HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

ROYAL BOTANIC GARDENS AND DOMAIN TRUST APPELLANT

AND

SOUTH SYDNEY CITY COUNCIL RESPONDENT

Royal Botanic Gardens and Domain Trust v South Sydney City Council
[2002] HCA 5
14 February 2002
S263/2000

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

J T Gleeson SC with A S Bell for the appellant (instructed by Minter Ellison)

D F Jackson QC with P J Brereton for the respondent (instructed by Pike Pike & Fenwick)

CATCHWORDS

Royal Botanic Gardens and Domain Trust v South Sydney City Council

Contract – Construction of lease – Determination of rent by lessor – Lease provided that, in determining amount of rent payable, lessor "may have regard to" certain additional costs and expenses – Whether lessor limited to consideration of those factors – Use of surrounding circumstances to assist in interpretation of written contract in case of ambiguity – Both parties public bodies operating under particular legislative regimes – Whether statutory powers of lessor relevant to the meaning of the lease and the exercise of the determination of the amount of rent payable under the lease – Transaction of a non-commercial nature and designed to provide a public facility – Whether covenant of good faith and fair dealing implied in contractual dealings.

Precedent – Application of *Codelfa Construction Pty Ltd v State Rail Authority of NSW* – Status in other Australian courts of subsequent English authority.

Construction and interpretation – Contract – Deed of lease – Primary duty to construe language of the lease – Use of surrounding circumstances to assist in interpretation of written contract in case of ambiguity – Both parties public bodies operating under particular legislative regimes – Whether statutory powers of lessor relevant to the construction of the lease – Whether covenant of good faith and fair dealing implied in contractual dealings.

Words and phrases – "may have regard to".

City of Sydney Act 1988 (NSW).
Crown Lands Consolidation Act 1913 (NSW).
Public Parks Act 1912 (NSW).
Public Trusts Act 1897 (NSW).
Domain Leasing Act 1961 (NSW).
Royal Botanic Gardens and Domain Trust Act 1980 (NSW).

1 GLEESON CJ, GAUDRON, McHUGH, GUMMOW AND HAYNE JJ. This appeal from the New South Wales Court of Appeal[1] concerns the construction of a deed ("the Lease") dated 15 May 1976 between, on the one part, four persons collectively identified as "the Trustees of the Domain" and called "the Lessors" and, on the other part, the Council of the City of Sydney called "the Lessee". The Lease was registered under the provisions of the *Registration of Deeds Act* 1897 (NSW) ("the Registration of Deeds Act") on 17 March 1984. By force of subsequent statute, the present appellant, the Royal Botanic Gardens and Domain Trust, stands in the place of the Trustees of the Domain and, where appropriate, in these reasons will be called "the Lessor", and the respondent, South Sydney City Council, stands in the place of the Council of the City of Sydney and, where appropriate, in these reasons will be called "the Lessee".

2 It will be necessary later in these reasons to say something further respecting the legislative antecedents of the Lessor and the Lessee. However, it should be noted at the outset that the Domain referred to is part of that area set apart and identified as such from the earliest days of European settlement. The history of the matter is detailed, particularly by Barton ACJ, in *Williams v Attorney-General for New South Wales*[2]. His Honour points out that at least since the time of Governor Darling portions of the Domain have been reserved for public purposes including recreation[3].

3 The Lease recites the construction by the Council of the City of Sydney with the consent of the then Trustees of the Domain in the strata of the land identified in the Schedule as "the demised land" of a building used for the purpose of accommodating vehicles on payment of a fee or charge and a footway leading thereto. The former is defined as "the Parking Station" and the latter as "the footway". The strata identified as "the demised land" is leased to the Lessee for a term of 50 years commencing some 18 years before the date of the deed, that is to say on 1 May 1958. As will appear, this lapse of time is significant for the issue of construction with which this appeal is concerned.

4 Clause 1 of the Lease, which contains the demise, continues:

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1 *South Sydney Council v Royal Botanic Gardens* [1999] NSWCA 478.

2 (1913) 16 CLR 404 at 417-423.

3 (1913) 16 CLR 404 at 421.

> "YIELDING AND PAYING during and in respect of the first three years of the said term the yearly rent of Two thousand dollars ($2,000.00) AND YIELDING AND PAYING thereof after the first three years of the term and during and in respect of each of the fifteen periods each of three years and the remaining period of two years comprising in all the residue of the said term a yearly rent which shall be determined by the Trustees in respect of each and every such period as is hereinafter in Clause 4(b) provided".

5 The litigation turns on the correct construction of cl 4(b), in particular of par (iv). Clause 4(b) provides:

> "That the yearly rent payable during and in respect of each of the fifteen periods each of three years and the remaining period of two years comprising in all the residue of the said term after the first three years thereof (each of such periods being hereinafter referred to as 'the affected periods') may be determined by the Trustees at the commencement of each of the affected periods and the yearly rent so determined shall be payable during and in respect of the then succeeding three years of the term PROVIDED that –
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> (i) the Trustees shall notify the Lessee of the yearly rent as so determined as soon as practicable after the commencement of each of the affected periods;
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> (ii) any necessary adjustment of rent shall be made between the Trustees and the Lessee on the next day for payment of rent following such notification to the Lessee;
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> (iii) the yearly rent determined by the Trustees as aforesaid shall not in any event be less than Two thousand dollars ($2,000.00); and
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> (iv) in making any such determination the Trustees may have regard to additional costs and expenses which they may incur in regard to the surface of the Domain above or in the vicinity of the parking station and the footway and which arise out of the construction operation and maintenance of the parking station by the Lessee."

6 The respondent, as the current Lessee, instituted a proceeding in the Equity Division of the Supreme Court of New South Wales seeking declaratory relief respecting the construction of cl 4(b). The relief sought was to the effect that the appellant, as Lessor, in determining any amount of yearly rent in excess of the yearly rental payable over the three year period immediately prior to that in

question, was constrained by cl 4(b) only to do so by having regard to any additional costs and expenses which the Lessor might incur during the three year period for which the yearly rent was being determined in respect of the surface of the Domain above or in the vicinity of the Parking Station and footway and which arise out of the construction, operation and maintenance of the Parking Station by the Lessee. However, the primary judge (Hodgson J) did not accept that construction of the Lease. Rather, his Honour granted a declaration that the Lease had "an implied term that in making a determination of rent pursuant to clause 4(b), the lessor must act bona fide for the purposes of determining a rent which is no more than a fair and reasonable rent". In his reasons for judgment, Hodgson J identified the operation of par (iv) of cl 4(b) as making:

> "it clear that the lessor can take into account the matters referred to there, without thereby raising any question as to whether they are acting fairly and reasonably".

7 The relief by Hodgson J did not reflect the constraint which the Lessee maintained was imposed by cl 4(b)(iv) and favoured the interests of the Lessor. The Lessee accordingly appealed to the Court of Appeal (Spigelman CJ, Beazley and Fitzgerald JJA) and was successful. The relief granted by the Court of Appeal included a declaration:

> "that clause 4(b)(iv) of the lease dated 15 May 1976 between the Trustees of the Domain as lessor and the Council of the City of Sydney as lessee ('lease') specifies exhaustively the considerations material to a determination by the lessor of the rent payable pursuant to the lease".

8 In this Court, the appellant Lessor seeks the setting aside of the orders of the Court of Appeal and in place thereof an order that the appeal from the primary judge be dismissed. In our opinion, the Court of Appeal reached the correct result and the appeal to this Court should be dismissed.

9 In his judgment, Fitzgerald JA referred to well-known passages in the judgment of Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[4] respecting the admissibility of evidence of surrounding circumstances to assist in the interpretation of a written contract if the language be ambiguous or susceptible of more than one meaning. In the present case, the difficulty concerns the phrase in par (iv) of cl 4(b) "the Trustees may have regard to

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4 (1982) 149 CLR 337 at 352.

additional costs and expenses". Does this mean that the Trustees, in making a determination, cannot have regard to matters other than those additional costs and expenses? If the Trustees may have regard to other matters, what are they? In a context such as cl 4(b), to specify a particular matter to which a party may have regard without expressly stating either that it is the only such matter or, to the contrary, that the specification does not limit the generality of the matters to which regard may be had is likely to result in ambiguity. It does so in the present case. The resolution of the ambiguity requires the application of settled principles of construction.

10 In *Codelfa*, Mason J (with whose judgment Stephen J and Wilson J agreed) referred to authorities[5] which indicated that, even in respect of agreements under seal, it is appropriate to have regard to more than internal linguistic considerations and to consider the circumstances with reference to which the words in question were used and, from those circumstances, to discern the objective which the parties had in view. In particular, an appreciation of the commercial purpose of a contract[6]:

> "presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating".

Such statements exemplify the point made by Brennan J in his judgment in *Codelfa*[7]:

> "The meaning of a written contract may be illuminated by evidence of facts to which the writing refers, for the symbols of language convey meaning according to the circumstances in which they are used."

11 In the Court of Appeal, Fitzgerald JA said that, when, consistently with *Codelfa*, the Lease was read against the background of what he identified as the

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5 In particular, speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381 at 1383-1385; [1971] 3 All ER 237 at 239-241; *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 261; and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 995-997; [1976] 3 All ER 570 at 574-576.

6 *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 995-996; [1976] 3 All ER 570 at 574.

7 (1982) 149 CLR 337 at 401.

principal, potentially material, surrounding circumstances, par (iv) specified exhaustively the considerations material to the determination of rent by the Lessor. The surrounding circumstances identified by his Honour were:

> "(a) the parties to the transaction were two public authorities;
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> (b) the primary purpose of the transaction was to provide a public facility, not a profit;
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> (c) the lessee was responsible for the substantial cost of construction of the facility;
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> (d) the facility was to be constructed under the lessor's land and would not interfere with the continued public enjoyment of that land for its primary object, recreation;
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> (e) the parties' concern was to protect the lessor from financial disadvantage from the transaction; and
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> (f) the only financial disadvantage to the lessor which the parties identified related to additional expense which it would or might incur immediately or in the future."

12 That summary should be accepted. In order to show why this is so, it is convenient to return both to the legislative antecedents of the parties and to the dedication of the relevant portion of the Domain to public recreational purposes. The present is a case where both parties to the lease and their successors have been public bodies, moving within legislative regimes with which the common law respecting contracts for leases and leases interacts. Therefore, as in *Tepko Pty Ltd v Water Board*[8], it is necessary to view the particular circumstances with an appreciation of the legislation.

13 By statute enacted in 1842[9], a body corporate and politic was instituted by and under the name, style and title of the "Mayor Aldermen Councillors and Citizens of the City of Sydney". Further legislative provision with respect to that

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8 (2001) 75 ALJR 775 at 777 [8], 786 [69], 790 [90], 797-798 [124]; 178 ALR 634 at 636-637, 649, 654, 664.

9 6 Vict 3.

corporation was made in 1850, 1879 and 1902[10]. The legislation was consolidated by the *Sydney Corporation Act* 1932 (NSW). That Act was repealed by s 25(1) and the Fourth Schedule of the *Local Government (Areas) Act* 1948 (NSW), Pt 3, Div 3 of which had contained a number of special provisions respecting the Council of the City of Sydney. It was at that stage of legislative development that the Lease was entered into in 1976. The present respondent, South Sydney City Council, owes its existence to the *City of Sydney Act* 1988 (NSW) ("the City of Sydney Act"). Section 5 thereof provided for the alteration by proclamation of the boundaries of the City of Sydney by taking from it certain land and attaching that land to the City of South Sydney, a body constituted under s 10. It was accepted on the pleadings that the Domain car parking station was in an area previously within the boundaries of the City of Sydney and that the City of South Sydney succeeded to it.

14 The City of Sydney Act provided in Sched 3 for savings, transitional and other provisions. Part 3 thereof (cll 7-8) provided for Commissioners appointed under the *City of Sydney Act* 1987 (NSW) to make arrangements for the apportionment of assets between the two Councils and for the making of a proclamation to give effect to those arrangements. Paragraphs (a) and (g) of cl 8 provided, respectively:

> "(a) all real and personal property (including any estate or interest in, or right to control or manage, real or personal property) that, immediately before [the date of that proclamation], was vested in the City Council vests in the South Sydney Council;
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> …
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> (g) any contract, agreement or undertaking entered into with the City Council and in force immediately before that day becomes a contract, agreement or undertaking entered into with the South Sydney Council".

By this legislative path, the present respondent stands in the position of the Lessee under the Lease.

15 The position respecting the Lessor and the subject land is more complicated. Section 5(1) of the *Crown Lands Consolidation Act* 1913 (NSW) ("the Consolidation Act") defined "Crown Lands" as meaning:

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10 By, respectively, Acts Nos 14 Vict 41, 43 Vict 3, and Act No 35 of 1902.

> "lands vested in His Majesty and not permanently dedicated to any public purpose or granted or lawfully contracted to be granted in fee-simple under the Crown Lands Acts".

Section 24 authorised the Minister by notification in the *Gazette* to dedicate Crown lands, among other purposes, for public health, recreation, convenience or enjoyment; the section went on to provide:

> "And upon any such notification being published in the Gazette, such lands shall become and be dedicated accordingly, and may at any time thereafter be granted for such purposes in fee-simple."

