

“Economics of Commercial Leasing – Not Just a Legal Issue”

The Seventh Annual Queensland Property Law Conference

Brisbane – Stamford Plaza Hotel

**Professional Skills Topic for Property Lawyers
Friday 21 February 2014**

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Overview

In commercial leasing practice the structuring of the deal may involve fit out incentives, plus other add on benefits that may sweeten the deal. This may create a difference between the “face rent” on the lease and the “effective” rent that underlies the transaction. That is why it is a good idea to get your lease checked by an accountant and a valuer. The economics of commercial leasing present many challenges for the unwary.

This paper discusses:

- The broad range of rental concepts including “face” and “effective” rent
- Market Rent (Effective Rent) as envisaged by Retail Shop Leases Act 1994
- Understanding the underlying costs of a commercial leasing transaction
- Understanding the accounting issues when incentives are provided to enter a lease
- Understanding the commercial implications of a market rent review clause
- Working out the market rent and obtaining valuations

Definitions

The concepts of rental vary widely. There is a wide range of terms that must be understood but each Lease wording must be considered individually. Stein JA in *Alcatel Australia Ltd v Scarcella* [2001] NSWSC 154 said

“great care must be taken when utilising judicial dicta on a differently worded rent review clause.”

This was taken further by Olsen J and Williams J in *Bank of South Australia Ltd v South Australian Health Commission and McCafferty*:

“Because of the infinite variety in the wording of such clauses no one case is of real assistance when it comes to the construction of a particular clause in another.”

So in drafting leases a detailed knowledge is needed of the terminology and the implications of the wording.

Market Rent

The estimated amount for which an interest in real property should be leased on the valuation date between a willing lessor and a willing lessee **on appropriate lease terms** in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.

There is no such thing as market rent without the terms and conditions of the lease being known. Market Rent reflects the rental of the premises subject to the lease terms and conditions. The market rent for premises can vary greatly if the terms and conditions of the lease change.

Gross Rent

The rental reserved/derived where all operating costs on the property (excluding tenancy power and cleaning) are included in the rental.

Definitions (Cont'd)

Net Rent

The rent to the owner free of all outgoings. (ie Gross Rent less all outgoings including Land Tax).

Net Rent is a term that should be avoided. It is a term that is useful in valuation being the amount that is normally capitalised.

Unfortunately, net rent is the most mis-used term in the real estate industry. It is inappropriately used to describe rental in leases where outgoings to a degree are payable by the tenant. Whilst it is possible a rental in a lease is net, it is not the norm that a tenant pays all the outgoings including land tax. Some agents suggest a net rent is where some of the outgoings are paid by the tenant, net net is all outgoings other than land tax and even net net net is all outgoings including land tax. They are wrong.

If the Site Value of a retail property in Queensland is greater than \$350,000 meaning land tax is payable the rent in a lease cannot be net.

Effective Rent

The actual liability for rent and outgoings after adjustments for any incentives to the face rent are taken into account.

Adjustments for incentives should be converted into a periodic equivalent over the term of the lease. Any effective rental should represent the most valid interpretation of the transaction concerned for comparative purposes, which may not necessarily represent market rent.

For the determination of rent under a retail shop lease, Effective Rent is the rent taking into account:

All associated advantages and disadvantages under arrangements made between the lessor and lessee that reflect the net consideration passing to the lessor from the lessee under the lease and associated arrangements.

There is no codified method for calculating the effective rent. In my opinion however it is appropriate to use Discounted Cash Flow techniques. This can be done by both escalating and non escalating cash flows. The discount rate to be used in the former is the expected Internal Rate of Return and in the latter case the discount rate would be the Capitalisation Rate.

The approach is to assess the Net Present Value of the actual cash flow incorporating the incentives and then to determine the rental that results in the same net present value where the incentives do not form part of the cash flow. Windows Excel provides a "What If" function that is very useful for this calculation.

