IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No.M143 of 2016

ON APPEAL FROM THE COURT OF APPEAL
OF THE SUPREME COURT OF VICTORIA

BETWEEN:

10 **ECOSSE PROPERTY HOLDINGS PTY LTD**

Appellant

and

GEE DEE NOMINEES PTY LTD

Respondent

APPELLANT'S SUBMISSIONS

20 **Part I:**

I certify that this submission is in a form suitable for publication on the internet.

Part II:

The issues the Appellant contends that the appeal presents are -

1. In construing the lease between the parties (or indeed in construing any commercial or mercantile document in any other case), whether the Court should have regard to and give effect to the contracting parties' mutual subjective intention in relation to the purpose and operation of the agreement where such intention is clearly expressed within the lease itself.

2. The factors and considerations (if any) which differentiate the extent to which a Court should have regard to contracting parties' intrinsic mutual subjective intention in relation to the purpose and operation of their agreement compared with the extent to which a Court should have regard to contracting parties' extrinsic mutual subjective intention in relation to the purpose and operation of their agreement.

3. In construing the lease (or indeed in construing any commercial or mercantile document in any other case) where it is properly found that an ambiguity exists (here, that clause 4 of the lease was ambiguous as to whether the lessor or the lessee should pay outgoings levied upon or otherwise payable by the lessor), whether the Court should adopt a construction which is commercially absurd when the alternative construction is commercially sound.

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Dated: 4 November 2016
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4. In construing the lease (or indeed any commercial or mercantile document in any other case) where it is found that an ambiguity exists (here, that clause 4 of the lease was ambiguous as to whether the lessor or the lessee should pay outgoings levied upon or otherwise payable by the lessor), whether the Court should adopt a construction which is relatively capricious, unreasonable and unjust when the alternative construction is open and reasonable.

5. Whether clause 4 of the lease, on its proper construction, provides that the lessee should pay all rates, taxes, assessments and outgoings whatsoever in respect of the leased land regardless whether such imposts are levied on the lessor or the lessee.

Part III:

I certify that the appellant has considered whether any notice should be given in compliance with section 78B of the Judiciary Act 1903 and considers that no such notice should be given.

Part IV:

The citation of the trial judgment is [2014] VSC 479.
The citation of the appeal judgment is [2016] VSCA 23.

Part V:

Croft J made the following relevant findings of fact at trial -

1. The contracting parties expressed an intention within the lease that the lessor wished to sell and the lessee wished to purchase the leased land for a consideration of $70,000.[1]

2. The contracting parties were precluded from doing so because of planning restrictions and because the leased land was part of a larger parcel of land known as Lot C which had not then been subdivided.[2]

3. The contracting parties therefore sought to achieve as nearly as they practicably could, what they could not achieve directly by a sale transaction[3] by making amendments to a standard form instrument of lease and did so –

   (i) by the grant of a 99 year lease for a rental of $70,000, paid in advance;

   (ii) by deleting the obligation of the lessee to repair and maintain the land during the term of the lease;

   (iii) by deleting the provision entitling the lessor to enter onto the land and examine the condition thereof;

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1 Paragraph 20 of the Trial Judgment.

2 Paragraphs 19, 20, 39 and 40 of the Trial Judgment. The leased land was part of a much larger area of land owned by Westmelton (Vic) Pty. Ltd.

(iv) by deleting the provision requiring the lessee to obtain the lessor's consent before assigning, transferring or sub-letting the land;

(v) by adding a provision entitling the lessee to assign, transfer, sub-let or grant licences in respect of the land without obtaining the consent of the lessor;

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(vi) by adding a provision that the lessor have no power of early determination of the lease or any power or right of re-entry whatsoever regardless whether or not the lessee is in breach of the lease; and

(vii) by adding a provision entitling the lessee to repair rebuild or replace any dwellings, out-houses or other improvements and to build further dwellings and out-houses on the land whether for personal, commercial purposes or otherwise without obtaining the consent of the lessor.