Section 26(1) empowered the Minister, by notification in the *Gazette*, to appoint trustees to be charged with the care and management of, among other lands, those lands reserved or dedicated under the Crown Lands Acts. The sub-section continued:

> "and any grant issued to such trustees may confer such estate in such lands accompanied by such powers and with such conditions as he may think fit, and as may be therein specified".

By two notifications, both dated and published on 22 December 1916, an area including the portion of the Domain beneath which the car park was later constructed was dedicated for "Public Recreation" and Trustees were appointed. Thereafter, on 29 December 1916, there was published a proclamation by the Governor. This recited the steps just described and vested in the Trustees the subject land "to hold the same for the purposes of Public Recreation, with the same powers and subject to the same limitations as are conferred and imposed by the *Public Parks Act 1912* [(NSW) ('the 1912 Act')] upon Trustees appointed under the provisions of that Act". The proclamation was expressed as made in accordance with the provisions of s 3 of the *Public Trusts Act* 1897 (NSW) ("the 1897 Act"). This stated:

> "Where land has, before or after the day on which this Act takes effect, been set apart, dedicated, or reserved for any public purpose, under any Act, the Governor may by notice in the Gazette, and without any deed, grant, or other assurance, vest the land in the trustees for such estate, and with such powers and subject to such limitations and conditions as he may think fit."

In turn, s 8 of the 1912 Act provided:

> "Trustees shall, for all purposes of this Act, and of any by-law thereunder, be deemed to hold an estate in fee-simple in the land for which they were appointed, but shall not be capable of alienating, charging, or in any way disposing of such land, or any part thereof:
>
> Provided that trustees may, with the consent of the Minister, lease or grant grazing or other temporary licenses to occupy or use any portion of such land for such purposes, on such terms and subject to such conditions as the Minister approves."

16 The four individuals identified as Trustees of the Domain in the Lease and therein called "the Lessors" were those in whom the subject land was vested pursuant to s 3 of the 1897 Act to hold for the purposes of public recreation and with the powers and limitations conferred and imposed by the 1912 Act.

17 The area of the dedication made in 1916 was specified in the *Gazette* as having an area of about 178 acres. A further dedication under s 24 of the Consolidation Act was notified on 28 October 1955; the area specified was 170 acres, 1 rood and 28 perches, the contraction being attributable to the statement in the notification "(ex Vice-Regal Residence, Conservatorium and Art Gallery)".

18 The primary judge found that in 1955 the Sydney City Council had proposed the construction of a car parking station in the Domain. There followed negotiations involving that body, the Trustees of the Domain and the Department of Agriculture. His Honour found:

> "In these negotiations, it was contemplated that there would be a fifty year lease, with rent payable by the Sydney City Council at £1,000 per annum, subject to periodic review. It appears that the amount of £1,000.00 was based on an estimate of the additional expense that would be incurred by the Trustees by reason of construction of the car park in respect of maintenance, gardening and other services."

The car parking station and footway were constructed by the prospective Lessee, the Sydney City Council, and were opened on 8 April 1958. The Sydney City Council paid rent at the rate of £1,000 per annum commencing on 1 May of that year. However, during 1957, the Crown Solicitor had formed the view that there was no power in exercise of which the Trustees could grant the lease in question and that special legislation was required. That eventually led to the enactment of the *Domain Leasing Act* 1961 (NSW) ("the Domain Leasing Act"). This stated in the long title that it was "[a]n Act to make provision for leasing, and licensing

the use, of certain land within the Domain to the Council of the City of Sydney … to amend the Crown Lands Consolidation Act, 1913, as amended by subsequent Acts; to validate certain matters; and for purposes connected therewith". The reference to validation is important because it deals with the effect of steps taken by the Trustees with respect to the car park and footway before the Domain Leasing Act.

19 The problem as to the power to grant the Lease has a bearing upon the context of the transaction. In particular, it indicates the remoteness of the transaction from commercial concepts of market rental, and opportunity costs to the parties. Leasing of land dedicated for use by the public for recreational purposes gave rise to serious legal issues. The issues are reflected in cases such as *Randwick Corporation v Rutledge*[11], decided in 1959, and *Storey v North Sydney Municipal Council*[12], decided in 1970.

20 So far as relevant, s 4 of the Domain Leasing Act stated:

> "Notwithstanding anything contained in any other Act, it shall be deemed always to have been within the power of the trustees to grant or give such leases, authorities, consents, licenses or rights of occupancy as have been granted or given by them before the commencement of this Act –
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> (a) to the Council for or in connection with the construction, operation and maintenance by or on behalf of the Council on parts of the Domain of a car parking station and a moving footway leading thereto;
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> …
>
> and all leases, authorities, consents, licenses or rights of occupancy so granted or given and all conditions, including payment of rental, subject to which such leases, authorities, consents, licenses or rights of occupancy were so granted or given, are hereby validated."

21 Before turning to the state of affairs to which the validating operation of s 4(a) applied, reference should be made to later legislation, the *Royal Botanic*

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11 (1959) 102 CLR 54.

12 (1970) 123 CLR 574.

Gardens and Domain Trust Act 1980 (NSW) ("the 1980 Act"). Section 5(1) of that Act constituted a corporation with the corporate name "Royal Botanic Gardens and Domain Trust" and thus constituted the present appellant. Schedule 3 of the 1980 Act is headed "Transitional and Other Provisions". Clause 1 thereof defined "former trustees" as meaning "the trustees appointed pursuant to section 37O of the [Consolidation Act] who were, immediately prior to the commencement, trustees of the Trust lands described in Schedule 2, or part thereof". Clause 3(2)(a) vested in the new body property which had been vested in the former trustees and par (e) stated:

> "all deeds, contracts, agreements, arrangements and undertakings entered into with the trustees of the Trust lands described in Schedule 2 and in force immediately before the commencement shall be deemed to be deeds, contracts, agreements, arrangements and undertakings entered into with the Trust".

Part 2 of Sched 2 identified the Domain as among the lands vested in the Trust. The Trust, for the purposes of any New South Wales statute, is to be deemed a statutory body representing the Crown (s 5(4)). The reference in the definition of "former trustees" to s 37O of the Consolidation Act is to a provision included in that statute by the *Crown Lands and Other Acts (Reserves) Amendment Act* 1974 (NSW). This had repealed various statutes including the 1897 Act and the 1912 Act. Section 37M(1) of the Consolidation Act provided for a definition of "reserve" as including lands in respect of which trustees appointed under the 1897 Act or the 1912 Act held office. Section 37O of the Consolidation Act had provided for the appointment by the Minister of trustees of any reserve before it was superseded by the 1980 Act which constituted the present appellant.

22 The objects of the evident validating purpose of s 4(a) of the Domain Leasing Act included an agreement for lease which had been reached between the relevant parties for the opening of the car parking station and footway on 8 April 1958. For the period commencing 1 May 1958, the Council paid rent at the rate of £1,000 per annum. This is significant in various respects. First, the term of the lease created by deed made on 15 May 1976 was expressed to have commenced on 1 May 1958 and the instrument repeated an obligation in respect of the first three years of the term to pay a yearly rent in that sum of what was now $2,000 with, after the expiration of that first three years, and during and in respect of each of the fifteen periods each of three years and the remaining period of two years thereafter, being in all the residue of the term, a yearly rent to be determined as described in cl 4(b). The deed also provided that the yearly rents in question were to be paid in advance on 1 May in each and every year. The obligation of the Trustees under cl 4(b)(i) was to notify the Lessee of the yearly

rent as determined by the Trustees in accordance with that provision "as soon as practicable after the commencement of each of the affected periods", that is to say as soon as practicable after the particular first day of May in question.

23 Further, in addition to taking 1 May 1958 as its commencement date, the 1976 instrument proceeds expressly on the basis that its provisions do not contradict the regime under which the parties had operated in the long intervening period from 1958. Clause 4(l) stipulates:

> "That this Lease shall for the purpose of determining the rights and obligations of the parties be construed as if it had been executed on the date from which the term is expressed to run."

Further, the preamble recites the empowering provision in par (a) of s 3(1) of the Domain Leasing Act. This provided:

> "Notwithstanding anything contained in any other Act, the trustees may, with the consent of the Minister for Lands, from time to time grant –
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> (a) to the Council such leases, and licenses for the use, of such parts of the Domain as may be necessary for the purposes of or for purposes connected with the operation and maintenance by the Council of the car parking station and the moving footway leading thereto, constructed before the commencement of this Act by or on behalf of the Council on part of the Domain".

The empowering provision in par (a) of s 3(1) may be compared with the validating provision in s 4, to which reference has been made.

24 The result of the operation of these two provisions in the Domain Leasing Act was both to validate any agreement for lease arrived at before the commencement of the statute and to authorise what later was done in 1976. In this way, any doubt as to the existence at any period of the necessary power to enter into these dealings was removed.

25 It follows that the terms of any agreement reached under which payments were made at the rate of £1,000 per annum commencing on 1 May 1958 are part of the immediately surrounding circumstances throwing light upon what later was expressed in the 1976 instrument "backdated" to 1 May 1958.

26 To the content of that earlier agreement we now turn. The negotiations culminated in the following correspondence. By letter dated 17 January 1956,

the Under Secretary and Director of the Department of Agriculture, on behalf of the Trustees of the Domain, wrote to the Town Clerk of the Sydney City Council setting out the offer of the Trustees respecting the terms and conditions of an agreement with the Council for the construction and operation by the Council of an underground car parking and servicing station on the site selected within the Domain. The terms and conditions which were then detailed included in cl 5 the statement that the Trustees were to grant to the Council a lease of the site on which the parking station was erected "excluding the turfed portion immediately above the Station". The proposed cl 5 continued:

> "The term of the lease shall be 50 years from the date on which the Station commences to operate. The rental shall be £1,000 per annum. If at the end of each three year period of the term of the lease the additional cost of maintenance of the Domain in consequence of the construction of the Station (namely the cost of employing one additional gardener and one person to provide necessary services on weekends and on public holidays and of supplying additional fertilizers) shall have varied from such cost at the commencement of such period, the rental for the succeeding period of three years shall be correspondingly varied by the amount of such variation but shall not in any case be less than £1,000 per annum."

The Town Clerk responded by letter dated 17 May 1956 suggesting what were said to be minor amendments to the terms of the proposed lease. The minor amendments did not include anything in cl 5. Those proposed amendments were accepted in a letter by the Under Secretary and Director directed to the Town Clerk dated 8 June 1956. The letter concluded:

> "On advice of the Council's concurrence, the Crown Solicitor will be asked to prepare a formal agreement."

27 The result appears to fall within the second category in *Masters v Cameron*[13]:

> "a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document".

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13 (1954) 91 CLR 353 at 360.

That formal document, drawn as a deed, was necessary for the creation of the proposed demise. The subject land was not under the provisions of the *Real Property Act* 1900 (NSW) as the subsequent registration of the Lease under the Registration of Deeds Act indicates[14]. The deed was made necessary by s 23B(1) of the *Conveyancing Act* 1919 (NSW) ("the Conveyancing Act") to pass an interest at law for such a lengthy term as 50 years[15]. In the meantime, the written agreement constituted by the correspondence[16] would attract recognition as a lease in equity under the doctrine in *Walsh v Lonsdale*[17].

28 The minutes of a meeting of the Trustees held on 17 January 1957 state that the Crown Solicitor had been asked to prepare a draft agreement for lease of the site to the City Council for a term of 50 years. However, the Crown Solicitor then discerned a difficulty respecting the enjoyment by the Trustees of the necessary power. By letter dated 27 August 1957, the Under Secretary and Director, on behalf of the Trustees, wrote to the Town Clerk stating that, with regard to the preparation of the proposed lease, the Crown Solicitor had advised that he was not aware of any power under which the Trustees might grant a lease to the Council. The letter continued:

> "In the circumstances the only course seems to be to seek the enactment of special legislation to provide the Trustees with the necessary power and consideration is at present being given to such action."

29 It is unnecessary to determine whether in truth the Trustees under the legislation as it stood in 1957 lacked the necessary power. Nor is it necessary to determine whether, even if that power were absent, the subsequent acts of the parties over many years were such as to generate between them equities upon

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14 Section 6(V) of that Act stated:

> "Instruments which are registered or require to be registered under the provisions of the *Real Property Act* shall not be affected by the provisions of this Act."

15 Helmore, *The Law of Real Property in New South Wales*, 2nd ed (1966) at 99-102.

16 To satisfy the Statute of Frauds requirement of s 54A of the Conveyancing Act.

17 (1882) 21 Ch D 9; see also *York House Pty Ltd v Federal Commissioner of Taxation* (1930) 43 CLR 427 at 436; *Patti v Belfiore* (1958) 100 CLR 198 at 210; *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 250-253, 261-262.

which the Council might have relied in answer to any purported termination by the Trustees of the relationship between them. What is of significance is, first, that in this correspondence there appears the genesis of what later became cl 4(b) and, secondly, that cl 4(l) of the Lease set out above, in "backdating" the Lease, postulates consistency between the Lease and the earlier agreement for lease.