Incentives have the effect of inflating market rent and the hence the value of the property particularly in the office sector. The market for property has regard to passing income. This is not to say there is not also regard to rental reversions. The market rent, which is the amount capitalised, is normally expressed taking into account the market level of incentives at the time.

Definitions (Cont'd)

Effective Rent (Cont'd)

Incentives in the market reduce when the supply demand co-efficient is weighted to demand and increase when the market is in oversupply. By way of example at the current time incentives are increasing with some pundits predicting the market will increase to 50% or even higher incentives within the next few years in the Brisbane CBD Office Market.

Care however needs to be taken in providing incentives or accepting incentives as there can be unforeseen circumstances.

Take for instance a five year Retail Shop Lease with a couple of five year options. The lease had a significant incentive equivalent to 2 years rental spread evenly over term which equates to 40%. The incentive was offered due to high fitout costs. If there is no market movement the rental, when reviewed to market rent, would only be 60% of the original rent under the lease. The Retail Shop Leases Act 1994 ("RSLA") is intended to protect the tenant but a number of Landlords have been caught out by similar circumstances.

I will not pretend to give taxation advice. But I still remember the *Federal Commissioner of Taxation v Cooling (1990) 90 ATC 4472*. Cooling worked for a law firm that was induced to take a lease in Comalco Place by AMP Society. The inducement was a cash inducement that was shared by the partners. That type of incentive was subject to taxation.

Incentives therefore can be subject to taxation and before accepting or giving incentives the taxation status of that incentive should be fully understood. Hence an Accountant should be consulted.

Face Rent

The rent shown on a lease document which may or may not include incentives and may or may not include outgoings.

Passing (Initial or Contract) Rent

The Initial or Contract is the rent specified by a given lease agreement - The Passing Rent current rent being paid by the lessee(s) as specified by the terms of the lease(s)/tenancy agreement(s).

Equivalent Rent

Should not appear in leases. Equivalent Rent is a valuation and marketing term. It relates to the aggregate rental income in a building where all rentals are adjusted for the effects of any market rent reviews that will occur in the period of consideration. This includes vacant space which should also be included at market rent.

Effectively it is the market rent for the building where the terms and conditions of existing leases are unchanged.

Reversionary Rent

Reversionary Rent is similar to Equivalent Rent but no rent is applied for the Vacant Space.

Definitions (Cont'd)

Turnover Rent

Any form of lease rental arrangement in which the lessor receives a form of rental that is based upon the sales of the lessee. Percentage rent is an example of a turnover rent.

Rental Concepts

The use of various wording to describe rent in leases has been the subject of much litigation. Care is needed to ensure the correct wording is adopted to reflect the actual intention of the parties. Quite often the following terms are adopted by parties whose real intention is the rent should be Market Rent.

Market Rental Value

In *McCafferty v Queensland Treasury Corporation* [1994] 2 Qd R 538 Ambrose J stated:

"In my view no competent experienced valuer would have any difficulty in distinguishing between a 'rental' and a 'rental value.'"

I have put the question to many valuers and very few can state the difference. The judiciary had a far higher opinion of my colleagues than actual exists.

Ambros J continued:

"A 'rental' is simply the money paid as rent for the defined period under a lease. A 'rental value' on the other hand in my view is the sum arrived at after making proper allowance for all collateral advantages and disadvantages ascertained upon proper examination of all the arrangements made between the Lessor and Lessee including the various rights and obligations under the terms of the lease which reflects the net consideration passing to the Lessor from the Lessee under the lease and associated collateral arrangements."[Emphasis Added]

Whilst I am simply speculating I note the coincidence between the Retail Shop Leases Act 1994 and the date of McCafferty and of course the similarity of the wording. Effective Rent under the Retail Shop Leases Act 1994 is defined

All associated *advantages and disadvantages* under *arrangements made between the lessor and lessee that reflect the net consideration passing to the lessor from the lessee under the lease and associated arrangements.*

Whilst Ambrose J felt the concept was very clear in 1994 the difference between market rental and market rental value was still misunderstood in 2008 where Eureka as Lessor and Freehills as Lessee took the concept, albeit in reverse to the Victorian Court of Appeal which overturned the Supreme Court decision. *Eureka Funds Management Limited & Anor v Freehills Services Pty Ltd* [2008] VSCA 156 (26 August 2008).