4. McLeish JA (with whom Santamaria JA agreed) made the following additional findings of fact –

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4.1 A reasonable person in the position of the parties is to be taken as knowing that -

(i) the land in question was not at the time that the lease was entered into able to be sold by way of freehold;[4]

(ii) the original landlord received, as the payment of rent, the sum of $70,000 at the commencement of the lease;[5] and

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(iii) $70,000 was more or less equivalent to the market freehold value of the leased land.[6]

4.2 The parties had, before entering into the lease, intended to enter into a freehold sale as expressly stated in clause 13.[7]

5. It was common ground on the hearing of the appeal and was accepted by each member of the Court –

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(i) that clause 4 is ambiguous and can be read as imposing on the lessee an obligation to pay all rates and outgoings or it can be read as confining that obligation to those imposts which are payable by the tenant;[8] and

(ii) that had it not been for restrictions in the applicable planning scheme, Lot C would have been subdivided and the leased land would have been sold to Mr. Morris rather than leased to him.[9]

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4 Paragraph 89 sub-paragraph 1 of the Appeal Judgment.
5 Paragraph 89 sub-paragraph 2 of the Appeal Judgment.
6 Paragraph 89 sub-paragraph 2 of the Appeal Judgment.
7 Paragraph 112 of the Appeal Judgment.
8 Paragraphs 3 and 103 of the Appeal Judgment.
9 Paragraph 44 of the judgment of Kyrou JA.

Part VI:

1. The appeal from the judgment of Croft J should have been dismissed, substantially for the reasons given by Kyrou JA which, in summary, are –

1.1 The intention of the contracting parties, under clause 13 of the lease, was to recreate, so far as was possible within the confines of a lease, the conditions which would have obtained under an absolute conveyance of property. Informed by that intention, the Appellant's ("Ecosse") construction of clause 4 of the lease (whereby the lessee pays all imposts just as a purchaser would bear all imposts under an absolute conveyance) is to be preferred.

> "In my opinion, when the Lease - including deleted words - is read as a whole, the respondent's preferred construction becomes very persuasive. In this context the new cl 13 is very significant because it sets out the original contracting parties' intention in entering into the Lease. Although the phrase 'it was the intention' is couched in the past tense, when it is read with the phrase 'and as a result thereof', it is clear that the parties entered into the pro forma lease agreement, as modified by them, in order to give effect to the intention stated in cl 13. Read in this manner, cl 13 in substance states that, as the parties could not give effect to their intention to enter into a sale of the Leased Land for $70,000, they entered into a 99 year lease for prepaid rental of $70,000 in order to achieve indirectly through a lease transaction what they could not achieve directly through a sale transaction."[10]

> "...the intention in cl 13 of the Lease.... is to place the Lessee as close as possible to the position of an owner/occupier of the Leased Land within the constraints of a lease transaction.[11]

1.2 Ecosse's construction of clause 4 of the lease is to be preferred because the benefits conferred on the lessee, as reflected in its use and enjoyment of the leased land, were greater than available under a conventional lease and approximated the use and enjoyment of land by an owner -

> "The deletions referred to at [30] above and the insertions referred to at [31] above mean that the Lessee's use and enjoyment of the Leased Land far exceeds the use and enjoyment available to a lessee under a conventional lease, and approximates the use and enjoyment of an owner of the freehold title who occupies the relevant land. In this context, the respondent's preferred construction of cl 4 makes more sense than that of the appellant. This is because, consistently with the Lease conferring on the Lessee rights over the Leased Land which approximate those of an owner/occupier, the Lease also imposes on the Lessee the obligation for the payment of Imposts to which an owner/occupier is normally subject."[12]

1.3 The nature of the land and the fact that it was held for the purpose of subdivision and sale make it more likely that parties to the lease intended clause 4 to impose all imposts on the lessee.

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[10] Paragraph 29 of the judgment of Kyrou JA.
[11] Paragraph 33 of the judgment of Kyrou JA.
[12] Paragraph 32 of the judgment of Kyrou JA.

"The fact that Westmelton held the land in Lot C for the purpose of subdivision and sale rather than for ongoing primary production renders it more likely that, when it entered into the Lease with Mr Morris as a substitute for the proposed sale, the parties intended that liability for Imposts be shifted from Westmelton to Mr Morris. This is because, as Westmelton was seeking to divest itself of the land, it would not have wanted to be subject to ongoing liabilities in relation to the land."[13]

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"It follows that the nature of the Leased Land and its relationship with Lot C favour the respondent's preferred construction of cl 4."[14]

1.4 The fact that the original lessor was a company in receivership makes it more likely that the parties to the lease intended clause 4 to impose all imposts on the lessee.

