which might be adverse.

18 Although during the hearing I was attracted to the applicant's submissions on this point, on reflection it seems to me that they should not be accepted. I have already referred to the statutory scheme, which seems to me to contemplate a different procedure pursuant to s 11 from the procedure prescribed by Pt III. It is to be noted that in Pt III express provision is made for a hearing before the Registrar. That tends to suggest, as a matter of statutory interpretation, that a hearing, with its accompaniments such as the right to ask questions or to cross-examine the opposing party, was not intended in relation to disputes arising pursuant to s 11.

19 Further, it seems to me that s 11 does provide for a means by which parties will be aware of the substance of anything adverse in a valuer's report which is to be referred to the Registrar. Subsection (4), as I have noted, provides that the valuers acting under subs (3) shall, where required, provide reasons for decision in writing. The statutory scheme then appears to be that there will be informal discussion between valuers, if two are appointed. One would expect that to reveal to each valuer the substance of the other's view. There is then further provision for written reasons to be made available. That scheme overall suggests that it is intended that notice of matters which may be relevant to the Registrar's decision will be provided by the less formal procedures of s 11(3) and s 11(4).

20 As I have already noted, s 11(7) permits the Registrar to require the parties to furnish documents, valuations and other documents to him with no provision for disclosure or inspection thereafter. That provision suggests that disclosure of those materials to the parties, rather than to the Registrar, is not required. I am fortified in that conclusion by a consideration of the sorts of material which are likely to be found in valuer's reports. There will on many occasions be commercially sensitive information about rents and other conditions applicable either in respect of other shops within the same shopping centre or district, or in relation to other shops of the same kind (that is, offering similar goods) in other shopping centres which shops, or which centres, may be in direct competition with a party seeking a determination. It seems to me unlikely that the legislature would have intended that all of the

detail of such information necessarily be made directly available to a commercial tenant or to a commercial landlord.

21 For those reasons therefore, it seems to me natural justice in this case did not require the Registrar to disclose either valuer's report to the other party, or to notify either party of the content of the other party's valuer's report, or to conduct a hearing in the ordinary sense.

22 Finally, in relation to the ground of the order *nisi* which seeks to quash the Registrar's decision on the basis of inadequate reasons, as the applicant's counsel herself noted, the decision of the High Court in *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 657 presents a significant obstacle to that ground. It was sought to justify the ground in this case by suggesting that there were "special circumstances" which might have the result that natural justice would require reasons to be given in the present case.

23 However, on examination, it seems to me that the alleged special circumstances amount to nothing more than the contention that, the Registrar having embarked on the provision of "reasons", no greater or more significant burden would have been cast upon him by requiring full and detailed reasons. In my view, the submission is not correct in a practical sense. It would obviously be much more burdensome for the Registrar to provide detailed reasons relating to the substance to each of the reports and to the inspections which he carried out, rather than simply referring to them and to his "consideration" of them, as he did in the few brief paragraphs of his determination. However, even if the submission were correct in a practical sense, it seems to me that "special circumstances" of the type contemplated in *Osmond's* case must be more than simply the fact that it would not be unduly difficult for the decision-maker to provide reasons. Rather, something must be found either in the statutory scheme or in the nature of the decision or in some other circumstance particular to the case, to suggest that the case is so out of the ordinary that the general rule in relation to the provision of reasons does not apply.

24 It is my view therefore that this order *nisi* should be discharged.