HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER AND NETTLE JJ

MORETON BAY REGIONAL COUNCIL APPELLANT

AND

MEKPINE PTY LTD RESPONDENT

Moreton Bay Regional Council v Mekpine Pty Ltd
[2016] HCA 7
10 March 2016
B60/2015

ORDER

1. *Appeal allowed with costs.*

2. *Set aside orders 2 and 3 of the Court of Appeal of the Supreme Court of Queensland made on 2 December 2014, and in their place order that the appeal be dismissed with costs.*

On appeal from the Supreme Court of Queensland

Representation

D F Jackson QC with A N S Skoien for the appellant (instructed by Moreton Bay Regional Council)

G W Diehm QC with P D Hay for the respondent (instructed by Hillhouse Burrough McKeown Pty Ltd)

CATCHWORDS

Moreton Bay Regional Council v Mekpine Pty Ltd

Real property – Resumption of land – Leases – Where registered lease expressed to confer interest over specified lot of land that was later amalgamated with adjacent lot – Where land previously part of adjacent lot resumed by local council – Whether lessee's interest extended to entire amalgamated lot upon registration of plan of subdivision under *Land Title Act* 1994 (Q) – Whether lessee had compensable interest in resumed land under *Acquisition of Land Act* 1967 (Q), s 12(5).

Real property – Leases – Retail leases – Construction and interpretation – Whether necessary to construe lease otherwise than in accordance with natural and ordinary effect of its terms.

Statutes – Interpretation – Function of definition clause – Whether definition of "Common Areas" in retail shop lease inconsistent with definition of "common areas" in *Retail Shop Leases Act* 1994 (Q), s 6.

Words and phrases – "common areas", "interest in land", "outgoings", "plan of subdivision", "registered lease", "registration of an instrument", "resumed land", "retail shop lease", "retail shopping centre".

Acquisition of Land Act 1967 (Q), ss 2, 12(5).
Acts Interpretation Act 1954 (Q), s 36.
Land Title Act 1994 (Q), ss 12, 49, 49A, 50, 64, 65, 182, 183, 184, Sched 2.
Retail Shop Leases Act 1994 (Q), ss 3, 5, 6, 7(1), 8, 19, 20, 38(2), 40(1), Pt 3 Div 2, Schedule.

1 FRENCH CJ, KIEFEL, BELL AND NETTLE JJ. This is an appeal from a judgment of the Court of Appeal of the Supreme Court of Queensland. The respondent ("Mekpine") was a tenant in a shopping centre. Mekpine's registered lease was expressed to be over certain premises on land described as "Lot 6 on RP 809722" ("former Lot 6"). The lessor subsequently registered a plan of subdivision under the *Land Title Act* 1994 (Q) ("the LTA") to amalgamate former Lot 6 and an adjacent lot ("former Lot 1"[1]) to create a larger lot ("new Lot 1"[2]). When part of the land, which was part of former Lot 1, was resumed by the appellant ("the Council"), Mekpine claimed compensation under the *Acquisition of Land Act* 1967 (Q) ("the ALA").

2 The question in the appeal is whether Mekpine's rights under a lease of premises on former Lot 6 remained over that part of new Lot 1 which previously lay within former Lot 6 or whether they extended to the entirety of new Lot 1. For the reasons which follow, it should be concluded that Mekpine's interest in land remained confined to that part of new Lot 1 which previously lay within former Lot 6.

The facts

3 In March 1999, Mekpine entered into a 10 year retail lease ("the Lease") of a shop ("the Premises") within the Castle Hill Shopping Court in Murrumba Downs, Queensland ("the Shopping Centre") with options to renew. At that time, the Shopping Centre lay within the land comprised in former Lot 6.

4 The Premises were defined in Item 3 of the Schedule to the Lease as:

> "Shop 1 at Castle Hill Shopping Court, Corner Dohles Rocks Road and Ogg Road, Murrumba Downs, Queensland, 4503".

The Schedule to the Lease included a diagram setting out the metes and bounds of the Premises and former Lot 6.