"The fact that Westmelton was in receivership at the time the Lease was executed also favours the respondent's preferred construction of cl 4. This is because a receiver's duty is to act promptly to take control of the secured property and to take all reasonable care to sell such of that property as is required to pay the secured debt for not less than the market price of the property. Where, as in the present case, part of the secured property cannot be sold, it is understandable that a receiver and manager might agree to a long-term lease involving prepayment of the entire rent in substitution for a proposed sale. However, it would not make any commercial sense for a receiver and manager of a company who enters into such a substituted transaction to burden the company - which would not have been in the best financial health - with long-term obligations to pay Imposts pursuant to a bespoke lease in circumstances where those obligations would not apply if a pro forma lease were entered into. It would make more commercial sense to amend the pro forma lease to ensure that only the Lessee is liable to pay Imposts."[15]

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1.5 The statutory scheme for the payment of imposts that was in force in 1988 when the lease was executed favours Ecosse's preferred construction of clause 4.[16]

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1.6 Ecosse's preferred construction of clause 4 was commercially sound whereas the Respondent's ("Gee Dee") preferred construction of clause 4 was commercially unsound.

"In accordance with the principles in Woodside, the meaning of cl 4 must be determined by reference to what a reasonable businessperson would have understood it to mean and so as to avoid commercial nonsense or inconvenience. An understanding of the genesis of the transaction and its context facilitates an appreciation of the commercial purpose which in turn is highly relevant to what a reasonable businessperson would understand cl 4 to mean."[17]

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13 Paragraph 45 of the judgment of Kyrou JA.

14 Paragraph 46 of the judgment of Kyrou JA.

15 Paragraph 47 of the judgment of Kyrou JA.

16 Paragraph 67 of the judgment of Kyrou JA. His Honour's analysis of the provisions and reasons for this conclusion are set out in paragraphs 50 to 66 inclusive of His Honour's judgment.

17 Paragraph 40 of the judgment of Kyrou JA.

> "When the Lease is read as a whole, it is readily apparent that the deletions and insertions to the pro forma lease document were made with the aim of conferring on Mr Morris key attributes of an owner/occupier. In these circumstances, it does not make any commercial sense for Westmelton to agree to amendments to cl 4 that would have the effect of increasing its liability to pay Imposts in respect of the Leased Land from that which would have applied if cl 4 were left in its original form. It must follow that a reasonable businessperson would have understood cl 4 as imposing on Mr Morris an obligation to pay all Imposts in respect of the Leased Land during the term of the Lease irrespective of whether, from the point of view of the third party imposing them, they are payable either by Westmelton or Mr Morris. Such a construction would avoid the Lease making commercial nonsense and working commercial inconvenience."[18]

> "...Having regard to the abovementioned intention of the original contracting parties, the appellant's preferred construction of cl 4 does not make commercial sense. The reason for this is that the Lessor would be obliged to pay land tax for 99 years in respect of land that it would not have a right to use or control during that period."[19]

2. The judgments of the majority in the Court of Appeal fell into error for the following reasons –

2.1 The acceptance by the majority of the conclusion reached by the Trial Judge that clause 4 was ambiguous[20] ought to have led to the application of the principle that a construction that accords with commercial sense should be preferred over the opposite. "If language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, "even though the construction adopted is not the most obvious or the most grammatically accurate....""[21]

2.2 Another principle of construction which it is submitted was effectively disregarded by the majority is the principle that requires attention to be paid to reading the contract as a whole and having regard to the coherence and consistency of all of the contract terms when trying to give meaning to the words used in the provision under consideration.[22] The whole of the instrument has to be considered "and the words of every clause must if possible be construed so as to render them all harmonious one with another."[23]

It is not legitimate to achieve coherence and consistency by ignoring other relevant provisions - especially if those provisions in themselves have no effective ambiguity.

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[18] Paragraph 41 of the judgment of Kyrou JA.
[19] Paragraph 66 of the judgment of Kyrou JA.
[20] See Part V paragraph 5 (i) above.
[21] *Australian Broadcasting Commission v Australasian Performing Right Association Limited* (1973) 129 CLR 99 at 109 per Gibbs J at [3].
[22] Ibid
[23] *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1925) 35 CLR 449 at 455 per Isaacs and Rich JJ. See also *Re Strand Music Hall Co Ltd* (1865) 35 Beav 153 at 159; 55 ER 853 at 856.