30 Consideration of the antecedent materials and circumstances respecting the dealings between the predecessors of the present parties before entering into the deed in 1976 indicates various relevant matters: the parties to the transaction were two public authorities, in one of which there had been vested land long dedicated for public recreation; the purpose of their transaction was the provision of a further public facility, in the form of the parking station and the footway, but without disturbing the availability of the surface for continued public recreation and without providing for the obtaining by one public authority of commercial profit at the expense of the other; it was the Lessee which was responsible for the substantial cost of construction of the new facility and the concern of the parties had been to protect the Lessor from financial disadvantage suffered from the transaction, namely additional expense which the Lessor would or might incur immediately or in the future.

31 In the deed itself, various of these considerations are directly reflected. In particular, to the argument that, to deny to the Lease a construction which permits the Lessor now to determine a yearly rent at a "commercial" or "market" rate would unduly favour the interests of the Lessee, the Lessee responds by pointing to the capital investment made by its predecessor, and to the onerous obligations respecting the car park which bind the Lessee.

32 The recital, to which reference has been made earlier in these reasons, refers to the construction by the Lessee in the subterranean strata of the parking station and footway; other provisions indicate that it is the Lessee who bears all costs of operating the car park, maintaining it and refurbishing throughout its life as necessary and that, at the end of the term, the Lessee will be obliged either to give up the car park to the Lessor with no compensation in respect thereof or to follow the steps indicated in the proviso to cl 4(c). These stated:

> "PROVIDED HOWEVER that:-
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> (i) the Lessee may upon the expiration or sooner determination of this lease or within six months [thereafter] and with the previous consent in writing of the Trustees remove from the demised land all moveable improvements which may have been placed on the

demised land by the Lessee or at the cost and expense of the Lessee;

(ii) if the Trustees by notice in writing to the Lessee direct the Lessee so to do the Lessee shall remove any building structure or improvement or any material from the demised land at the expense and cost of the Lessee and the Lessee shall not be entitled to any compensation in respect of such removal".

If the Trustees give the consent indicated in (i) or a direction in (ii), cl 4(c)(iii) will require the Lessee to:

> "remove the movable improvements or the buildings structures or improvements or materials as the case may be from the demised land within such time as may be specified by the Trustees in such permission or direction and [to] leave the land hereby demised in a clean and tidy condition and free from rubbish and debris and restore the surface thereof for use as parkland for public recreation to the satisfaction in all respects of the Trustees".

33 Moreover, the Lease may be brought to a premature determination; the Lease is (cl 4(m)):

> "subject to the power of the Minister to revoke wholly or in part the dedication of the subject land AND if such [dedication] be revoked in whole or part during the currency of this lease the rights and privileges hereby conferred shall as to the land so revoked absolutely cease and determine and neither the Lessee nor any other person shall be entitled to any compensation on account of such revocation".

34 The Lessee is obliged by cl 2(g) to keep the parking station and the footway and all appurtenances thereto in good and efficient condition and in a thorough state of repair "in all respects to the satisfaction of the Trustees".

35 The Lessee is obliged by cl 2(h) to ensure that the surface of the Domain above the parking station and the footway do not become, in the opinion of the Trustees, unsafe for use as parkland for public recreation. Further, it is for the Lessee to pay to the proper authorities all charges for services supplied by them to the demised land or the parking station and footway, including charges for gas, electricity, excess water, removal of garbage and the rent of gas and electricity meters (cl 2(p)).

36 It is against that background that par (iv) of cl 4(b) is to be construed. This states that, in making any such determination of the yearly rent payable in respect of the then succeeding three years of the term, the Trustees "may have regard to additional costs and expenses" which have a certain character. First, they must be incurred in regard to the surface of the Domain above or in the vicinity of the parking station and the footway; secondly, the additional costs and expenses must arise out of the construction, operation and maintenance of the parking station by the Lessee. The word "additional" indicates that par (iv) is concerned with that which has not been taken into account in the immediately prior determination. As the successive determinations were made, each might be expected to include additional costs and expenses identified in par (iv). In the determination for the next succeeding three years, those additional costs and expenses would be measured against what was now said to be "additional". The clause made no provision for the Trustees having regard in their determination to any other additional matters. Clause 4(b) read as a whole contained a statement of the totality of the matters to be taken into account in fixing the successive rent determinations. That is the way in which the arrangements between the parties had been agreed some 20 years before the execution of the deed in 1976. There is nothing to suggest that in the intervening period the parties had conducted themselves on any basis other than that the rent was to be computed in this fashion. Moreover, for the purposes of determining the rights and obligations of the parties to the Lease, cl 4(b) was to be construed as if it had been executed on 1 May 1958 (cl 4(l)).

37 This conclusion is reinforced by the absence from the Lease of any mechanism for dispute resolution in relation to periodic rent determinations by the Trustees. There are no provisions concerning arbitration, or valuation, of the kind that often appear in rent review clauses in long-term leases. This is consistent with the non-commercial nature of the transaction.

38 If cl 4(b) be construed to the above effect, no question of uncertainty arises[18]. An implied term in the form favoured by the primary judge and urged by the appellant in this Court would contradict the express terms of cl 4(b)[19].

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18 cf *The Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep 205 at 210.

19 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352.

39 Two further matters should be noticed. First, reference was made in argument to several decisions of the House of Lords, delivered since *Codelfa* but without reference to it. Particular reference was made to passages in the speeches of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*[20] and of Lord Bingham of Cornhill and Lord Hoffmann in *Bank of Credit and Commerce International SA v Ali*[21], in which the principles of contractual construction are discussed. It is unnecessary to determine whether their Lordships there took a broader view of the admissible "background" than was taken in *Codelfa* or, if so, whether those views should be preferred to those of this Court. Until that determination is made by this Court, other Australian courts, if they discern any inconsistency with *Codelfa*, should continue to follow *Codelfa*[22].

40 The second matter concerns the debate in various Australian authorities concerning the existence and content of an implied obligation or duty of good faith and fair dealing in contractual performance and the exercise of contractual rights and powers[23]. It emerged in argument in this Court that both sides accepted the existence of such an obligation in the exercise by the Lessor of its rental determination power conferred by cl 4(b). Rather, the dispute between them was directed to the content of that power, in particular the construction of par (iv) of cl 4(b). The result is that, whilst the issues respecting the existence and scope of a "good faith" doctrine are important, this is an inappropriate occasion to consider them.

41 The Court of Appeal was correct in the declaration made in Order 2 of its orders ordered and entered on 31 August 2000. No question for this Court arises as to the consequential relief given by the Court of Appeal.

42 The appeal should be dismissed with costs.

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20 [1998] 1 WLR 896 at 912-913; [1998] 1 All ER 98 at 114-115.

21 [2001] 2 WLR 735 at 739, 749; [2001] 1 All ER 961 at 965, 975; cf *Melanesian Mission Trust Board v Australian Mutual Provident Society* [1997] 1 NZLR 391 at 394-395; *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523 at 542.

22 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403 [17].

23 The authorities are collected and discussed by Finn J in *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 188-198.

43 KIRBY J. This appeal concerns the interpretation of a contract between non-commercial statutory authorities. It raises questions about the construction of a deed of lease, the meaning of that lease in terms of its own language and structure and the availability of contextual materials and extrinsic evidence to produce a construction different from that suggested by its terms. The appeal thus concerns the continuing efficacy of the parol evidence rule, the circumstances in which evidence of the parties' prior negotiations and post-contractual conduct may be received in aid of construction and the extent to which implications may be found in the written document, or elsewhere, to elaborate matters about which it is silent.

A long-term lease, minimal rent and the justice of the case

44 Near the heart of the City of Sydney, close to its central business district and harbour, is a large open space known as the Domain[24]. Beneath this space is a vehicular parking station. Because it was built long ago the costs of constructing it have been substantially recouped. It is now, and for some time has been, a profitable operation.

45 A dispute arose between the statutory trust now responsible for the Domain and the local government body now responsible for the parking station. This dispute concerned the rent payable by the latter to the former. The trust says that, as implied in the deed of lease governing the matter, the rent payable must be fair and reasonable as determined at specified intervals in accordance with a power conferred by the lease. The local authority claims that the rent payable is in the order of an annual sum of $2,000, adjusted for costs of gardening and maintenance of the grass surface above the parking station and the like. For many years a trifling amount of that order was all that the local authority paid as rent. Then the statutory trust woke up. It demanded a fair and reasonable rent. Having obtained legal advice, the local authority for several years paid the rent so determined. From 1988 to 1991, for example, it paid $175,000 per annum. From 1991 to 1994 it paid $500,000 per annum. Thereafter it paid more, but by that stage under protest. Obviously, there is a big difference between sums of the order of $2,000 and sums of the magnitude lately paid.

46 By June 1994, the parties had fallen out. Although both were public bodies, they could not resolve their difference. It has not been resolved for them by the Parliament of New South Wales. So they took their dispute to court. At

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24 The history is described by Callinan J at [117]. See also the reasons of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ ("the joint reasons") at [3].

first instance the statutory trust substantially succeeded[25]. The New South Wales Court of Appeal reversed that decision[26]. By special leave, an appeal has now been brought to this Court.

47 On the face of things, the suggestion that a rent clause in such a deed of lease confined the trust to determining rent of little more than $2,000 per year appears absurd. It offends intuition that a formal agreement in respect of an enterprise with such large and profitable implications would be so construed, at least when the document containing the relevant power is read with today's eyes. To produce such a result, one would expect that the language of the document would leave no doubt and thus demand that the apparently irrational conclusion be forced on the trust (and hence on the public to whom the Domain ultimately belongs).

48 The primary judge rejected the construction of the lease urged by the local authority. In his view, it did "very great violence" to the language of the lease[27]. He held that it sought to read into that language words that were not there[28]. Moreover, in dismissing an alternative suit brought by the local authority for rectification of the terms of the lease, the primary judge concluded, on the evidence, that the words propounded could not be inserted[29]. The Court of Appeal upheld the primary judge's decision on rectification[30]. It is no longer in issue. However, the construction of the deed of lease is.

49 Sometimes appellate reconsideration of the facts of a case, or the constraints of binding authority, produce unexpected and even bizarre outcomes. Almost anything can happen when the language of the Constitution is involved[31]. Particular legislation may occasionally produce results which, in the context,

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25 *South Sydney City Council v Royal Botanical Gardens and Domain Trust* unreported, Supreme Court of New South Wales, 29 July 1997 per Hodgson J ("reasons of the primary judge").

26 *South Sydney Council v Royal Botanic Gardens* [1999] NSWCA 478.

27 Reasons of the primary judge at 37.

28 Specifically that "may" in cl 4(b)(iv) should be read as "may only".

29 Reasons of the primary judge at 46-47.

30 [1999] NSWCA 478 at [44] per Spigelman CJ, [52] per Beazley JA, [74] per Fitzgerald JA.

31 eg *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

seem odd to some[32]. The resolution of this case depends upon the ascertainment of the relevant facts that define the boundaries of the dispute and the application to them of the principles of the common law, understood in the context of the statutory powers of the parties. The common law does not usually produce unreasonable outcomes[33]. As Lord Steyn recently remarked, "the justice of the case … has been one of the great shaping forces of the common law"[34]. This is not, his Lordship pointed out, "the subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right"[35].

50 In my view, there is little question of what ordinary citizens today would think as right concerning the meaning of the lease and the dispute about it between the trust responsible for the Domain and the local authority collecting the profits of the parking station. They would not think it right (or "fair and reasonable") that the rent payable for such a valuable property should be no more than a trivial amount, as the Court of Appeal has found. Most likely they would think that rents of the order that were paid between 1991 and 1997 (after June 1994 under protest) would be nearer the mark[36]. Yet a closer look at the terms of the deed of lease might oblige the opposite conclusion. A better understanding of the admissible evidence might reverse intuitive conclusions. Perhaps the ordinary citizen of May 1976 (when the deed of lease was executed) or of May 1958 (when the term of the lease is taken to have begun) would have viewed the "justice of the case" differently.

51 Defining the problem with precision, and determining the proper approach to the problem, are thus the keys to finding the solution to this appeal which the law requires.

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32 eg *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 75 ALJR 600; 178 ALR 253.

33 *Emmens v Pottle* (1885) 16 QBD 354 at 357-358 noted *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 519.

34 *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 82. In the case of commercial contracts, commercially sensible constructions should be preferred: *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 201; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 770-771.

35 *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 82.

36 [1999] NSWCA 478 at [71]: the rent determined by the trust from 1 May 1991 to 30 April 1994 was $500,000 per annum; from 1 May 1994 to 30 April 1995 it was $500,000 per annum. From 1 May 1995 to 30 April 1996 it was $550,000 per annum. From 1 May 1996 to 30 April 1997 it was $600,000 per annum.

The facts and the provisions of the lease

52 The facts necessary to elaborate the foregoing brief description of how the present problem arises can be found in the reasons of other members of this Court[37]. I will not repeat them unnecessarily.

53 Royal Botanic Gardens and Domain Trust ("the Trust") is the appellant. Under its statute, the *Royal Botanic Gardens and Domain Trust Act* 1980 (NSW) ("the 1980 Act"), it is the successor to the trustees of the Domain created by the earlier *Domain Leasing Act* 1961 (NSW) ("the 1961 Act")[38]. The South Sydney City Council ("the Council") is the respondent. It is the transferee of the interest of the Sydney City Council ("the SCC") under the deed of lease between the SCC and the trustees of the Domain. With the consent of the successive trustees of the Domain and the Minister in the New South Wales Government responsible for its affairs, the SCC paid for the construction of the subterranean parking station.