Whilst the issues were complex with a number of different leases and complicated lease wording essentially, in that instance, there were two rentals to be determined by a valuer as at 2003 and 2004. The rental in 2003 was to be Current Annual Market Rental Value.

Rental Concepts (Cont'd)

Market Rental Value (Cont'd)

The parties drafted the rent review provisions for the July 2003 Review in a way to ensure it would be a true market review. This was achieved by:

- expressly defining a separate "July 2003 Review" in the rent review provisions;
- removing references to a "floor by floor" methodology for review which had existed in the Original Lease;
- not restricting the valuer from taking into account evidence of leasing incentives and inducements; and
- ensuring the July 2003 Review would be without ratchet.

The parties were in agreement that the 2003 review was to be an effective rent.

The dispute was over the 2004 determination of Current Annual Market Rental.

There were identical instructions to the assessment of current annual market rental value at July 2003 other than the instruction not to take into account 'incentives' which was omitted in the 2004 review.

The valuer stated:

"In conclusion I believe that the terms "market rental value" and "market rental" are treated as synonymous in practice by the valuation profession, in the absence of instructions within a lease which clearly demonstrate that the parties wish the valuer to apply a specific definition or approach."

He discounted the face rentals of comparable properties to make what he regarded as a proper allowance for incentives. He took no further step by way of 'grossing up' those figures before arriving at his determination. The Court in first instance supported the valuer had the right to make this decision and in so doing had completed the determination in accordance with the lease.

The Court of Appeal disagreed and distinguished between the 'market rental value' and 'market rental'. It concluded the valuer's determination was not made in accordance with the lease provisions and was invalid and ineffective. It ordered the determination was to be remitted to the valuer to determine the rental in accordance with the lease.

Fair Rent

Fair Value is defined as the estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties that reflects the respective interests of those parties.

The essential difference between Fair Value and Market Value is the parties are identified rather than hypothetical. It follows that Fair Rent differs to the extent the parties are identified.

Rental Concepts (Cont'd)

Fair Rent (Cont'd)

Ricciardello v Caltex Oil (Australia) Pty Ltd [1991] ANZ Conv R 445 at 449-450

In the former case (Market Rent) the rent is determined on the basis of the rent the premises would bring on the open market having regard to the rents paid for comparable premises in the same or a comparable area. The test is objective.

In the latter case (Fair Rent) the rent is determined on the basis of the rent which it would be fair for the particular landlord and the particular tenant to have agreed under the lease in question having regard to all the circumstances relevant to any negotiations between them from the rent review date.

Reasonable Rent

Reasonable Rent has been subject to different interpretation.

Ponsford v HMS Aerosols Ltd [1979] AC 63. House of Lords Viscount Dilhorne said at 77

"The rent payable by the lessee will of course be rent for the demised premises but as I see it the task of the surveyor is not to assess what would be a reasonable rent for the tenants to pay but what is a reasonable rent for the premises. That, when assessed, is payable by the tenants. If the effect of the improvements on the rent payable is to be disregarded, then the lessee's will not be paying a reasonable rent for the demised premises but a reasonable rent for the demised premises less the improvements; but it is recognised that the improvements are part of the demised premises. If the effect on the rent of the improvements is to be disregarded then in my opinion an express opinion is required to effect that." [Emphasis Added].