Clause 13 is such a provision. It was negotiated and included as a special condition and has to be understood and given its proper meaning and effect when seeking to resolve the ambiguity which has been found to exist in the text of clause 4.

Given the genesis of the contract (which was common ground) and the stated purpose, it is illogical to consider that the amendments made to clause 4 were devised so as to achieve the opposite effect.

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2.3 McLeish JA observed that the thwarted intention of the parties to execute a sale and purchase of the land expressed in clause 13 explains the term of the lease and the advance payment of rental by reference to that intention.[24] His Honour was, with respect, correct in that observation. However His Honour failed to observe that clause 13 also (and in the same way) explains why the parties "agreed to enter into this Lease" (with all its terms). Interestingly McLeish JA referred to other aspects of the lease as documented that were explained by this intention.[25] Again, we agree with McLeish JA on this point.

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The statement of the parties' intention in clause 13 of the lease was not inserted for merely historical interest. While the first phrases explain the genesis of the lease, the passages commencing "thereby" and "as a result of" signify not a wistful recollection of some past wish but a statement of what is being done in the present - and in a way which explains what is being done in the present.

Although the phrase 'it was the intention' is couched in the past tense, when it is read with the phrase 'and as a result thereof', it is clear that the parties entered into the pro forma lease agreement, as modified by them, in order to give effect to the intention stated in clause 13. Namely that, as the parties could not give effect to their intention to enter into a sale of the leased land for $70,000, they entered into a 99 year lease for prepaid rental of $70,000 in order to achieve indirectly through a lease transaction what they could not achieve directly through a sale transaction.

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2.4 In the light of the parties' intentions and purpose in preparing the form of lease as explained in clause 13 and indeed having regard to the matters of common ground referred to at Part V paragraph 5 above, the amendments being made to clause 4 would naturally have been expected to impose a greater burden on the lessee than that which would have subsisted under the unamended clause 4. Similarly, the amendments being made would, in light of clause 13, naturally be expected to impose a lesser burden on the lessor than the clause in its unamended form would have imposed.

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Indeed, further, as Kyrou JA pointed out:

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> "....As the amendments to the pro forma lease document were made with a view to achieving the intention set out in cl 13 - that is, to place the Lessee closer to the position of an owner/occupier - one would

24 Paragraph [115] of the Appeal Judgment.
25 Paragraph [112] of the Appeal Judgment.

> have expected the amendments to cl 4 to impose a greater burden on the Lessee rather than the Lessor to pay Imposts that became payable in respect of the Leased Land. Having regard to the intention in cl 13, it does not make any commercial sense for the amended final version of cl 4 to be construed as having the opposite effect of imposing a lesser burden on the Lessee and a correspondingly greater burden on the Lessor in relation to such Imposts."[26]

2.5 The majority also seems to have considered that the Trial Judge found that the purpose of the lease was to effect a sale.[27] That is not the case and the majority seems to have misunderstood the Trial Judge's conclusions in this respect. That purpose was not to effect a freehold sale by executing a lease. It was to achieve in practical terms, as close an outcome as was possible.[28]

2.6 The majority observed [29] that the lease contained no option to purchase at its conclusion and contained no right of renewal nor did it provide any rights in the lessor in respect of improvements or other fixtures at the conclusion of the lease. It was reasoned by the majority that these matters could have been expected to have been addressed in a lease seeking to achieve, in effect, a sale and purchase under another name.

As Kyrou J explained, however,[30] while the inclusion in the lease of an option to renew for another 99 years for nominal consideration would have brought the position of the lessee closer to the position of an owner/occupier, the absence of such an option does not undermine the lessor's preferred construction of clause 4 of the lease.

Furthermore, an option to purchase and an option to renew are devices usually employed where a lessee does not yet want to commit to a property for a long period of time and wishes to defer such a decision to a future time. In contrast, the contracting parties in this case were committing to such a long lease that the issue of purchase or renewal was so far distant it may never have even occurred to them as it otherwise might were there a reluctance to make such a long term commitment.

There are many possible reasons why such options were not added to the lease, including - in common with other features of the lease - inadvertence. Speculation about the reasons would not assist in resolving the issue of construction.