54 Of the many matters upon which the Trust and the Council were in dispute at earlier stages of these proceedings, at least now they both agree that the primary question in the appeal to this Court is the construction (or interpretation[39]) of the deed of lease dated 15 May 1976, entered between the trustees of the Domain and the SCC ("the deed of lease"). The critical words in cll 1 and 4(b) of the deed of lease are set out in other reasons[40]. I incorporate them by reference.

55 There are other relevant provisions in cl 4[41]. However, it is sufficient to note that cl 4(k) authorises the trustees to form "any opinion" on "such materials as they … may think sufficient". Clause 4(l) requires that the lease "shall for the purpose of determining the rights and obligations of the parties be construed as if it had been executed on the date from which the term is expressed to run". This sub-clause was designed to accommodate the long delay between May 1958

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37 Joint reasons at [1]-[3]; reasons of Callinan J at [118]-[134].

38 The 1961 Act was repealed by the 1980 Act, s 25. The applicable legislation is explained in the joint reasons at [13]-[18].

39 *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60 at 78; cf *Fashion Fabrics of Iowa Inc v Retail Investors Corporation* 266 NW 2d 22 at 25 (1978).

40 The provisions of cl 1 are set out in the joint reasons at [4]; the relevant provisions of cl 4 are contained in the joint reasons at [5] and in the reasons of Callinan J at [125].

41 Joint reasons at [31]-[35].

when an informal lease commenced and May 1976 when the deed of lease was finally executed. Clause 4(m) states that the agreement is "conditional upon and subject to the approval of the Minister and subject to the power of the Minister to revoke wholly or in part the dedication of the subject land". In the event of such revocation, the rights and privileges conferred cease without any entitlement in the lessee for compensation. No such revocation has occurred. But the absolute terms of the Minister's powers, and the requirement for the Minister's consent, were relied on both by the Trust and the Council to support their respective arguments.

56 Both parties suggested that the starting point was to construe the lease. I will shortly turn to its language. The majority in the Court of Appeal began, instead, with a description of the history of the negotiations between the original parties to the lease, stretching back to 1955[42]. The reasons recounted at some length the conduct of the parties' dealings after the deed of lease was executed[43]. They did this before turning to the analysis of the language. For what follows, it is important to make it clear that the deed of lease was not an exact reflection of the correspondence exchanged during negotiations, nor even of the informal agreement that existed between the government entities concerned prior to the execution of the deed of lease.

57 In this Court, the Trust produced an analysis covering more than four closely typed pages, contrasting the provisions respectively contained in the letter from the Department of Agriculture to the SCC of 17 January 1956 and the terms of the deed of lease of 15 May 1976. Much of this analysis relates to provisions inserted by the Crown Solicitor on matters of detail which, perhaps understandably, had not been considered by the Department or the SCC during their negotiations. Much more significant, however, are the variations from the matters contained in the letter of 1956 which represented the "offer as to terms and conditions of an agreement with the [SCC] with respect to the construction and operation by the [SCC] of an underground car parking and servicing station on … the Domain" that subsequently, with immaterial amendments, the SCC accepted.

58 Whereas the foregoing letter simply provided, as to the amount to be paid, "[t]he rental shall be £1,000 per annum", and then went on to refer to the "additional cost of maintenance of the Domain" at the end of each three year period of the lease, with specific reference to the employment of an additional gardener and the supply of additional fertilisers, the deed of lease of 1976 contained no such particularity. Instead, it provided in the terms of cll 1 and 4.

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42 [1999] NSWCA 478 at [56]-[63] per Fitzgerald JA.

43 [1999] NSWCA 478 at [66]-[72].

There were also differences in the terms of an easement in favour of the SCC contemplated by the letter of 1956 and the deed of lease which omitted any reference to such an easement. There were distinct differences between the covenants and conditions contemplated by the letter of 1956 and those included in the deed of lease of 1976, in some instances at the request of the SCC. Without rectification, such divergences make it hazardous to go behind the language of the deed of lease to which the parties formally signified their assent.

59 Before its execution, the draft deed of lease was submitted by the SCC to the City Solicitor. In a perceptive comment, after setting out the clause that became cl 4(b)(iv) of the deed of lease, the City Solicitor remarked:

> "it appears that there is no provision for [the SCC] to object to the amount of rent which the trustees determine".

60 At the end of his advice, the City Solicitor stated that "as long as [the SCC] is prepared to accept the restrictions contained therein" he could "certify that the document is in order for execution". A handwritten note is appended to this minute stating that the restrictions contained in the lease "were agreed to in discussions leading up to the leasing of the Site, by [the SCC]".

61 The SCC was therefore on express notice about the large powers assigned by the deed of lease to the trustees in the determination of the amount of rent to be paid for the parking station. The SCC can thus be taken to be aware of the variation between the negotiations and the formal lease. With its eyes open, the SCC entered the lease as expressed in the deed. Apart from legal principle, this sequence of events suggests a good reason why the rights and obligations of the parties (and hence of their successors in title) should be construed, at least primarily, by reference to the terms of the deed of lease itself rather than by reference to what officers of the predecessors to the parties intended, or believed, would be the conditions with respect to rent governing their relationship.

Common ground

62 Before embarking on the task of construing the lease, it is appropriate to record certain matters about which there was common ground between the parties or with which this Court is not concerned.

63 The Council did not argue that the promises contained in the lease of 1976 were too vague or indeterminate to give rise to a binding agreement between the parties. It would scarcely have been in the interests of the Council to do so. Having regard to the action taken by the SCC to build the parking station and the extremely long gestation period for the conclusion of the terms of the lease (twenty years) it would be wholly unreasonable to infer that the parties intended otherwise than that they (and in the event their successors) would conform to the deed of lease, once executed, during its term. A provision as to rent is normal in

such a lease. It would have been astonishing for those with responsibility for the Domain to have omitted any provision in respect of rent. They did not. Accordingly, on the face of things, the periodic determination of rent must conform to that provision[44].

64 The Council did not argue that the demands by the Trust for the rent in contest in these proceedings were made otherwise than in good faith. Before this Court, in the light of its argument as to the proper construction of the lease, whether in terms of its language or by reference to extrinsic evidence, the Council did not descend into the detail of what would be a "fair and reasonable" rent if the Trust were entitled to use its power under the lease to determine the rent as it contended. But from the voluntary payments of the large sums as rent for the periods between May 1988 and June 1994 (after which time the Trust accepted that payments were made under protest), it is probably fair to infer that such payments afford some notion of what both parties regarded at that time as "fair and reasonable rent" for the lease of the parking station under the Domain land.

65 The Council did not revive its earlier submission that the provisions in the deed of lease as to rent represented an instance of mutual mistake. The Council's submissions at trial on rectification were rejected by the primary judge[45] and the Court of Appeal. They are not in issue before this Court.

66 One of the arguments which the Council pressed below was that, because the lease required the Trust to determine the rent at the commencement of each rental period, and to notify the Council "of the yearly rent as so determined as soon as practicable after the commencement of" that period, the failure of the Trust strictly to conform to that timetable deprived it of any entitlement to rent, even presumably the tiny amount which the Council argued that the lease provided. This argument was rejected by the Court of Appeal[46]. Wisely, it was not repeated in this Court.

67 Nor did the Council seek to revive the attempt, upon which it failed at trial and in the Court of Appeal[47], to recover the rent aggregating $1.5 million paid between May 1991 and April 1994. However, if the Court of Appeal judgment stands, the Trust will be obliged to repay the very substantial sums paid after

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44 cf [1999] NSWCA 478 at [12] referring to *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 at 477, 483-484.

45 Reasons of the primary judge at 44-48.

46 [1999] NSWCA 478 at [128]-[129] per Fitzgerald JA.

47 [1999] NSWCA 478 at [45] per Spigelman CJ, [110]-[112] per Fitzgerald JA.

June 1994, less only the trifling amount which the Council acknowledges to be payable as rent during that time.

The construction of contracts and legislation

68 Starting with the language of the lease itself, Spigelman CJ in the Court of Appeal said that he regarded the construction issue as "finely balanced"[48]. According to his Honour, it was one upon which minds might differ[49]. He accepted that the conclusion which he reached was "by no means obvious"[50]. Whilst the other members of the Court of Appeal did not disclose any similar doubts or difficulties, with respect, this might have been because they did not approach the task in the way that I regard as orthodox.

69 Where parties reduce their agreement to writing, the orthodox approach to contractual construction obliges the decision-maker to address attention primarily to the document in which the rights of the parties are stated[51]. In this case, that document was the deed of lease.

70 In statutory construction, there is a tendency, noted in several recent cases, for judges and others to look first to a number of external sources for guidance, including judicial generalities[52] or legal history[53]. It is as if some who have the responsibility of interpretation of legal words find the reading and analysis of the texts themselves distasteful[54], like dentists happy to talk about the problem but

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48 [1999] NSWCA 478 at [17].

49 [1999] NSWCA 478 at [2].

50 [1999] NSWCA 478 at [44].

51 Like the primary rule which governs the interpretation of treaties: *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 682.

52 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 75 ALJR 1342 at 1351 [46]; 181 ALR 307 at 319; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 75 ALJR 1513 at 1526-1527 [63]; 182 ALR 321 at 339; *Allan v Transurban City Link Ltd* (2001) 75 ALJR 1551 at 1561 [54]; 183 ALR 380 at 392-393; cf *Brodie v Singleton Shire Council* (2001) 75 ALJR 992 at 1038 [231]-[232]; 180 ALR 145 at 209-210.

53 *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1630 [249]; 184 ALR 113 at 180.

54 Hayne, "Letting Justice Be Done Without the Heavens Falling", (2001) 27 *Monash University Law Review* 12 at 16.

loath to pull a tooth. In statutory construction this error of approach must be rooted out. The proper place to start is the statute. A wide range of other materials may now be accessed, if need be, to assist in the task. But the task itself remains that of finding the meaning of the legislation from the text – not from other materials.

71 The same point of principle is applicable where the function in hand is to construe the terms of a written contract. The starting point must be the contract. Only later, if need be, may the decision-maker have resort to contextual materials and supplementary or extrinsic evidence in elaboration of the written text. This approach is equally applicable to a statute and a written contract because it is based on a principle informed by strong considerations of practicality. The text may be unarguably clear. In such a case, it will not be necessary, or ordinarily permissible, for the decision-maker to go beyond the written language from which the legal answer to the question in issue is to be found. If the text is so clear, that will normally be the end of the matter. A great deal of time and disputation may then be avoided.

72 In the case of a complex lease, entered for a very long term, in respect of a significant property development with high capital and income elements to it between public bodies with express or implied statutory duties to perform in ways intended to fulfil the obligations respectively imposed upon them by law, one would normally expect that their written agreement would contain all of the provisions essential to govern the relationship between them. Especially would this be so where, as here, the parties were severally advised by highly competent and experienced solicitors and where they took what appears to have been an inordinate amount of time both to secure enabling legislation and to reduce the terms of their informal agreement to a written document in the form of a deed.

73 On the face of things, therefore, the present contextual circumstances suggest that all of the provisions in respect of a material term (such as rent) in a lease finally executed in the form of the deed of lease of May 1976, would be found within the four corners of the written instrument. There would thus be no need to resort to contextual information, still less evidence of background negotiations, a mass of correspondence, oral testimony and other extrinsic sources. For the moment, I leave aside any restrictions which the law may impose upon access to extrinsic evidence[55]. I simply make the point that in the circumstances of this case, one would normally have expected that the answer to the provision concerning rent would be found in the deed of lease itself.

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55 *Burns Philp Hardware Ltd v Howard Chia Pty Ltd* (1987) 8 NSWLR 642 at 645-646.

The construction urged by the Council

74 In its primary argument, the Council accepted this challenge. In my view, its best submissions were these. By cl 1 of the lease, the rent for the first three years was fixed at $2,000 per year. Even in 1958, such a sum would not have been anything like a commercial rent for a large and central letting space in the City of Sydney. This fact suggests that the character of the rent had been adjusted to the public character of the parties to the lease, the public interest involved in the development of parking facilities provided by the lease and the wide powers which the lease reserved to the Minister to supervise the activities of the parties so as to protect the public.

75 The reference to cl 4(b) of the deed of lease controls the power given by the lease to the trustees in cl 1 to determine the annual rent. An unlimited power in relation to the SCC's (and ultimately its ratepayers') funds could not have been within the contemplation of the parties. When, within cl 4(b), clues are then sought as to the amount of the rent after the initial period, only two are available. The first, in cl 4(b)(iii), indicates that the rent "shall not in any event be less than" $2,000. The second directs the trustees, in exercising their power, to have regard to "additional costs and expenses" incurred in relation to the parking station. If it had been intended that a commercial rent should be paid, pars (iii) and (iv) of cl 4(b) would not have been necessary. In the context, therefore, the direction to the trustees to "have regard to" additional costs and expenses identified both the character and quantum of the rent for which the lease provided. Thus, "have regard to" amounted here to "have regard *only* to"[56]. Similarly "may" in the context was not permissive but restrictive. It meant "may only". The Council submitted that the language of the lease indicated objectively the intention of the parties that the power of the trustees was to be limited to ensuring that they suffered no financial disadvantage by virtue of the building of the parking station under the Domain land in respect of which the trustees would retain their obligation to maintain the external environment[57].