5 Clause 6.1 of the Lease conferred on Mekpine a right of exclusive possession of the Premises for the permitted use of operating a supermarket.

6 In addition, cl 6.8 of the Lease provided that Mekpine was entitled to use the "Common Areas", in common with other tenants, as follows:

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1 Former Lot 1 was on RP 847798.

2 New Lot 1 was on SP 184746.

> "The Lessee and the Lessee's Employees may use the Common Areas but must obey all reasonable directions and rules given by the Lessor relating to their use. The Lessee must not obstruct the Common Areas or Car Park."

7 "Common Areas" were defined in cl 1.2 of the Lease as "those areas of the Building or the Land which have not been leased or licensed by the Lessor". "Land", which appears in the definition of "Common Areas", was defined as "the lot described in Item 2 of the Form 7 in this Lease" and Item 2 of the Form 7 referenced former Lot 6 as the relevant "Land".

8 Clause 15 further provided, however, in broad terms, that the Lease did not give Mekpine any rights to the Common Areas other than those specifically provided for in the Lease, that the Common Areas were the property of the lessor and that the lessor retained a right to use, control, manage, alter, close or deal with the Common Areas as the lessor might deem appropriate.

9 The Lease was registered in the freehold land register kept under and for the purposes of the LTA on 25 January 2002.

10 Subsequently, the lessor acquired former Lot 1, which was adjacent to former Lot 6, and obtained planning approval to extend the Shopping Centre over former Lot 1 on condition that former Lot 1 be amalgamated with former Lot 6 and that the area which later became the resumed land be excluded from the proposed development and kept clear of permanent structures and improvements. In accordance with that approval, in 2007 former Lot 1 was amalgamated with former Lot 6 by registration of a plan of subdivision under Div 3 of Pt 4 of the LTA, thereby creating new Lot 1 ("the Plan of Subdivision"). The Lease was endorsed on the Plan of Subdivision under the heading "EXISTING LEASE ALLOCATIONS" and identified as an encumbrance on the title.

11 On 14 November 2008, the Council resumed a strip of vacant land from a corner of new Lot 1, being part of the land previously comprised in former Lot 1 ("the Resumed Land"), to perform road works[3]. The Resumed Land was never part of former Lot 6.

12 Mekpine then brought a claim for compensation under the ALA contending that, by reason of s 182 of the LTA, upon registration of the Plan of

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3 *Queensland Government Gazette*, No 72, 14 November 2008 at 1329. The Gazette provided that the Resumed Land was to be registered as Lot 11 on SP 215604.

Subdivision for the amalgamation of former Lot 1 with former Lot 6, Mekpine acquired an interest in new Lot 1 and thus in the Resumed Land.

Mekpine's claim

13 In order to be entitled to compensation under the ALA, Mekpine must have had an "interest" in the Resumed Land.

14 Section 12(5) of the ALA relevantly provides:

> "On and from the date of the publication of the gazette resumption notice the land thereby taken shall be vested or become unallocated State land ... and the estate and interest of every person entitled to the whole or any part of the land shall thereby be converted into a right to claim compensation under this Act".

15 "Land" is defined in the ALA as "land, or any estate or interest in land, that is held in fee simple, including fee simple in trust under the *Land Act 1994*, but does not include a freeholding lease under that Act"[4].

16 Although "interest in land" is not defined in the ALA, s 36 of the *Acts Interpretation Act* 1954 (Q) ("the AIA") provides:

> "***interest***, in relation to land or other property, means—
>
> (a) a legal or equitable estate in the land or other property; or
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> (b) a right, power or privilege over, or in relation to, the land or other property."

17 It has not been in dispute in these proceedings that Mekpine has a relevant interest in the land in former Lot 6 by virtue of the Lease. The principal question on the appeal is whether that interest extended to new Lot 1 on the registration of the Plan of Subdivision.

18 Mekpine's claim for compensation under the ALA had two alternative bases. First, it claimed that its interest in the Resumed Land for which it had a right to compensation arose from the registration of the Plan of Subdivision under s 182 of the LTA. It contended that, by necessary implication, "Land" in the Lease refers to "new Lot 1" and, therefore, that Mekpine had a right to use the

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4 ALA, s 2.