Full Court of the Supreme Court of Victoria in *Email v Robert Bray (Langwarrin) Pty Ltd* [1984] VR 16 Distinguishes from *Ponsford* which was 'Reasonable Rent for the Premises'. Court held the complex would not be easy to let on the open market but were premises that had 'special value' to the lessee.

"The expression 'reasonable rental' is not a term of art. It has no fixed or precise meaning. It is of quite different character from 'market rental'..... a rental which the valuer considers is reasonable as between the parties to the lease having regard to all circumstances which the valuer considers are relevant.....a rent which was reasonable in the light of all relevant circumstances including particular circumstances of the lessee."

Email referred to the English Court of Appeal in *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077.

Fair Market Rent

Fair Market Rent is simply a hybrid of Fair Rent & Market Rent even though the two terms are mutually exclusive. Market Rent assumes hypothetical parties and Fair Rent Actual parties. The interpretation would depend on the other lease wording explaining the intention of the parties. I tend think in isolation of further explanation the term would mean actual parties based on market rents.

Lease Costs

There are four areas of costs that are faced by parties to the lease.

1. Lease Establishment
2. Obligations Under the Lease
3. Market Rent Reviews
4. Lease Problems

Lease Establishment

The Lease Establishment costs are readily identifiable. Generally the costs are limited to consultancy and registration / stamp duty. It is only on rare occasions that the costs exclude Legal and Surveyor. The Landlord is usually up for marketing costs and sometimes the tenant engages a consultant to identify appropriate accommodation and negotiate the lease terms and conditions.

Costs also extend to Accountancy and Valuation. These latter two costs unfortunately are often forgone to the ultimate expense of the party concerned.

Retail leases subject to RSLA potentially have greater establishment costs.

S.22 D (1) Retail Shop Leases Act 1994 ("RSLA") provides:

A prospective lessee of a retail shop who is not a major lessee must, before entering into the lease, give the lessor—

- (a) *a financial advice report; and*
- (b) *a legal advice report.*

financial advice report means a report—

- (a) *in the approved form; and*
- (b) *containing the particulars prescribed under a regulation; and*
- (c) *signed by a person who is a qualified accountant.*

legal advice report means a report—

- (a) *in the approved form; and*
- (b) *signed by a lawyer; and*
- (c) *stating that the lawyer has given the prospective lessee of a retail shop, or the prospective assignee of a retail shop lease, seeking the report, advice about the legal meaning and effect of—*
 - (i) *the terms and conditions of the proposed lease, or the lease the subject of the proposed assignment; and*
 - (ii) *the disclosure statement given to the person under part 5; and*
- (d) *containing the other particulars prescribed under a regulation.*

Part 3 of the Regulations set out the detail for the financial advice and legal advice reports. Section 7 details the Financial Advice Report

Lease Establishment (Cont'd)

Financial Advice Report

The prescribed particulars for a financial advice report given by a prospective lessee or prospective assignee under section 22D of the Act are the following—

- (a) the name of the qualified accountant signing the report;
- (b) the name of the prospective lessee or prospective assignee;
- (c) the name of the lessor;
- (d) the address of the retail shop;
- (e) a statement that the accountant has given advice about the prospective lessee or prospective assignee's financial rights and obligations under the lease including—
 - (i) the rent, outgoings and other payments; and
 - (ii) the potential financial impact of the rent review; and
 - (iii) the fact that the operation of the business is restricted by the term of the lease;
- (f) a statement that the accountant has advised the prospective lessee or prospective assignee to obtain further professional advice including advice about the following—
 - (i) the volume of sales required to meet all costs of carrying on the business including capital costs, loan repayments and salary for the business operator;
 - (ii) appropriate accounting and financial reporting systems;
 - (iii) cash flow forecasting;
 - (iv) sales budget forecasting;
 - (v) taxation requirements;
- (g) a declaration by the accountant about any relationship, whether professional or personal, that the accountant has with the lessor;
- (h) a statement by the prospective lessee or prospective assignee about receiving and understanding the advice mentioned in the report.