76 According to the Council, the foregoing construction of the lease was harmonious with its terms. It did not result in a meaning that was capricious, unreasonable, inconvenient or unjust[58]. The lease was negotiated in earlier times before the more recent trend had taken hold to require public bodies to charge

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56 cf *Perry v Wright* [1908] 1 KB 441 at 458; *Wallace v Stanford* (1995) 37 NSWLR 1 at 9, 10, 23; cf at 19-20.

57 [1999] NSWCA 478 at [3], [83].

58 *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109.

users for the costs of their facilities, or some of them, at or near market prices. When the original lease was negotiated in 1958, and even when the deed of lease was executed in 1976, such notions were not prevalent in relation to contracts between the parties to this lease. Such ideas should not be imposed retrospectively, when the object of the interpretation of the written contract is to ascertain what, objectively, the parties agreed to when they executed the deed of lease in 1976.

77 Obviously, the foregoing presents an arguable case. That is the nature of disputed questions of construction (whether of statutes, contracts or other instruments) that come to this Court[59]. However, like the primary judge, it is my view that the better construction of the language of the lease is that submitted by the Trust.

The contractual language read with enabling legislation

78 It can be recognised, as the solicitor for the SCC clearly did when advising the SCC before execution of the deed of lease in 1976, that cl 1 of the lease confers on the trustees a very large power. It is a power to make a determination of the rent for each successive three year period. By this language, the lease picks up the provisions of s 3 of the 1961 Act which authorised the trustees, with the consent of the Minister, to grant leases of parts of the Domain for the purposes of the parking station "for such terms or periods, *at such rentals* and subject to such covenants and conditions as the trustees, with the approval of the Minister … may determine" (emphasis added).

79 The 1961 Act granted statutory powers to the then trustees. The Parliament of New South Wales enacted that law some three years after the initial informal lease was agreed between the SCC and those then responsible for the Domain. That Act became the statutory basis for the deed of lease of 1976. By the provisions of the 1961 Act, the trustees were empowered to "grant … such leases" and in that connection to "determine" such "rentals". By that Act, they were empowered to do so "from time to time". One would normally infer that such statutory trustees would, in any case, exercise their general powers for the purposes, and in the best interests, of the objects of their trust. Yet whatever doubt might have existed prior to 1961, it was removed by the terms of the 1961 Act, which preceded the execution of the deed of lease. Thereafter, the ultimate source of the power to grant the lease executed in 1976 was s 3 of the 1961 Act.

80 In accordance with orthodox principles governing the exercise of statutory powers by the repository of such powers, it was obligatory upon the trustees in

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59 cf *Allan v Transurban City Link Ltd* (2001) 75 ALJR 1551 at 1559 [40]; 183 ALR 380 at 389.

granting the lease and in determining the rentals, to fulfil their statutory obligation as trustees of the Domain. In short, such repositories were obliged to perform their functions only in a way that advanced the objects of the statutory trust. Legally, it was not open to them to act otherwise. The deed of lease of 1976 must be construed in this statutory setting. The statute was well known to both parties to the deed of lease and to their lawyers. They had waited for the legislation to be enacted before negotiating, and eventually executing, the deed of lease. In any case, the 1961 Act, as a public law, was binding on them all.

81 The provisions of the lease and the later conduct of the Trust become clearer when so understood[60]. The determination of the rental is apparently at large. However, it is to be performed by a repository of statutory power granted such power for specific purposes. To that extent, the power could not be performed unlawfully, unreasonably or irrationally. In discharging the function of rental determination belonging to them by the deed of lease, the trustees (and in due course the Trust) were granted a large power whose exercise was ultimately constrained by statute. The normal principles controlling the exercise of statutory power therefore governed their conduct[61]. With all respect to those who have gone before in these proceedings, insufficient attention was given to the statutory obligations and public duties of the trustees (now the Trust). This is yet another instance where fascination with common law principles has been permitted to blot out the requirements of applicable statutory provisions[62]. After the 1961 Act, the only power that the trustees had to grant the subject lease and to determine rentals for the demised land was the power they derived from the Act. No exercise of power under the deed of lease or otherwise could lawfully contradict the requirements of that Act[63].

82 Viewed against this background, the provisions of cll 1 and 4(b) are more readily understood. Specifically, proviso (i) in cl 4(b) imposes a notification obligation. Proviso (ii) specifies how and when adjustments of rent are to be

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60 *Tepko Pty Ltd v Water Board* (2001) 75 ALJR 775 at 777 [8], 786 [69], 797-798 [124]; 178 ALR 634 at 636-637, 649, 664 mentioned in the joint reasons at [12], n 8.

61 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 343-344; *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 195-197; *Webster v Auckland Harbour Board* [1983] NZLR 646 at 649-651.

62 *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1631 [254]; 184 ALR 113 at 182.

63 cf *Annetts v McCann* (1990) 170 CLR 596 at 604; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at 899 [52]; 179 ALR 238 at 251.

made. Proviso (iii) indicates a minimum figure for rent, below which, in no circumstances, the rent may fall. No maximum rent is specified. However, a maximum rent would be implied from the statutory source of the power afforded to determine the "rentals" from time to time. Proviso (iv) is an enabling provision. It identifies some factors to which regard may be had in making the rental determination. But it does not state that these are the *only* factors to which regard may be had. Indeed, to do so would have conflicted with the provisions of the 1961 Act that identify the repository of the power and sufficiently indicate the general purposes for which the power may be used.

83 The language of par (iv) is strongly against the proposition advanced by the Council. That paragraph is expressed in terms of what the trustees "may have regard to". Where the drafter intended to impose restrictive obligations, the words "shall" or "shall not" were used, as in the preceding paragraphs. Had it been proposed to confine the trustees to having regard *only* to the costs and expenses mentioned in par (iv) (assuming that to be lawful in terms of the 1961 Act) this would have been expressly stated. It was not.

84 The provisions of cl 4(k) which permit the trustees (or their delegates in the Department of Agriculture) to form any opinion under the lease "on such materials as they or he may think sufficient", provide still further support for the construction urged by the Trust. Its view of the meaning of the lease does not rob par (iv) of a useful purpose. On the contrary, by identifying particular matters to which the trustees (now the Trust) could "have regard", that paragraph removed any possibility of debate as to the propriety of taking such considerations into account.

85 Clearly, then, the lease was intended to fix a minimum component for the rent and to require the trustees to determine the rent in such a way as to cover their expenses. So much is not in doubt. But, by its language, the lease held back from fixing a maximum rent. It neither provided a detailed formula nor nominated an external arbitrator who could resolve differences between the parties. Yet, once it is appreciated that the power to grant the lease and to determine the "rentals" is a power ultimately deriving from statutory provisions[64], the difficulty that might otherwise have arisen in a private agreement between private parties evaporates. The law, in the form of the implication derived from the 1961 Act, steps in to govern the exercise by the trustees (now the Trust) of the power to determine the rent conferred by the deed of lease.

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64 1961 Act, s 3(1).

86 There was much debate before the primary judge[65], in the Court of Appeal[66] and in this Court concerning the way in which a workable formula could be found, consistently with cll 1 and 4 of the lease, to avoid a capricious imposition by the Trust on the Council of a totally unrealistic rent. Indeed, the Council used this spectre to support its submission that, notwithstanding the language of cl 4(b)(iv), the word "may" as there appearing had to be read as "may only".

87 Much time was taken in exploring the common law cases by which, in leases between private parties affording machinery for the determination of a "price" but no explicit formula, obligations to act fairly and reasonably will be implied into the contract so as to save it from failure and to provide a measure by reference to which the "price" can be objectively proved[67]. The Court was taken to case law both in this country[68] and overseas[69] as well as to academic commentary[70] to demonstrate a growing tendency to imply into private

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65 Reasons of the primary judge at 32-36.

66 [1999] NSWCA 478 at [8]-[10] applying *Thorby v Goldberg* (1964) 112 CLR 597 at 613; *Meehan v Jones* (1982) 149 CLR 571 at 581, 589-590.

67 *Hillas & Co Ltd v Arcos Ltd* (1932) 43 Ll Rep 359 at 371; *Powell v Braun* [1954] 1 WLR 401 at 404-405; [1954] 1 All ER 484 at 485-486; *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600 at 614-617; cf *The Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep 205 at 209-210.

68 *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 256, 263-268; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349 at 369; *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) ATPR ¶41-703; *Far Horizons Pty Ltd v McDonald's Australia Ltd* [2000] VSC 310 at [120].

69 *Restatement of Contracts*, 2d, vol 2, (1981), §205; *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 469 at 478-483; *Martselos Services Ltd v Arctic College* (1994) 111 DLR (4th) 65.

70 eg Peden, "Incorporating Terms of Good Faith in Contract Law in Australia", (2001) 23 *Sydney Law Review* 222; Renard, "Fair Dealing and Good Faith", in Saunders (ed), *Courts of Final Jurisdiction*, (1996) 63; Farnsworth, "Good Faith in Contract Performance", in Beatson and Friedmann (eds), *Good Faith and Fault in Contract Law*, (1995) 153; Staughton, "Good Faith and Fairness in Commercial Contract Law", (1994) 7 *Journal of Contract Law* 193; Lücke, "Good Faith and Contractual Performance", in Finn (ed), *Essays on Contract*, (1987) 155.

contractual dealings a covenant of good faith and fair dealing[71]. As expressed in some United States decisions, this is a principle that is not confined to an obligation to exercise express contractual powers fairly and reasonably. In some parts of the United States, the obligation has been accepted as a general implied contractual term in its own right[72].

88 However, in Australia, such an implied term appears to conflict with fundamental notions of *caveat emptor* that are inherent (statute and equitable intervention apart) in common law conceptions of economic freedom. It also appears to be inconsistent with the law as it has developed in this country in respect of the introduction of implied terms into written contracts which the parties have omitted to include[73].

89 In the present appeal, it is unnecessary to explore this question further[74]. Except as it reflects somewhat parallel and analogous developments in public law, I consider that it is irrelevant, as such, to examine concepts of implied contractual obligations to act fairly and reasonably in the discharge of an agreed power. This is because here the repository of the power in question is not a private individual or corporation. It is not even a public corporation required by its statute to pursue commercial objectives. It is not therefore entitled, without restraint, to pursue its own selfish, commercial, economic interests. Here, the trustees were (and the Trust is) a repository of statutory powers, obliged (and known to be obliged) to discharge those powers as Parliament provided. To the extent that Parliament made no express provision, the law would imply an obligation on the part of the trustees (and the Trust) to act lawfully, reasonably and without disqualifying irrationality to fulfil the provisions of the 1961 Act[75].

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71 *Sons of Thunder Inc v Borden Inc* 690 A 2d 575 (1997).

72 *Sons of Thunder Inc v Borden Inc* 690 A 2d 575 (1997).

73 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283 (PC); *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 353; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 121-122; *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 241; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 185 ALR 335 at 379-382 [156]-[164]; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 256; cf *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84 at 96-97.

74 In this I agree with the joint reasons at [39] and the reasons of Callinan J at [156].

75 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 554 [116]; see also *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600 at 615;

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90 It is true, as the Council pointed out, that the waters of this litigation were earlier muddied by the repeated assertion for the Trust that, under the deed of lease, it was entirely without restriction in its power to fix the rent[76]. Only later did the Trust accept that there might be some restriction on its power. But the mistake then made was to attempt to derive the source of that restriction only from the principles of the common law of contract applicable to *private* parties. Insufficient attention was paid to the fact that the repository in this instance was a non-commercial *public* body whose powers were relevantly granted by statute.

91 Resort to the principles governing the exercise of a power that cannot lawfully diverge from its statutory source produces an outcome not materially different from that which some of the foregoing rules of private law would produce. The power must be exercised in good faith reasonably and only for the purpose for which it is conferred on the repository. The repeal of the 1961 Act by the 1980 Act[77] does not alter the continuing obligation, that now devolves on the Trust, to "determine" the "rentals"[78]. No such "determination" could involve the exercise of the power in a way different from that envisaged by the 1980 Act. Relevantly, this required the Trust, at the times specified, to determine a fair and reasonable, not necessarily a commercial, rent[79]. Any other determination would have been outside the powers enjoyed by the Trust. The governing principles of public law impose on the Trust the duty to determine the rent in accordance with the terms of the lease but consistently with the purpose for which the Trust was established, namely the advancement and protection of the objects of the Domain and, now, the wider objects imposed on the Trust for trust lands committed to its care[80].

92 Given the terms of the deed of lease itself, this conclusion is hardly a surprising one. The term of the lease envisaged in the deed of 1976 was fifty

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Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at 410.

76 This is what the Trust stated in its amended points of defence.

77 1980 Act, s 25.

78 By the 1980 Act, Sched 3, cl 3(2)(e), all deeds entered into by the trustees under the 1961 Act, in force immediately before the commencement of the 1980 Act, "shall be deemed to be deeds … entered into with the Trust".

79 Contrast the legislation referred to in *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at 578 [5], 602-603 [78]-[79].