2.7 The majority of the Court of Appeal said[31] that the lease contains provisions which are not explicable as effecting the parties' intention to achieve a transaction approximating a freehold sale. They referred to four provisions. The lessee is obliged to keep the land free from vermin and noxious weeds (clause 6) and not to damage timber or trees except for fencing and domestic purposes (clause 7). The lessee

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26 Paragraph 39 of the judgment of Kyrou JA.

27 The penultimate sentence of paragraph 83 of the Appeal Judgment and the last two sentences of paragraph 84 of the Appeal Judgment.

28 Compare paragraphs 20, 39 and 40 of the Trial Judgment.

29 Paragraph 116 of the Appeal Judgment.

30 Paragraph 71 of the Appeal Judgment)

31 Paragraph 113 of the Appeal Judgment.

is required to deliver up possession of the land in good repair and condition at the end of the term (clause 10). The lessee is further required not to commit any nuisance on the land or do anything that might prejudice or increase the cost of any insurance of the land (clause 12).

Ecosse submits that contrary to the conclusion reached by the majority, each of these provisions is explicable by the reservation of the surrounding land and by the inevitable fact that the mode used by the parties to achieve their objective as best as they could, was in the form of a very long lease.

As Kyrou JA observed[32] –

> *"... the retention of those clauses is explicable by the fact that the Lessor retained all the land in Lot C which adjoins the Leased Land. Compliance with the Lessee's covenants in those clauses had the effect of protecting the Lessor's interest in the land in Lot C and not merely its reversion in respect of the Leased Land."*

2.8 The deletion of the word "landlord" was critical to the reasoning of the majority.[33] But the deletion of that word is neutral as between the two readings of the clause that Croft J and all members of the Court of Appeal found were open.

If the ambiguity is resolved in favour of Ecosse's interpretation the word "landlord" must go because otherwise the person required to make the payment would be both the landlord and the tenant, which would be confusing.

On Gee Dee's interpretation the word "landlord" must go so as to reinforce that the tenant is to pay only those imposts which it is, by virtue of other obligations, liable to pay.

The deletion of the words "or landlord" is not relevant let alone critical to the exercise of construction. It is a necessary consequence of the intended effect ascribed to the clause by each party.

2.9 In considering whether commercial common sense supported Gee Dee's construction of clause 4, the majority of the Court of Appeal stated[34] –

> *"It could not be assumed, and there was no evidence, that the burden of rates, taxes, assessments or outgoings that might be imposed on the landlord over the term of the lease transformed that asset into a liability so that the arrangement made no commercial sense. The stated intention of the parties to execute a freehold transfer (cl 13) had not been able to be achieved and the language of the lease should not be strained to reach such an outcome."*

Although the Trial Judge deferred the case in relation to quantum, the Trial Judge did have before him evidence as to the quantum of the imposts under consideration by the Court. In his judgment, His

[32] Paragraph 34 of the Appeal Judgment.
[33] Paragraphs 124 and 125 of the Appeal Judgment.
[34] Paragraph 107 of the Appeal Judgment.

Honour[35] referred specifically to the document prepared under the supervision of Mr. Iacovangelo, Ecosse's accountant, which summarised outstanding rates and land tax liability and was accepted into evidence.

That document was before the Court of Appeal at Tab D page 155 of the Appeal Book. It claimed a sum of $288,422.05 for arrears of council rates and land tax. In the year ended 30 June, 2015 council rates amounted to $9,968.57 and in the year ended 31 December, 2013 land tax amounted to $40,976.22.

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The relevant evidence in relation to that document appears at page 30 lines 21 to 29 in the transcript of the proceeding before the Trial Judge which was also before the Court of Appeal and comprised Tab C of the Appeal Book.

It should have been clear to the majority of the Court of Appeal, as it was to the Trial Judge, that the monetary consequences of the proceeding involved "clearly millions and millions of dollars" (see page 19 line 25 of the transcript comprising Tab C of the Appeal Book).

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At the time the lease was negotiated, the parties contemplated the incidence of land tax and other statutory imposts. It is and always would have been self-evident that exercise of the right of the lessee to build on the land for commercial purposes would lead to an increase in the statutory charges and the rateable value of the leased land.

2.10 At trial, Gee Dee pleaded and argued that the words "payable by" in clause 4 was intended to be and should be understood as "levied on." Although the pleaded case on this point was abandoned on appeal, it remains right to say that the interpretation sought to be given to the clause by Gee Dee does in effect require the words "payable by" to be read as meaning "levied on".