Common Areas in new Lot 1. In the alternative, Mekpine claimed that, pursuant to s 20 of the *Retail Shop Leases Act* 1994 (Q) ("the RSLA"), the definition of Common Areas in the Lease was inconsistent with the definition of "common areas" in the RSLA and, therefore, that the definition of "common areas" in the RSLA had to be read into the Lease in place of the Lease definition of Common Areas.

The proceedings below

19 On 10 September 2012, the Land Court of Queensland[5] held that, as the parties had not amended the Lease, the Common Areas over which the lessee gained contractual rights pursuant to the Lease remained those within former Lot 6, not the extended Common Areas within new Lot 1. The Land Court nevertheless upheld Mekpine's claim for compensation on the basis that the definition of Common Areas in the Lease should be substituted by the definition of "common areas" in the RSLA. The effect was that, once former Lot 1 became part of the Shopping Centre, the Common Areas for the purpose of the Lease extended to those parts of the common areas as defined by the RSLA as lay within new Lot 1. On that basis, the Land Court concluded that Mekpine had an interest in the nature of contractual rights over the parts of the common areas as defined in the RSLA that lay within former Lot 1.

20 The Land Appeal Court of Queensland allowed an appeal against the Land Court's judgment[6]. It upheld the Land Court's conclusion that, despite the amalgamation of former Lot 1 with former Lot 6, Mekpine's interest as lessee under the Lease continued to be defined by the terms of the Lease and so remained confined to the land previously comprised in former Lot 6. But it reversed the Land Court's holding that the definition of "common areas" in the RSLA should be substituted for the definition of Common Areas in the Lease. It concluded that the amalgamation of former Lot 1 with former Lot 6 did not confer any interest in Mekpine beyond the land previously comprised in former Lot 6.

21 Mekpine appealed to the Court of Appeal and the appeal was allowed by majority (McMurdo P and Morrison JA, Holmes JA dissenting)[7].

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5 *Mekpine Pty Ltd v Moreton Bay Regional Council* [2012] QLC 0046.

6 *Moreton Bay Regional Council v Mekpine Pty Ltd* [2013] QLAC 5.

7 *Mekpine Pty Ltd v Moreton Bay Regional Council* (2014) 206 LGERA 120.

The reasoning of the Court of Appeal

22 The majority of the Court of Appeal held that the Plan of Subdivision for the amalgamation of former Lot 1 with former Lot 6 with "EXISTING LEASE ALLOCATIONS" noted on it was an "instrument" within the meaning of s 182 of the LTA which transferred to, or created in, Mekpine a leasehold interest in new Lot 1; and, therefore, that, as from the time of registration of the Plan of Subdivision, the definition of "Land" in the Lease was required to be read as referring to new Lot 1 rather than former Lot 6. As former Lot 6 ceased to exist, the reference to "Land" became a reference to the land in new Lot 1.

23 The effect of the decision of the majority, it will be observed, is to extend Mekpine's interest in land beyond that given by the Lease as registered.

24 In the alternative, their Honours reasoned that, if that were not the case, it was nevertheless apparent that the legislative intent of the RSLA was that the s 6 definition of "common areas" should be incorporated into retail shop leases and, therefore, that the Land Court had been correct in concluding that the RSLA in effect amended the Lease so that the Common Areas as defined in the Lease became all of the common areas within new Lot 1.

25 In contrast, Holmes JA concluded that the only interest created or vested by registration of the Plan of Subdivision was the lessor's interest in new Lot 1 and, consequently, that Mekpine's existing leasehold interest in former Lot 6 was simply recorded in respect of new Lot 1.

26 Holmes JA also held that the definition of "common areas" in s 6 was without substantive effect and had no other function than to explain what was meant by "common areas" in the definition of "retail shopping centre" in s 8 of the RSLA, with the result that s 6 of the RSLA did not replace the Lease's definition of Common Areas.