80 1980 Act, s 7(1).

years. By any account that is a lengthy term. The provision for triennial reviews of rent under the deed permitted regular determinations by the trustees (now the Trust) of the rent that was fair and reasonable to the circumstances, as viewed by the repository of the power at the time of each determination. With such a long term to the lease, the intervention of new considerations that might properly affect each determination of rent was expressly allowed for.

93 Equally, the regular reviews of the rent contemplated by the lease would necessarily involve perceptions of what a "fair and reasonable" rent would be, viewed in the light of the then prevailing perspectives of such questions. Just as a statute, intended to operate over a long period, may contain words that come, in time, to attract new and larger content[81], so in a lease for a term of fifty years such changes were catered for. This was done in the deed of lease by the large power of rental determination conferred on the trustees (now the Trust) and by the requirement that the power was to be exercised at triennial rests. This is not a case of imposing on the Council, retrospectively, perceptions of the "rent" or "fair and reasonable rent" envisaged by the lease different from the rent which the parties agreed to, either in 1956 or 1976. The question is not the subjective intentions, beliefs or expectations of such parties. The terms of the informal lease and, more relevantly, of the deed of lease of 1976 envisaged, objectively, an intention of the parties that a regular review would be undertaken and that the rent would then be as determined by the trustees exercising their power.

94 Viewed in this way, there is nothing inconsistent with the decision of the Trust, in discharging its power of "determination" under the lease, to conclude, as it did after 1980[82], that the rent previously determined was not fair and reasonable. Then began the triennial determinations by the Trust that bore a reflection of the extremely valuable asset which the Council enjoyed on the Trust's land.

95 Even if, as the Council asserted, the only factor that the lease expressly mentioned as relevant to the determination of the rent was that of "additional costs and expenses", as stated in cl 4(b)(iv), it is clear that after 1976 fresh consideration was given by the trustees (later the Trust) to the increased costs incurred by them, including opportunity costs[83]. Such opportunity costs

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81 eg *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553 [45]; *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 at 35.

82 [1999] NSWCA 478 at [66]-[67].

83 In the early years of the informal lease, when the SCC was obliged to reduce its very large capital investment, and to service a large interest debt in respect of that investment, it could well have been a proper exercise of the power to determine a "fair and reasonable rent" to keep that rent relatively small. When, in time, the

(Footnote continues on next page)

represented the costs of leasing the land on which the parking station stood to the SCC (and later the Council) for a very small rent at a time by which the facility was highly profitable and in circumstances in which a lease of the same area of land to another operator would produce a much more substantial rent. Given that the lease afforded the power to the trustees to determine the rent at triennial rests and that the trustees were obliged to perform their functions as envisaged by the 1961 Act, such a determination involved no more than the discharge, albeit somewhat belatedly, of the obligations of the trustees both under the lease and consistently with that Act[84].

96 It follows that, by simply construing the deed of lease and adding no more to the task of construction than the provisions of the 1961 Act governing the trustees (and the equivalent provisions under the 1980 Act devolving on the Trust) I reach a conclusion similar to that of the primary judge.

97 Upon my analysis, the error of the Court of Appeal was that of going outside the language of the deed of lease and failing to read that language in the light of the legislative source of the power and the special public character of the repository of that power. Without more, this conclusion requires that the appeal be allowed and the judgment of the primary judge restored.

Contextual and extrinsic considerations

98 *Written documents and legal rights*: The fundamental reason for observing restraint in receiving extrinsic evidence to elaborate, explain and, as some parties would hope, vary a written contract, where parties have put their agreement in writing, was stated by Isaacs J in *Gordon v Macgregor*[85]:

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income from the parking station substantially became pure profit to the SCC (and later the Council), and that body could, in any case, pass on to users a "fair and reasonable" rent, a consideration of the opportunity costs would be neither unreasonable nor unfair.

84 cf *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 194-197; *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 469 at 478-480; Seddon, *Government Contracts*, 2nd ed (1999) at 236 [7.15]; Taggart, "Corporatisation, contracting and the courts", (1994) *Public Law* 351; O'Brien, "Administrative Law – Can it come to grips with tendering and contracting by public sector agencies?", in Pearson (ed), *Administrative Law: Setting the Pace or being left behind?*, (1997) 420; Schoombee, "The judicial review of contractual powers", in Pearson (ed), *Administrative Law*, (1997) 433.

85 (1909) 8 CLR 316 at 323-324. See also *Bacchus Marsh Concentrated Milk Co Ltd (In Liq) v Joseph Nathan & Co Ltd* (1919) 26 CLR 410 at 427.

> "The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings partly consisting of letters and partly of conversations. The written contract is that which is to be appealed to by both parties, however different it may be from their previous demands or stipulations, whether contained in letters or in verbal conversation."

99 The practical utility of this rule has been recognised many times, including by this Court[86]. The reason for its persistence as a matter of legal doctrine is based on a desire to uphold the more formal bargains that parties commit to writing; to discourage expensive and time-consuming litigation about peripheral and disputable questions; and to recognise the ample capacity of our law to rectify a written contract where a party can prove that it does not reflect the true agreement of the parties, objectively ascertained[87].

100 However, like the analogous principle of statutory construction that primarily focuses the task of interpretation on the text in question, in recent years this rule has come under attack from several quarters. Lord Denning MR regarded it as indicating that English law (and by inference that of the jurisdictions such as Australia that had followed it) was "uncivilised" and out of step with other legal systems, notably those of Europe[88].

101 Judicial recognition of the inherent ambiguity of much language and the potential for restrictive rules to work injustice has led to a questioning of the rigid application of the primary rule[89]. A greater flexibility in the use of contextual materials and extrinsic evidence in the construction of contracts has

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86 *Petelin v Cullen* (1975) 132 CLR 355 at 359; see also *Prenn v Simmonds* [1971] 1 WLR 1381 at 1384; [1971] 3 All ER 237 at 240.

87 cf Greig and Davis, *The Law of Contract*, (1987) at 414. The authors suggest that the reason for the reception in United States law of evidence of subjective intentions in the interpretation of contracts is the much greater fusion between common law and equity that has taken place in that country and the consequent reception of equitable principles into common law doctrines of contract.

88 *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* [1977] 2 Lloyd's Rep 5 at 11 commenting on *Wickman Machine Tool Sales Ltd v L Schuler AG* [1974] AC 235.

89 *Manufacturers' Mutual Insurance Ltd v Withers* (1988) 5 ANZ Insurance Cases ¶60-853 at 75,343 per McHugh JA; see also *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 at 337.

therefore, to some extent, flowed over from the changes, stimulated by statute, that have occurred in the construction of legislation[90].

102 I would not resist this "liberalisation" of sources to aid construction of written contracts any more than of statutes[91]. However, it would be indefensible for this Court, without good reason, to adopt a different approach in the ascertainment of the meaning of contested language in a *contract* from the approach observed in respect of *legislation*. In the latter context, the Court has made it plain that, if the language of the statute is clear, no amount of extrinsic material – whether ministerial speeches, explanatory memoranda, law reform reports, legislative history or otherwise – authorises a refusal to give the clear words their legal effect. That was said most clearly in *Re Bolton; Ex parte Beane*[92]. I regard the present appeal as the occasion to make it plain that the same rule governs the obligations of courts when construing a contested provision in a written contract or other private instrument giving rise to rights *inter partes*.

103 In a sense, such cases present even stronger reasons for adhering to a text upon which the parties have agreed. In the case of private documents, unlike statute, there is no general legislation requiring or encouraging a court to have regard to extrinsic materials[93]. Equitable remedies are available to modify the effect of the written text in a way that is not possible with legislation[94]. As with

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90 *B & B Constructions (Aust) Pty Ltd v Brian A Cheeseman & Associates Pty Ltd* (1994) 35 NSWLR 227 at 234.

91 Some judicial diehards still disapprove the use of extrinsic materials in aid of statutory construction: *James Hardie & Co Pty Ltd v Wootton* (1990) 20 NSWLR 713 at 719; cf at 718; *Lemair (Australia) Pty Ltd v Cahill* (1993) 30 NSWLR 167 at 172.

92 (1987) 162 CLR 514 at 518; see also *Re Coleman; Ex parte Billing* (1986) 61 ALJR 37 at 39; 68 ALR 416 at 420.

93 eg *Acts Interpretation Act* 1901 (Cth), s 15AB; *Interpretation Act* 1987 (NSW), s 34; see Pearce and Geddes, *Statutory Interpretation in Australia*, 5th ed (2001) at 58-63 [3.9]-[3.15]; *Avel Pty Ltd t/a Leisure & Allied Industries v Attorney-General for New South Wales* (1987) 11 NSWLR 126 at 128.

94 Rescission was a remedy available in the present case, sought by the Council but rejected by the primary judge and the Court of Appeal; cf *Taylor v Johnson* (1983) 151 CLR 422 at 431.

legislation[95], it is impermissible to receive contextual material or extrinsic evidence to indicate what the *subjective* intentions, beliefs or expectations of the makers were[96]. At a time of increasing international trade, ordinarily conducted on the basis of written contracts, there are strong reasons of legal policy for adhering to a general principle that holds parties to their written bargain in the terms that they have accepted[97]. In the present case, the long interval during which the deed of lease was negotiated and the facts that both sides were legally advised, that the resulting lease was different from the earlier informal arrangement and that rectification had been refused are all reasons for holding the present parties to the language of the deed as executed.

104 *Pre-contractual negotiations*: Accepting that the law on the availability of contextual materials and extrinsic evidence has advanced somewhat in Australia as elsewhere[98], the position remains, in my view, that stated by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[99]:

> "The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties …
>
> It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this

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95 This is why the fiction of parliamentary "intention" should not be used in relation to statutes: *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1633-1634 [261]-[262]; 184 ALR 113 at 185.

96 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 913; [1998] 1 All ER 98 at 114-115.

97 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 771.

98 cf *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-913; [1998] 1 All ER 98 at 114-115; *Bank of Credit and Commerce International SA v Ali* [2001] 2 WLR 735 at 739 [8]; [2001] 1 All ER 961 at 965.

99 (1982) 149 CLR 337 at 352. In this I agree with the joint reasons at [39].

> tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable. The point is that such statements and actions reveal the terms of the contract which the parties intended or hoped to make. They are superseded by, and merged in, the contract itself."

105 Approaching the prior negotiations between the predecessors to the parties to this appeal in that manner, I would not alter the conclusion I have reached on the basis of my analysis of the terms of the deed of lease. It is no more permissible to do "very great violence"[100] to the actual language of the deed as executed by the parties by reference to their prior negotiations than it would be to ignore, or override, the plain language of an Act of Parliament because of earlier parliamentary evidence. The same rule of construction applies to both processes. In the end, it is the written text that governs the rights of parties. This Court should be consistent in its approach to the ascertainment of the meaning of language expressed in words intended to have legal effect.

106 The critical contextual fact in the present case, known to both parties, was that passage of the 1961 Act was procured in order to put beyond doubt the power of the trustees to execute the deed of 1976. Far from supporting the Council's position, in my view the relevant extrinsic evidence (assuming it to be admissible) is against its case. At the crucial moment, immediately prior to the execution of the deed of lease, the SCC was expressly advised by its solicitor of the extremely large powers which the trustees enjoyed under the deed to determine the rent. Notwithstanding such advice, the SCC decided to execute the deed and did so. It thereby accepted the terms of the deed of lease with the large power that the deed conferred on the trustees (now on the Trust) to determine the rent from time to time. As its predecessor in title was warned, the Council cannot now be heard to complain that the situation under the deed of lease turns out to be precisely as the solicitor advised the SCC.

107 *Rejection of rectification*: It must be remembered that the Council's attempt to secure rectification of the deed of lease involved an effort to have the primary judge insert in cl 4(b)(iv), after the word "may", the words "and may only". This is what the Council originally submitted was the common intention of the parties at all times up to and including the execution of the deed of lease. That case failed because, based on the evidence of the two officers of the SCC, the primary judge held that, at the relevant time, the SCC did not hold that intention[101].

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100 Reasons of the primary judge at 37.

101 Reasons of the primary judge at 45-46.

108 In reaching this conclusion, the primary judge noted that the SCC had not sought rectification so as to bring the lease into line with the rent review clause contained in the 1956 correspondence. In the light of the advice provided to the SCC by its solicitor, the claim for rectification was hopeless. The Court of Appeal recognised this. So, belatedly in this Court, did the Council. But given rejection of the argument for rectification, the attempt by the Council to rely on the preliminary agreement of 1956 in order to help construe cl 4(b)(iv) of the deed of lease in an exhaustive fashion is likewise doomed to fail. Where extrinsic evidence does not succeed in affording a foundation for rectification of a written agreement in the terms propounded by a party, it would be paradoxical if the same evidence could be received to produce the desired result as a matter of construction[102]. Difficult as it may be, it is important for a judge, in a case where construction and rectification arguments are run together (as often happens), to keep the issues separate[103]. This is necessary to avoid "[t]he danger of allowing the judicial mind to be diverted by knowledge of the negotiations and dealings between the parties, as it approaches the task of construction"[104].

109 *Post-contractual conduct*: It is unnecessary now to resolve the controversy about the admissibility of post-contractual conduct of the parties. On that topic differing views have been expressed in this Court[105], other Australian courts[106] and overseas courts[107].