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This argument was rejected by Croft J [36] -

> "The defendant in its submissions focuses on the phrase 'payable by the tenant' reading it, in effect, as meaning 'levied on the tenant'. In my view, as contended by the plaintiff, the expressions bear significantly different meanings. More particularly, the word 'levied' denotes something different from 'payable'. The former, in my view, is a word which contemplates payment both as a result of some requirement for payment made by a governmental authority of some kind with authority based in statute to require payment. This is in contrast to an obligation to make payment of a sum levied on another person arising under a contractual (or lease) requirement."

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It is submitted that the reasoning of Croft J remains relevant and, it is submitted, correct.

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[35] At paragraph 7 of the Trial Judgment.

[36] Paragraph 35 of the Trial Judgment.

3. **Construction Issues – Role of statement of actual intent**

3.1 As submitted above, in their approach to the interpretation of clause 4 the majority judges in the Court of Appeal failed to give proper regard to two relevant principles of construction that are applicable to the interpretation of this clause (as referred to in paragraphs 2.1 and 2.2 above), namely (1) that a construction which produces a result that is uncommercial should be avoided; and (2) that the provisions of the contract must be read as a whole and so as to give full effect to all of the provisions.

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3.2 The status and effect of the mutual statement of subjective intent, or the statement of mutual subjective intent, expressed in clause 13 is a further matter for consideration in relation to the interpretation of this contract (and specifically of clause 4).

It is submitted that such a provision gives the parties' joint instruction as to the approach to be taken when interpreting the clause and such an instruction should have predominant effect.

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3.3 Further, it identifies and conclusively determines the genesis and purpose of the agreement for any relevant purpose to which that concept may be put. Where parties have included such a statement of their mutual subjective intention in their contract, there is no need to consider surrounding circumstances.

3.4 On one view this may be thought an inroad into the objective theory of contract. But if so it is a necessary one as the Court may not disregard the operative terms of the contract. It is submitted however that the reasons underpinning the objective theory of contract that require rejection of extrinsic statements of actual intent have nothing to say in relation to a statement articulated by the parties in the contract.

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3.5 A prior extrinsic statement of mutual intent is inadmissible because the parties' intentions may have changed between such a statement and their formalisation of their accord by an executed document. A subsequent extrinsic statement of mutual intent is inadmissible because it is inevitably self-serving thus the parties' subjective intention must be inferred from objective facts and surrounding circumstances.

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However neither of the above vices exists in the case of an intrinsic statement of mutual intention as that statement is contemporaneous with and forms part of the written accord.

3.6 It is submitted that there is no sound justification for failing to recognise and give effect to a plain statement of mutual or joint subjective intent or a joint statement of each party's subjective intent when that statement appears in the contract itself.

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3.7 Whether the task of construction involves a search for the presumed intention of the parties[37] - objectively ascertained – or the meaning

[37] *Australian Broadcasting Commission v Australasian Performing Right Association Limited* (1973) 129 CLR 99 at 109 per Gibbs J at [3]; *Codelfa Construction Pty. Ltd. v State Rail Authority of N.S.W*(1982) 149 CLR 337 at 352 per Mason J at [24].

which a reasonable third party would give to the contract,[38] the evident purpose of a contractual provision such as clause 13 in this lease indicates that it must be given primary importance in any exercise of construction.

3.8 The parties' statement of their intent satisfies the alternative more modern test of interpreting words by reference to what a reasonable third party bystander with knowledge of all relevant objective background facts would understand them to mean.

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As Kyrou JA observed:

> "An understanding of the genesis of the transaction and its context facilitates an appreciation of the commercial purpose which in turn is highly relevant to what a reasonable businessperson would understand cl 4 to mean."[39]

3.9 In this case, the reasonable bystander would know that planning restrictions and the fact that Lot C had not been subdivided, meant that the parties could not give effect to their desire to enter into a sale and purchase transaction under which the burden of all imposts would fall on the purchaser. The reasonable bystander would understand clause 13 as clearly indicating the parties' resolve to recreate by the only logical means then available, namely a long lease, the key features of an absolute conveyance of property. Those key features include the payment of the whole of the rent in advance as a purchase price, the length of the lease, the unfettered use of the land much as a title owner would enjoy the land and the imposition on the lessee of all imposts. Reading, then, clause 4 in conjunction with clause 13, the reasonable bystander would inevitably opt for the construction contended by Ecosse as it is the interpretation which satisfactorily gives effect to the parties' stated intention recorded in clause 13.