Relevant statutory provisions

Land Title Act

27 The LTA provides for the registration of land and interests in land.

28 An "instrument" must be registered in order to create an interest in a lot[8]. Section 184 gives such registered interests indefeasibility. Section 184(1)

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8 LTA, s 181.

provides that, subject to certain exceptions[9], a "registered proprietor of an interest in a lot holds the interest subject to registered interests affecting the lot but free from all other interests".

29 "Instrument" is defined in the Dictionary in Sched 2 to the LTA as including, inter alia, a "document that deals with a lot and may be registered under this Act" and "a map or plan of survey that may be lodged". Both the Lease and the Plan of Subdivision are instruments within the meaning of that definition.

30 "Lot" is defined as a "separate, distinct parcel of land" created on the registration of a plan of subdivision or the recording of particulars of an instrument.

31 Section 183 of the LTA gave Mekpine the right to register the Lease over former Lot 6 and the lessor the right to register the Plan of Subdivision amalgamating former Lot 1 and former Lot 6. It provides in substance that a person in whom an interest has been created has a right to have the instrument creating the interest registered if the instrument is executed, the person lodges the instrument for registration together with such other documents as the registrar requires to effect registration and the person has otherwise complied with the LTA.

32 Section 182, upon which Mekpine relied in its claim for compensation, sets out the effect of registration on an interest in land. It provides:

> "On registration of an instrument that is expressed to transfer or create an interest in a lot, the interest—
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> (a) is transferred or created in accordance with the instrument; and
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> (b) is registered; and
>
> (c) vests in the person identified in the instrument as the person entitled to the interest."

33 The LTA also contains specific provisions for the registration of leases. Section 64 provides that a "lot or part of a lot may be leased by registering an instrument of lease for the lot or part". Section 65 sets out the requirements of an instrument of lease. It provides, inter alia, that an instrument of lease for a lot or

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9 LTA, ss 184(3), 185.

part of a lot must be validly executed, include a description sufficient to identify the lot or part of the lot to be leased (which may be by plan of survey, as was done here) and include an acknowledgment of the amount paid or details of other consideration. Sub-sections (2) and (3) of s 67 provide that a registered lease may be amended by registering an instrument of amendment of the lease, but the instrument must not increase or decrease the area of land leased. In this case, the Lease was not amended.

34 Pursuant to the provisions relating to the registration of interests created by leases and ss 181-185, Mekpine's interest in former Lot 6 was created in accordance with the Lease by registration of the instrument of lease on 25 January 2002.

35 The LTA further provides for the registration of plans of subdivision[10]. A plan of subdivision is relevantly defined as a "plan of survey providing for ... amalgamation of 2 or more lots to create a smaller number of lots"[11]. Section 50 of the LTA creates requirements for the registration of a plan of subdivision. It requires, inter alia, that "all other registered proprietors whose interests are affected by the plan" must consent to the plan of subdivision[12].

36 Pursuant to the provisions relating to registration of plans of subdivision and ss 181-185, the amalgamation of former Lot 1 and former Lot 6 to create new Lot 1 was achieved by lodging the Plan of Subdivision for registration on 27 September 2007.

Retail Shop Leases Act

37 The RSLA relates to Mekpine's alternative argument that the definition of "common areas" in s 6 of the RSLA should be substituted for the definition of Common Areas in the Lease. Unlike in the Lease, "common areas" in the RSLA are not defined by reference to former Lot 6 and are broad enough to include the "common areas" of the retail shopping centre on new Lot 1 comprised in the Resumed Land.

38 The definition of "common areas" in the RSLA appears in Div 2 of Pt 3, which is entitled "Extended definitions". Section 6 provides in substance that

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10 LTA, s 49A(1).

11 LTA, s 49(b).

12 LTA, s 50(1)(j).

"common areas" of a retail shopping centre are areas, excluding leased areas, in or adjacent to the centre that are used or intended for use by the public or in common by the lessees of premises in the centre in relation to the conduct of businesses in premises in the centre[13]. "Common areas" include stairways, escalators and elevators, malls and walkways, parking, toilets and restrooms, gardens and fountains, and information, entertainment, community and leisure facilities[14].