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102 *Codelfa Construction* (1982) 149 CLR 337 at 353; *New South Wales Cancer Council v Sarfaty* (1992) 28 NSWLR 68 at 77.

103 *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep 98 at 101 per Lord Denning MR.

104 *B & B Constructions (Aust) Pty Ltd v Brian A Cheeseman & Associates Pty Ltd* (1994) 35 NSWLR 227 at 233. Note that a wider range of evidence may be considered by a court in a claim for rectification: *Frederick E Rose (London) Ltd v Wm H Pim Junr & Co Ltd* [1953] 1 Lloyd's Rep 84.

105 *White v Australian and New Zealand Theatres Ltd* (1943) 67 CLR 266 at 271, 281; cf *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 405, 446, 459.

106 *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 315, 328.

107 *Wickman Machine Tool Sales Ltd v L Schuler AG* [1974] AC 235; *Re Canadian National Railways and Canadian Pacific Ltd* (1978) 95 DLR (3d) 242; *New Zealand Diving Equipment Ltd v Canterbury Pipe Lines Ltd* [1967] NZLR 961 at 978, 980, 984; cf *Herriott v Crofton Holdings Ltd* [1974] 2 NZLR 383 at 388.

110 The present is not an appropriate case in which to resolve those differences because the evidence of what the parties did after executing the deed of lease cuts both ways. On the one hand, the trustees persisted for a time (as they had before the deed of lease) to determine a rent of trifling proportions, consistent with the construction of the deed of lease now urged by the Council. On the other hand, soon after it assumed responsibility for the Domain, the Trust began to determine much higher rents and for a time, the SCC and the Council, although legally advised, paid such rents. In a sense, the fact that the Council, after advice, paid a rent so completely inconsistent with the construction of the deed of lease that it now propounds may be of more significance than the fact that the trustees for twenty years did not (as the Trust now suggests it could have) "determine" a fair and reasonable rent but accepted something less.

111 The fact that the lease contemplated determinations of rent at triennial rests and thereby activated the power of the trustees (now the Trust) under the deed of lease also makes the post-1976 conduct of the parties less significant than it otherwise might have been. Each determination enlivened separately the power of the trustees (and later the Trust). Each determination had to conform with the respective powers of the repository both under the deed of lease and under its successive governing statutes. All that the different determinations may show is that different trustees at different times took a different view about the way in which the power could, and should, be exercised reasonably. The determination of one trustee could not bind another so long as the other's determination when challenged was found to be lawful, reasonable and not irrational in the circumstances in which it was made.

112 In this case, the post-contractual conduct is therefore not determinative of the proper meaning of the deed of lease[108]. For that reason too it is preferable to await a case in which the issue of principle must be decided before attempting to resolve the relevant differences of legal doctrine.

Conclusion and orders

113 The result is that the conclusion of the primary judge should be restored. He reached the right result because, with respect, he approached the problem in the correct way. He concentrated on the written document in terms of which the parties had expressed their agreement.

114 Further, the primary judge's conclusion is reinforced by viewing the resulting deed of lease in the context of the successive statutes which conferred on the trustees (now the Trust) the power to enter the lease and determine the

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108 cf *Re CNR Co and City of Ottawa* [1924] 4 DLR 1217 at 1221.

rent. They were obliged to discharge those functions, as every repository of statutory powers must do, in a way conforming to the language and purposes of the statute, to which their power had ultimately to be traced. It was erroneous to analyse this case in terms of the original intentions of the parties as if they were private individuals or corporations. Their intentions, and the deed of lease giving them effect, must find their ultimate source and content in public power. To omit that consideration involved serious error. Unsurprisingly, it produced an erroneous conclusion.

115 Once this simple point is recognised (as it was not in the Court of Appeal) the supposed defects of the deed of lease of 1976 melt away. The omission of an express formula (or identification of an arbitrator) for determining the rent was eventually immaterial. Because statute was the ultimate source of the power, statute would impose on the repository the duty to exercise such power in good faith, reasonably, without irrationality and for the purposes of the trust. The orders of the primary judge permit that result[109]. The Court of Appeal erred in disturbing those orders.

116 The appeal should be allowed with costs. The judgment of the Court of Appeal, including in relation to costs[110], should be set aside. In place thereof, it should be ordered that the appeal to the Court of Appeal be dismissed with costs.

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109 The primary judge made a declaration that in making a determination of rent pursuant to cl 4(b) of the lease, the lessor must act bona fide for the purpose of determining a rent which is no more than a fair and reasonable rent: *South Sydney City Council v Royal Botanic Gardens and Domain Trust* unreported, Supreme Court of New South Wales, 10 October 1997 at 8 per Hodgson CJ in Eq.

110 The Court of Appeal made a separate determination disposing of costs: *South Sydney Council v Royal Botanic Gardens [No 2]* [2000] NSWCA 242.

117 CALLINAN J. For almost 200 years, the Domain in Sydney has been a place of public resort. In *Randwick Corporation v Rutledge*[111], Windeyer J said this of it[112]:

> "In 1825 and 1826 the need to reserve from alienation lands likely to be required for public needs in the future was emphasized to the Governor in connexion with new land regulations. Before then some land had been set apart for public purposes – the Government Domain in Sydney being the oldest of such reserves."

Earlier his Honour had said[113]:

> "The term 'public reserve' – and the word 'reserve' alone, when not controlled by a definition or a context indicative of a different sense – have come to be used in common parlance in Australia in an imprecise way to describe an unoccupied area of land preserved as an open space or park for public enjoyment, to which the public ordinarily have access as of right."

118 By 1916, the Domain was vested in Trustees for the purposes of public recreation. By January 1956, Sydney City Council wished to use the sub-surface space, and a new level to be opened and created below the Domain for a public car park. On 17 January 1956, an official of the Department of Agriculture ("the Department") (which acted on behalf of the Trustees) wrote to the Sydney City Council stating the terms and conditions upon which the Council would be allowed to construct and operate a car parking station under the Domain. It was obviously contemplated by the parties that the original surface would remain available for public recreation. Paragraph 5 of the letter of 17 January 1956 proposed that a lease be granted to the Council of the excavated space and new land ("the land") on which the car park would be constructed. The term was to be 50 years at a rental of £1,000 per annum. The basis for the calculation of adjustments of rental was also stated:

> "If at the end of each three year period of the term of the lease the additional cost of maintenance of the Domain in consequence of the construction of the Station (namely the cost of employing one additional gardener and one person to provide necessary services on weekends and on public holidays and of supplying additional fertilizers) shall have varied from such cost at the commencement of such period, the rental for

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111 (1959) 102 CLR 54.

112 (1959) 102 CLR 54 at 71.

113 (1959) 102 CLR 54 at 70.

> the succeeding period of three years shall be correspondingly varied by the amount of such variation but shall not in any case be less than £1,000 per annum."

Paragraph 7 of the letter added that the lease would contain such covenants as the Crown Solicitor might advise to be appropriate for a lease of this kind. The letter concluded by noting that, upon receipt of advice that the conditions were acceptable to the Council, the Crown Solicitor would be instructed to prepare a draft instrument which would be submitted to the Council for consideration and acceptance. (In 1989, the current respondent assumed the benefits and obligations of the Council in respect of the car park. I will refer to each of the Councils interchangeably as the respondent.)

119 On 17 May 1956, the respondent informed the Department that the proposed terms were satisfactory subject to two non-material amendments. On 8 June 1956, the Department informed the Council that the Trustees were agreeable to the amendments, subject again to a further (non-relevant) variation. It was then for the Crown Solicitor to prepare the draft agreement for lease.

120 On 27 August 1957, the Department communicated to the Council the Crown Solicitor's opinion that the Trustees did not have power to grant the lease, in the absence of enabling legislation. By April 1958 however, the car park and footway had been constructed and were in use.

121 On 1 May 1958, the respondent began to pay rent at £1,000 per annum, although the enabling legislation, the *Domain Leasing Act* 1961 (NSW), was not enacted until 1961. On 4 July 1962, the Department proposed further amendments to the original terms to the respondent. On 6 November 1964, the Department notified the respondent of an increase in rental to £1,200 per annum because of increased costs associated with the employment of an extra garden labourer as well as increases in the costs of fertiliser and other materials.

122 The respondent responded on 12 April 1965, accepting the amended terms but suggested a variation of its own. The response of the Department was that several of the terms and conditions were obsolete, and that a complete revision should and would be undertaken.

123 On 23 August 1965, some immaterially different terms were offered by the Department. It should be noted however, that, again, the rental was to be adjusted by reference to what may compendiously be described as gardening expenses.

124 On 22 November 1965, the respondent accepted the new terms but proposed some further terms of its own. On 15 September 1966, the Crown Solicitor was instructed to prepare the instrument of lease and on 2 June 1970 the Department notified the respondent of a rental increase to $3,000 per annum by

reason of increased costs for labour and materials since 1965. Almost three years later, on 20 February 1973, the Department advised the respondent of another increase in rent to $4,500 per annum from 1 May 1973, by reason of the sharp increase in labour and other costs since the last review of rental.

125 On 23 March 1973, more than 14 years after the respondent had entered into possession, the first draft of the Deed of Lease was sent by the Crown Solicitor's office to the Department. It contained a number of variations and additions to the terms proposed in the correspondence which had passed between the parties in 1956 and 1965. Clause 4(b)(iv) of the draft took this form:

> "4. PROVIDED ALWAYS AND IT IS HEREBY EXPRESSLY AGREED AND DECLARED:
>
> …
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> (b) That the yearly rent payable during and in respect of each of the fifteen periods each of three years and the remaining period of two years comprising in all the residue of the said term after the first three years thereof (each of such periods being hereinafter referred to as 'the affected periods') may be determined by the Trustees at the commencement of each of the affected periods and the yearly rent so determined shall be payable during and in respect of the then succeeding three years of the term PROVIDED that –
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> …
>
> (iv) in making any such determination the Trustees may have regard to additional costs and expenses which they may incur in regard to the surface of the Domain above or in the vicinity of the parking station and the footway and which arise out of the construction operation and maintenance of the parking station by the Lessee."

On 23 January 1975, a revised lease prepared by the Crown Solicitor was forwarded to the respondent.

126 The respondent sought advice from the City Solicitor. He drew attention to cl 4(b), specifically to par (iv) and stated that "it appears that there is no provision for Council to object to the amount of rent which the trustees determine" and "[i]n the light of my comments above, as long as Council is prepared to accept the restrictions contained therein, I certify that the document is in order for execution". The respondent thereafter accordingly executed the lease which was dated 15 May 1976. The responsible Minister's consent was necessary for the lease to be effectual and this was obtained in September 1976.

127 The appellant seeks to make the point that the provisions for review of rent in cl 4(b) in the lease as executed, differed from the terms referred to in the correspondence in 1956 in four respects. First, any revision of rent was a matter for the decision of the Trustees, who were not obliged to adjust the rent by reference simply and exclusively to increases in costs, gardening or otherwise. Secondly, cl 4(b)(iv) was, in terms, worded to entitle the Trustees to have regard to certain factors of cost in making the determination, but it did not provide that these were the only factors to be taken into account. Thirdly, the factors of cost in cl 4(b)(iv) operated prospectively rather than retrospectively (as had been the case under the earlier correspondence). Fourthly, the actual wording of the clause had changed, it was submitted, in three significant respects:

(i) some proposals in the correspondence of 1956 were not pursued;

(ii) the term "cost" was expanded to "costs and expenses"; and

(iii) the phrase "additional cost of maintenance of the Domain in consequence of the construction of the Station" was expanded to "additional costs and expenses which they may incur in regard to the surface of the Domain above or in the vicinity of the parking station and the footway and which arise out of the construction operation and maintenance of the parking station by the Lessee".

128 On 14 October 1976, the Trustees increased the rent to $10,500 per annum citing "the sharp increase in labour and other costs since the last review".

129 The next relevant event occurred on 29 June 1977 when the Department drew attention, in a letter to the respondent, to the fact that cl 4 provided a basis upon which the Trustees might review the rent and that the rent review in May 1970 had not been accompanied by specific advice to the respondent of the basis of the increase. The letter went on to state:

> "Basically the situation is that the determination of the revised rental is at the discretion of the Trustees and while it is open to them to have regard to certain cost factors the Department does not consider that they are strictly bound to a justification of their calculations to Council."

130 The legal personalities of the parties were altered, in 1980, by establishing the appellant as a statutory body representing the Crown; and, in 1989 the current respondent replaced the Sydney City Council and the benefit and burden of the lease passed to it.

131 Mr Grieve of Queen's Counsel was asked in 1989 to advise the respondent whether it might obtain an order for rectification of the lease "to amend clause

4(b) … to bring it into line with the proposed rental clauses in 1956 and 1965". In May 1989 he gave a negative answer to that question.

132 In summary, the rent had been paid at the rate of £1,000 per annum to 30 April 1965, at the rate of £1,200 ($2,400) per annum from 1 May 1965 to 30 April 1970, $3,000 per annum from 1 May 1970 to 30 April 1973, and $4,500 per annum from 1 May 1973 to 30 April 1976. On each occasion of an increase, the Trustees explained that it was related to increased costs.