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3.10 Clause 13 is not ambiguous. As submitted above, McLeish JA was wrong to read it down as he did.

4. The outcome is so uncommercial that it must be wrong

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4.1 Not every inconvenient or untidy conclusion will establish commercial absurdity. Courts must be appropriately cautious in seeking to divine commercial purpose in an agreement or in finding its opposite - commercial nonsense.

4.2 Sometimes commercial absurdity is on analysis no more than a matter of perspective. It may be merely commercially advantageous for one party. But sometimes very little can be said to support the commercial common sense of a particular approach that may be adventured to the interpretation of an ambiguous clause.

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38 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22]; *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7 at [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37 at [47].

39 Paragraph 40 of the judgment of Kyrou JA.

4.3 This must be such a case, for the majority in the Court of Appeal essayed no explanation of their understanding of the commercial sense of their preferred construction. In contrast, Kyrou J and the Trial Judge explained in some detail the commercial consequences.

4.4 The lease transaction, on Gee Dee's construction of clause 4, was commercially improvident to Ecosse. On the other hand, on Ecosse's construction of clause 4, the transaction made good commercial sense to both parties because the parties recreated the conditions of a sale, paying the agreed consideration on sale, with no residual obligation on the landlord to underwrite the tenant's use and occupation of the land. The payment of rates taxes and other imposts is a natural concomitant of the control which an owner - and in this case the lessee - has over the use and development of land.

As Kyrou JA said –

> "When the Lease is read as a whole, it is readily apparent that the deletions and insertions to the pro forma lease document were made with the aim of conferring on the lessee key attributes of an owner/occupier. In these circumstances, it does not make any commercial sense for the lessor to agree to amendments to clause 4 that would have the effect of increasing its liability to pay imposts in respect of the leased land from that which would have applied if clause 4 were left in its original form. It must follow that a reasonable businessperson would have understood clause 4 as imposing on the lessee an obligation to pay all imposts in respect of the leased land during the term of the lease irrespective of whether, from the point of view of the third party imposing them, they are payable either by the lessor or the lessee. Such a construction would avoid the lease making commercial nonsense and working commercial in convenience."[40]

Croft J reached a similar conclusion concerning the commercial absurdity of clause 4 as contended for by Gee Dee.[41]

4.5 The fundamental absurdity of the construction of clause 4 by the majority of the Court of Appeal is the lack of commerciality in a landlord paying all rates and taxes for 99 years when the property is to be enjoyed by another person where that person has explained that he would have preferred to have purchased the land and so he and his successors and assigns would have had the responsibility for payment of all such rates and taxes themselves.

4.6 In this context it is important to remember that under the terms of the lease the tenant can develop the premises for, among other things, commercial purposes without reference to the landlord. The lessee can thereby magnify the quantum of the imposts and, on the construction found by the majority of the Court of Appeal, the burden of those imposts rests with the party who has no control over them. This outcome cannot have been intended.

[40] Paragraph 41 of the Appeal Judgment.

[41] Paragraphs 25, 32, 33 and 39 of the Trial Judgment.

4.7 Finally, the fact that the original lessor was in receivership at the time the lease was executed favours Ecosse's' preferred construction of clause 4 for the reasons already referred to in paragraph 1.3 of this Part, above.

Part VII:

There are no relevant or applicable constitutional provisions or statutes which bear
10 upon the proper construction of clause 4 of the lease.

Part VIII:

The Orders sought by the Appellant are –

1. The appeal is allowed.

20 2. The orders of the Court of Appeal of the Supreme Court of Victoria made on 4 March, 2016 are set aside and, in their place, it is ordered that –

 (a) The Court declares that the Lease on its proper construction provides that the tenant shall pay all rates, taxes, assessments and outgoings whatsoever in respect of the leased land, including land tax.

 (b) The Respondent pay the Appellant's costs of and incidental to the proceeding including the costs of the trial in the Supreme Court of Victoria and the costs of the appeal to the Court of Appeal of the
30 Supreme Court of Victoria.

 (c) The proceeding otherwise be remitted to the trial judge for orders and directions for the further hearing and disposition of this proceeding on the issue of quantum.

Part IX:

The Appellant estimates that it will require one hour for the presentation of its oral argument.
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