39 Section 20 of the RSLA provides that, if a provision of the RSLA is "inconsistent with a provision of a retail shop lease, the provision of [the RSLA] prevails and the provision of the lease is void to the extent of the inconsistency".

40 The definitions of "retail shop", "retail shop lease" and "retail shopping centre" inform the definition of "common areas" and the operation of s 20. While "retail shopping centre" appears in a division of the RSLA which is headed "Extended definitions"[15], "retail shop" and "retail shop lease" appear in the Schedule to the RSLA by reference to a division which is entitled "Standard definitions"[16].

41 "Retail shop" is defined in the Schedule to the RSLA as including premises that are situated in a retail shopping centre. It is not disputed that the Premises were a retail shop within the meaning of that definition.

42 "Retail shop lease" is defined in the Schedule to the RSLA as including a lease of a retail shop other than a retail shop with a floor area of more than 1,000 metres squared. It is not disputed that the Lease was a retail shop lease within the meaning of that definition.

43 "Retail shopping centre" is defined in s 8 of the RSLA as a cluster of premises where: five or more of the premises are used wholly or predominantly for carrying on retail businesses; all of the premises have the same lessor or head lessor; all of the premises are located in one building or two or more buildings separated by "common areas", other areas owned by the owner or a road; and the cluster of premises is promoted, or generally regarded, as constituting a shopping

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13 RSLA, s 6(1), (3).

14 RSLA, s 6(2).

15 RSLA, Pt 3 Div 2.

16 RSLA, Pt 3 Div 1.

centre, shopping mall, shopping court or shopping arcade. It is not disputed that the Shopping Centre was a "retail shopping centre".

Section 182 of the LTA

44 In common with other Torrens systems, the LTA establishes a system of title to land by registration. It has the effect, however, that when an "interest" is created by an "instrument" that is registered, the result is a registered interest corresponding to the interest created by the instrument. Thus, as has been seen, s 182 of the LTA provides that, on registration of an instrument that is expressed to create an interest in a lot, "the [registered] interest ... is ... created in accordance with the instrument; and ... is registered; and ... vests in the person identified in the instrument as the person entitled to the interest". It follows, as Holmes JA held, that the Lease was an "instrument" which created Mekpine's interest as lessee in former Lot 6 and, upon registration of the Lease pursuant to s 182 of the LTA, Mekpine acquired a registered interest as lessee in former Lot 6 in accordance with the Lease.

45 When former Lot 6 was later amalgamated with former Lot 1 resulting in the creation of new Lot 1, former Lot 6 ceased to exist as a "lot" and therefore as "a separate, distinct parcel of land"[17]. Hence, upon registration of the Plan of Subdivision, a single indefeasible title issued for new Lot 1[18]. If the Lease had not been registered at that point, it would have followed under s 184(1) that the registered proprietor of new Lot 1 took the proprietorship interest in new Lot 1 freed and discharged of Mekpine's interest as lessee (subject only to the fraud exception provided for in s 184(3)(b) and possibly some other personal equities). But, because the Lease was registered at that point, the lessor took its proprietorship interest in new Lot 1 subject to Mekpine's registered interest as lessee[19].

46 The registered interest created in Mekpine as a result of s 182 of the LTA was a registered interest as lessee corresponding to the interest which had been created in accordance with the Lease. That interest as lessee remained registered at the time of creation of new Lot 1 and was one of the "EXISTING LEASE ALLOCATIONS" noted on the Plan of Subdivision. And, as was clear from the

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17 LTA, Sched 2.

18 LTA, s 49A.

19 LTA, s 184(1).

terms of the Lease, that interest was confined to so much of new Lot 1 as had previously been comprised in former Lot 6.

47 In the result, there was nothing in s 182 of the LTA which of itself operated to increase the rights created by the Lease beyond the area of the land comprised in former Lot 6.