As can be seen the primary advice in regard to the lease is limited to subsection "e". The Tenant however should obtain further advice in regard to the matters detailed in subsection "f". The prudent Tenant will seek this advice and this whilst involving substantial funds is warranted expenditure.

The taxation obligations not only apply to the rent and outgoings but as discussed earlier can apply to incentives.

Legal Advice Report

Section 8 of the Regulations details the requirements for the Legal Advice Report

The prescribed particulars for a legal advice report given by a prospective lessee or prospective assignee under section 22D of the Act are the following—

- (a) the name of the lawyer signing the report;
- (b) the name of the prospective lessee or prospective assignee;
- (c) the name of the lessor;
- (d) the address of the retail shop;
- (e) a statement that the lawyer has given advice about the following matters in relation to the lease—
 - (i) the rent, outgoings and other payments and how they are calculated;
 - (ii) the rent review;
 - (iii) the liability to contribute to outgoings;

Lease Establishment (Cont'd)

Legal Advice Report (Cont'd)

- (iv) *the term of the lease;*
- (v) *any special or unusual terms or conditions of the lease;*
- (vi) *whether a repayable bond or guarantee is required under the lease;*
- (vii) *whether the lease contains an option to renew;*
- (viii) *if the lease does not contain an option to renew—any rights the lessee or assignee may have to extend the lease;*
- (ix) *the obligations on all parties at the end of the lease;*
- (x) *any terms or conditions of the lease that allow the proposed lessee or proposed assignee's business to be relocated to other premises;*
- (xi) *the uses permitted for the retail shop premises under the lease;*
- (xii) *the lessee's right, under section 45 of the Act or the lease, to deal with the lease and assets of the business intended to be carried on in the retail shop;*
- (xiii) *the consequences of a breach of a term or condition of the lease;*
- (f) *a statement that the lawyer has advised the prospective lessee or prospective assignee to obtain further professional advice including advice about the following—*
 - (i) *town planning matters, including the licences or permits required to carry on the business intended in the retail shop;*
 - (ii) *building laws, including the appropriate classification under the Building Act 1975 to carry on the business intended in the retail shop;*
 - (iii) *the statutory approvals required to carry on a retail business of the type intended;*
 - (iv) *financial advice about the operation of the retail business intended to be carried on;*
- (g) *a statement that the lawyer is not providing advice about, or making comment on, the following—*
 - (i) *the financial viability of the business intended to be carried on;*
 - (ii) *the ability of the prospective lessee or prospective assignee to meet the financial commitments under the lease;*
 - (iii) *accounting requirements or taxation implications of entering into the lease;*
- (h) *a declaration by the lawyer about any relationship, whether professional or personal, that the lawyer has with the lessor;*
- (i) *a statement by the prospective lessee or prospective assignee about receiving and understanding the advice mentioned in the report.*

Valuation Expertise

The prudent Tenant will engage a valuer to advise whether the proposed rent reflects market. The Valuer however should be consulted on the rent review clause and whether the outgoings clauses will work. There are too many instances where the outgoings clauses are ambiguous or will cause problems in the future particularly at review dates.

Where the lease provides for recovery of outgoings over a base date leases rarely state the actual base year outgoings. As a Determining Valuer I regularly have difficulties in obtaining the details of the base year outgoings, particularly where the building has sold in the interim.

The valuer should also be consulted to identify unexpected results from the rent review as per the example I provided earlier.

Lease Establishment (Cont'd)

Valuation Expertise (Cont'd)

Where instructions are given to a valuer to identify the market rent for the purpose of establishing the negotiation parameters this should be done early. The document provided by the valuer does not need to be a valuation as is normally expected of the term. The document should requested should more be of advice of the market parameters, the negotiating strengths of each party and the pitfalls that may await at review time.

Obligations Under the Lease

I am only going to concentrate on rental and outgoings as they are the highest obligation.