133 The first increase in rent after the execution of the lease, to $10,500 per annum from 1 May 1976 to 30 April 1979, was again justified by the Trustees by reference to increased costs, as was the next rent increase, to $13,640 per annum from 1 May 1979 to 30 April 1982. The subsequent increases were to $34,300 per annum from 1 May 1982 to 30 April 1985, and then to $50,000 per annum from 1 May 1985 to 30 April 1988.

134 From May 1988 rent has been demanded and paid as follows:

1 May 1988 to 30 April 1991	$175,000 per annum
1 May 1991 to 30 April 1994	$500,000 per annum
1 May 1994 to 30 April 1995	$500,000 per annum
1 May 1995 to 30 April 1996	$550,000 per annum
1 May 1996 to 30 April 1997	$600,000 per annum

Proceedings in the Supreme Court of New South Wales

135 These proceedings were commenced on 11 March 1996 in the Equity Division of the Supreme Court of New South Wales. There, the respondent claimed: declarations that the appellant could only fix the rent by reference to additional costs and expenses and that the rents demanded and paid from 1985 to 1996 were excessive; an order that those rents, to the extent that they went beyond additional costs and expenses be repaid; or, in the alternative, rectification of the lease to confine increased rents to sums related to additional costs and expenses. At first instance, the parties also litigated a claim, that the payments of rent from 1985 to 1996, were made under a mistake of law.

136 The case was tried by Hodgson J (as he then was). His Honour held that on the proper construction of the lease, the appellant was entitled to charge a "fair and reasonable rent". The trial judge rejected the claim for rectification.

137 The respondent appealed to the New South Wales Court of Appeal (Spigelman CJ, Beazley and Fitzgerald JJA). In that Court Fitzgerald JA, with

whom the other members of the Court substantially agreed, after reciting the arguments of the parties said this:

> "While it is possible to find some support for each alternative presented by the parties' rival arguments[114], neither argument is compelling on the basis of language, linguistic context or purpose, and each alternative is subject to objections. It is permissible to seek assistance in discerning what the parties intended by the terms in which their agreement was expressed from the background circumstances at the material time[115]. This view is reinforced by the consideration that the concept of 'fair and reasonable' which the Trust seeks to apply to the determination of rent under the lease is intrinsically ambiguous. A 'fair and reasonable' rent as between a particular lessor and lessee might be, but is not necessarily, the market rent. Even when one party is entitled to determine the rent, it must be possible to decide whether the rent determined is 'fair and reasonable', which will commonly be influenced by surrounding circumstances.
>
> The fundamental ambiguity for present purposes concerns the meaning of the phrase 'may have regard to' in subcl 4(b)(iv) of the lease, and in particular whether or not that phrase is intended to confine the matters which the Trust may consider in determining the rent, irrespective of the width of its discretion otherwise; for example, with respect to which, if any, 'additional costs and expenses ... [it] may incur' it considers, and the manner in which all or each of them is brought into consideration."

His Honour, then referred to circumstances of the kind which Mason J discussed in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[116], as an aid in the construction of the lease and he concluded as follows:

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114 cf *Wallace v Stanford* (1995) 37 NSWLR 1 at 9-10, 19-20, 23.

115 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337.

116 (1982) 149 CLR 337 at 352:

> "Consequently when the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, *but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting.* We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these

(Footnote continues on next page)

"In my opinion, when the lease is read against the background of those circumstances, the parties' 'presumed intention' in their reference to the costs and expenses to which the lessor 'may have regard' in determining the rent was to specify exhaustively the considerations material to that determination."

138 Because of the conclusion of the Court of Appeal with respect to the meaning of the relevant clause in the lease, it became necessary for that Court to decide the respondent's claim for restitution. It had been unnecessary for the primary judge to determine this matter, because of his decision on the point of construction in favour of the appellant. This issue was resolved by the Court of Appeal in favour of the appellant.

The appeal to this Court

139 The appellant appealed to this Court. Neither the claim for rectification nor the claim for restitution is pursued in this Court, although the respondent has filed a notice of contention, challenging, if the Court were to take the view that the lease was not ambiguous, the decision in *Codelfa*, to the extent that it holds that absent ambiguity recourse to surrounding circumstances is impermissible.

140 The appellant's first submission is that the lease was a complete and final agreement between the parties and was covered by the parol evidence rule.

141 Clause 4(b) of the lease provides that the yearly rent in respect to each of the periods of three years after the first may be determined by the Trustees at the commencement of each of the succeeding periods. The use of the word "determined" in each of cl 1 and cl 4(b) is a repetition of the language of s 3 of the *Domain Leasing Act*[117]. A power to make a determination of the rent for the

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factors at the expense of the actual language of the written contract." (emphasis added)

117 Section 3 of the *Domain Leasing Act* provided:

"(1) Notwithstanding anything contained in any other Act, the trustees may, with the consent of the Minister for Lands, from time to time grant –

(a) to the Council such leases, and licenses for the use, of such parts of the Domain as may be necessary for the purposes of or for purposes connected with the operation and maintenance by the Council of the car parking station and the moving footway leading thereto, constructed before the commencement of this Act by or on behalf of the Council on part of the Domain; and

(Footnote continues on next page)

period, the appellant submits, connotes a power in the appellant exclusively to decide the relevant factors and the weight to be given to them in fixing that rent.

142 The appellant points out that the broad powers conferred by cll 1 and 4(b) are then followed by four provisos. They deal with these subjects: an obligation to notify; how and when adjustments of rent will be made; a minimum sum for the rent as determined by the Trustees (there being no maximum specified); and the enabling or facilitative function of par (iv). The last refers to some factors to which the Trustees may have regard in making the determination, without stating or implying that these are the only factors to which they may have regard.

143 The appellant also places weight on the word "may", seeking to emphasise its presumably permissive meaning and the absence of the word "only" after it. The appellant emphasises that but one of the provisos, the last, uses the word "may" whereas the others use the word "shall".

144 The appellant submitted that its construction of cl 4 was supported by cl 4(k) which permits the Trustees (or their delegate in the Department) to form any opinion under the lease "on such materials as they or he may think sufficient" and in so doing be exercising "merely administrative functions".

145 The appellant next put a submission that, as both the trial judge and Spigelman CJ recognised, the construction of cl 4(b) contended for by the appellant did not render the Deed of Lease unenforceable for uncertainty: it is orthodox and well established that a court may imply an obligation of reasonableness when the parties intend to enter a valid and binding agreement and there is machinery, but no formula for determining price (or, also, it may be said, rent)[118].

(b) to the Commonwealth such leases of such part of the Domain as may be necessary for the purposes of or for purposes connected with the operation and maintenance by the Commonwealth of the fuel oil installations constructed before the commencement of this Act by or on behalf of the Commonwealth on part of the Domain,

for such terms or periods, at such rentals and subject to such covenants and conditions as the trustees, with the approval of the Minister for Lands, may determine.

(2) For the purposes of this section the trustees shall be deemed to hold an estate in fee simple in the land in respect of which their powers are exercised."

118 *Powell v Braun* [1954] 1 WLR 401 at 404-405 per Evershed MR; [1954] 1 All ER 484 at 485-486; *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600 at 614-617.

146 The appellant sought to rely on two recent decisions of the New South Wales Court of Appeal, *Alcatel Australia Ltd v Scarcella*[119] and *Burger King Corp v Hungry Jack's Pty Ltd*[120] which held that a duty of good faith, both in performing obligations and exercising rights, may by implication be imposed upon parties as part of a contract.

147 The appellant's submissions should be rejected. In my opinion, cl 4(b)(iv) is ambiguous. This is certainly not the first case and it will not be the last in which a court has thought, or will think a sentence in which the word "may" has been used, ambiguous. If the relevant factors to which the Trustees may, as opposed to must, have regard on each occasion for a determination, are not confined to those enumerated, then it becomes very difficult, as Fitzgerald JA pointed out, to catalogue others to which the Trustees may look, to determine what the primary judge held was determinable, a fair and reasonable rent. The appellant seeks to meet this by saying that it was not contested in the Supreme Court, that the rent actually demanded and paid from 1985 was fair and reasonable.

148 This is not a case in which there is no formula for determining the rent. The formula was a formula composed of the elements of increases in costs and expenses, the question being whether the increases were to be related to particular items of increased costs.

149 I do share the opinion of Fitzgerald JA that there is an ambiguity, but that it is capable of resolution by reference to, among other matters, the surrounding circumstances to which his Honour referred. The other matters are the contextual indications to be found elsewhere in the lease. One of these is the quantum of the initial rent itself, of only $2,000 per annum, on no possible view an ordinary commercial rent for a lease for a long term of a large car park close to the centre of the most populous city in Australia.

150 The second contractual indication, and it is a significant one, is the reference in cl 4(b)(iv) itself to "additional costs and expenses". The use of the word "additional" is almost, but not quite a strong enough indicator on its own, of a mutual intention to relate and confine the rent to be paid over the term of the lease to a rent determined by reference to costs and expenses. The use of the

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119 (1998) 44 NSWLR 349.

120 [2001] NSWCA 187. A similar approach has now been taken in Victoria in *Far Horizons Pty Ltd v McDonald's Australia Ltd* [2000] VSC 310 and in the Federal Court in *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) ATPR ¶41-703.

phrase "additional costs and expenses" rather than the words "costs and expenses" means that there must have been basic costs and expenses at the outset that the parties had in mind and to which increased costs and expenses could, after calculation, be added so that the aggregate of this would become the rent payable from time to time.

151 The fact that the nature of the costs and expenses in question is identified is also relevant. There is in cl 4(b)(iv) reference to expenses "in regard to the surface of the Domain above or in the vicinity of the parking station and the footway and which arise out of the construction operation and maintenance of the parking station by the Lessee". The surface at least, was and could only be used pursuant to the *Public Parks Act* 1912 (NSW) in force at the inception of the term and subsequent enactments all of which require that the Domain be used for public recreation. This reference in the lease, served further to indicate that the parties contemplated recoupment of expenses and not profit.

152 Another relevant matter apparent on the face of the lease is that the respondent's predecessor had to construct, obviously at much expense, the parking station[121]. In that sense the lease was in the nature of a building lease. And it would not be surprising in a lease of that kind, between public authorities seeking to exploit, within power, and completely for public purposes, land in public ownership, that the rent payable would be designed to do no more than recoup costs and expenses incurred, and to be incurred by the authority in whose name the land is owned.

153 It is also relevant that the lease required that the respondent pay all rates, taxes, charges and assessments, payable in respect of the demised land; keep the parking station in good repair; indemnify the appellant and others against claims and demands, arising out of the use of the land for a parking station; keep the car park insured; pay for services to, or in respect of the parking station; and, at the end of the term, if so required by the appellant, remove any building structure from the site. Some of these are of course conventional terms in many leases, but to impose upon the lessee a separate obligation to pay all rates, taxes, charges and assessments in respect of the land rather than a part of them as a component of the rent is unusual, and again is indicative of an arrangement between lessor and lessee of a non-commercial kind.

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121 It has been held that a covenant in a lease for a long term (99 years) requiring a lessee to undertake construction on land is enforceable by a decree of specific performance as damages would not be a sufficient remedy: *Molyneux v Richard* [1906] 1 Ch 34. See also *Wolverhampton Corporation v Emmons* [1901] 1 KB 515.

154 The internal indications in the instrument of lease to which I have referred, together with matters external to it, the long history of the Domain as a park, the Trustees' role as the public's guardians of the park, the statutory context of the legislation[122] under which the parties function, including the requirement that the responsible Minister consent to the lease[123], that the parties are statutory, non-commercial creatures, that the Domain had not apparently been used for other than public purposes before the lease was granted, that the respondent was let into possession long before the lease was executed, that the respondent has in fact constructed, obviously for much money, a public car park, and that at the time of entering into possession gardening and related expenses equated approximately to the amount of rent agreed, together compel the conclusion that the increases in rent were confined to additional costs and expenses of this kind.

155 I do not think that the fact that the respondent has from time to time paid the appellant rent considerably in excess of additional costs and expenses when demanded by the appellant, dictates a different result. The lease stands without amendment. As an instrument in writing, it could only be amended by further writing intended to have and having that effect. No estoppel arises. There is no suggestion that the appellant altered its position to its detriment on the basis of over-payment of rent by the respondent. The position simply seems to be that different officials on each side at various times took different views of the effect of cl 4(b) of the lease.

156 In view of the conclusion I have reached, it is unnecessary to answer the questions raised by the rather far-reaching contentions of the appellant, and for which, it says, *Alcatel Australia Ltd v Scarcella*[124] and *Burger King Corp v Hungry Jack's Pty Ltd*[125] stand as authorities: whether both in performing obligations and exercising rights under a contract, all parties owe to one another a duty of good faith; and, the extent to which, if such were to be the law, a duty of good faith might deny a party an opportunistic or commercial exercise of an otherwise lawful commercial right.

Orders

157 I would dismiss the appeal with costs.

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122 *Local Government Act* 1919 (NSW); *Domain Leasing Act* 1961 (NSW); *Royal Botanic Gardens and Domain Trust Act* 1980 (NSW).

123 Section 3 of the *Domain Leasing Act*.

124 (1998) 44 NSWLR 349.

125 [2001] NSWCA 187.