The best method of comparison rental between properties is the Gross Effective Rent. I have already discussed the issues surrounding the effective rent and the potential to make comparison using effective rent where there are consistent incentives. Due to the unlimited range of negotiated solutions for leases of similar premises it is unusual that consistent incentives are available in the evidence sample.

The same is true for outgoings. Where there is consistent outgoings other methods can be used but the level of outgoings can vary significantly between apparently similar properties.

Outgoings can form a large part of the rent. A recent strata office I looked at had the following rental details:

Area	250	sq m	
Passing Gross Rent	122,750	(\$491) psm	
Gross Market Rent	93,750	(\$375) psm	76.4%
Outgoings	<u>61,776</u>	(\$247) psm	
Net Market Rent	31,974	\$128 psm	
Gross Effective Rent	75,000	(\$300) psm	80.0%
Outgoings	<u>61,776</u>	(\$247)	
Net Effective Mkt Rent	13,224	(\$53) psm	

I am not sure of the reason the reason the passing rent was so far above market. Nevertheless it is obvious that this rent should not be used for comparison purposes.

The market rent is the figure normally used for capitalisation purposes. It is 76.4% of the passing rental. The Net Market Rent would normally be used for valuation purposes. Naturally adjustment needs to be made for the passing rent, whether above or below market for the period up to the date of the reversion.

Obligations Under the Lease (Cont'd)

When comparing rentals however incentives are not necessarily constant, just as the passing gross rent is not consistent with expectations. The Gross Effective Rent is derived from analysis of comparable evidence. Part of that analysis is the determination of the level of incentive then prevalent in the market. Therefore the Gross Market Rent technically should be a derivation of the Gross Effective Rent and not the reverse.

It is obvious that the Net Effective Rent should not be used to determine the market rent. It is rare however that outgoings for offices exceed \$150 per sq m. In this instance they are near \$100 per sq m higher than the normal market maximum. The sensitivity of Net Effective Rent can be seen with a 20% reduction in the Gross Effective Rent is a reduction of about 60% in the Net Effective Rent.

This leaves the Gross Effective Rent as the best method for making comparison of rentals.

Market Rent Reviews

There are two elements to a market rental review.

1. The Review Mechanism
 - Give the parties ample time to negotiate the rent.
 - If valuers are to be appointed from each side put a time limitation but ensure it can be extended.
 - Are the valuers to be appointed as experts or negotiators / advocates.
 - Ensure there is a remedy for all potential outcomes in the process.
 - If the matter is to be then determined by a single valuer:
 - Is the determining valuer to act as an Expert or Arbitrator
 - Ensure the valuer has reasonable time (at least 28 days from the date of the appointment).
 - Consider whether the valuer is to be provided with submissions by the parties and whether those submissions need to be considered.
 - Ensure the valuer is provided with all information necessary to complete the determination. Leases rarely detail the obligations on the parties to the lease in providing information to the valuer.
 - Parties to the lease should be obligated to accept reasonable terms and conditions required by the valuer including hold harmless provisions.
 - Consider specifying an ADR if the determination is not in accordance with the instructions under the lease.
2. The Review Process
 - Decide the type of review (Market Rent, Market Rental Value, Fair Rent,)
 - Simple Amplification of the desired outcome should be detailed.
 - Do not over specify and/or complicate the amplification.

Time Limitations on Parties and Cost of Determining Valuer

There should be no limitation on the period in which the parties can negotiate an agreement. The review process is costly and if possible the rent agreed. It is unlikely a determining valuer will charge less than \$5,000 even if the tenancy is small and there is limited difference. On more than one occasion I have been appointed to determine a rental of rents in the area of \$20,000 per annum and the parties are close. It seems many determining valuers are appointed due to what is best described as the pigheaded attitudes of the parties.

Market Rent Reviews (Cont'd)

Time Limitations on Valuers

I was recently involved in a review where the valuers did not achieve agreement within the stipulated time frame. In fact there was confusion over the appointment of one of the valuers. There was no provision in the lease for the period to be extended but the matter should proceed straight to determination. One of the parties has decided that the rent they deemed to be market is the new rent for the lease. The Valuers are still trying to explain to the Parties that they believe an agreement can be reached albeit one of the valuers has been instructed not to proceed further.

Expert or Arbitrator

Generally speaking to minimise costs the determining valuer should be appointed as an expert rather than arbitrator. The arbitration process is far more complicated and is weighted in favour of the party with the stronger negotiating position. This can often mean the successful submission is prepared by a consultant with the most expertise. It does not necessarily achieve a just result as the determining valuer's decision is limited to the submissions.

Negotiator or Expert

The Code of Professional Conduct prevents a valuer acting as an Expert and Advocate in the same matter. In my opinion a submission to a determining valuer can only be described as advocacy. Therefore if a valuer appointed by one party, acting as an expert in the first part of a determination cannot make a submission to a determining valuer. It is important that the determining valuer is provided with relevant valuation argument from a professional in order to understand the argument between the parties. Therefore the valuer for each side should initially be appointed as a negotiator rather than an expert in order for a professional submission to be provided.

Frustration of the Review Process

As a determining valuer I am frustrated by parties who do not accept or comply with the terms and conditions of my appointment. As part of my letter to the parties I list about 10 questions detailing information I need. This request often includes request for confidential information which cannot be disclosed. In one such instance one of the parties made complaints to both the Registration Board and the API both of whom supported the fact that if I obtain confidential information I cannot disclose the same. In fact to do so on a retail shop lease would be in breach of RSLA.

It is not uncommon that a party to a lease knowing they will be disadvantaged by a market review to frustrate the review process by not accepting the terms and conditions of the valuer. I am yet however to see lease conditions that compel each party to the lease to accept reasonable requirements of a determining valuer. At the start of the lease neither party knows who will be in that position at the market review - Put the provision in the lease.

Lease Problems (Summary)

Lease problems fall within three groups

1. Poorly drafted or ambiguous lease wording;
2. Rental Determinations that are not as directed by the lease; and
3. Rental Determinations that are not as directed by the lease due to poorly drafted lease wording that needs to be resolved through a dispute mechanism provided in the lease.

This paper has highlighted many pitfalls that have resulted in the three problems highlighted above. When the dispute gets to this stage the costs facing the parties to the lease are substantial.

Under RSLA the ADR provides a cost effective approach to resolving disputes where the Determining Valuer has not completed the Determination in accordance the RSLA. Whilst ADR is cost effective, costs are still substantial. I am currently acting in 3 such cases.

I have on another occasion been requested to advise the lessee on a particular lease of the market rent of a Retail Shop Lease where the lease was so badly drafted it was impossible to determine the market rent. In that instance the cost to the parties was substantial. The lessee was a franchisee of an organisation that had an in-house lawyer however I was appointed to negotiate the changes needed to the lease terms and conditions that would enable the lease to be workable. The Lessor decided they would negotiate directly albeit consulting with the lawyer who was responsible for drafting the initial lease. This combination with initial denial of any problems further increased costs. It took 2 years to reach agreement on a workable lease and 15 minutes to agree the rental.

Drafting a new lease from scratch inherently requires substantial costs. The costs to renegotiate the major changes to this lease were far greater than those initial costs. Appropriate initial drafting would totally avoid these costs that should not be faced by parties to the lease.

In summary any drafting of a lease should ensure the lease terms & conditions:

- where the lease is of a Retail Shop. Comply with RLSA;
- are unambiguous and adopt the terminology that is intended by the parties;
- provides a review mechanism that is workable by detailing a remedy for all potential outcomes;
- ensures there is no impediment to the appointment of the determining valuer;
- ensures the determining valuer is provided with all information necessary to complete the determination.