Sections 64 and 65 of the LTA

48 As already noted, s 64 of the LTA provides for the registration of an instrument of lease for a lot or part of a lot and s 65 provides, inter alia, that if the instrument of lease is for part of a lot, the instrument must include a sketch plan identifying the part of the lot which is drawn to a standard to the registrar's satisfaction, a plan of survey identifying the part of the lot, or a description alone if the registrar is satisfied that the land is sufficiently identified by the description in the instrument. The Lease included a plan of survey precisely identifying the metes and bounds of former Lot 6 and thus the part of new Lot 1 over which the Lease was to be registered. The Lease also contained a description of the "Land" the subject of the Lease which precisely identified the "Land" as "Lot 6 on RP 809722". Consequently, from the time of registration of the Plan of Subdivision, the Lease was registered under s 64 over only that part of new Lot 1 identified as former Lot 6. The "instrument" by which an interest in land, namely former Lot 6, was vested in Mekpine on registration was the Lease, not the Plan of Subdivision.

49 It follows that, despite registration of the Plan of Subdivision and the consequent extinguishment of former Lot 6 as a "lot"[20], the Lease's definition of "Land" remained unchanged as former Lot 6, and continued to function as a precise description of that part of new Lot 1 over which the Lease was registered.

Implication derived from the definition of Land in the Lease

50 Mekpine contended that it was implicit in the "Land" being defined in the Lease in terms of the registered description of the land on which the Premises were constructed that, if the land on which the Premises were constructed were amalgamated with other land, the "Land" should thenceforth be read as meaning the registered description of the amalgamated land.

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20 "Lot" is defined as "a separate, distinct parcel of land created on ... the registration of a plan of subdivision; or ... the recording of particulars of an instrument": LTA, Sched 2.

51 Counsel for Mekpine submitted that, in order to give the Lease business efficacy, it was necessary to read "Land" as meaning "Lot 6 on RP 809722" together with such other land as might be amalgamated from time to time with that lot. Counsel also relied on cll 6.8, 6.13, 16.4 and 25(k) of the Lease as supporting that implication.

52 Those submissions should be rejected. Clause 16.4 of the Lease provided:

> "The Lessor may subdivide the Land or grant easements or other rights over it or register a Community Title Scheme for the Land. The Lessee must at the Lessor's expense sign any consent or document needed by the Lessor so the Lessor can carry out its rights under this clause without interference with the Lessee's other rights under this Lease."

53 It is apparent from cl 16.4 that the parties to the Lease contemplated the possibility that the Land might be reduced by subdivision from time to time during the course of the Lease. It follows that, if the Land were subdivided, the definition of "Land" in the Lease would have to be read as applying to only so much of the Land as remained following the subdivision. In that sense, it is correct to say that the parties appear to have contemplated that the Common Areas as defined could be reduced accordingly from time to time.

54 It does not follow, however, that the parties should be taken to have intended that, if the Land were amalgamated with other land to form a new expanded lot, but the Lease were registered as an existing encumbrance over only such part of the new lot as was previously comprised in the Land, the definition of "Land" in the Lease should be read as extending to the remainder of the new lot. To the contrary, it is opposed to business common sense to suppose that honest and reasonable business persons would contemplate that, whenever and if the Land were amalgamated with other land, the lessee should automatically and without additional consideration acquire an interest in or right over the further land so acquired. The idea of the Common Areas expanding with each new consolidation is also inconsistent with the express exclusion by cl 15 of the Lease of any common area rights other than those specifically provided for in the Lease and the entitlement of the lessor under cl 15 to reduce and restrict the Common Areas at the lessor's discretion.

55 Clause 25(k) of the Lease provided that:

> "This Guarantee and Indemnity shall extend to cover any holding over under or renewal of this Lease (whether resulting from a valid exercise of any option under this Lease or otherwise) and shall also extend to cover any substitute or replacement lease resulting from any right under this

> Lease for the Lessor to relocate the Lessee or subdivide, amalgamate or otherwise deal with the Premises or Land containing the Premises".

The effect of that clause was that, when and if amalgamation of the Land with other land or subdivision of the Land results in the need for a substituted lease – as it could do if the terms of the Lease needed to be amended to accommodate the amalgamation or subdivision – the Guarantee should apply to the replacement lease. Given that a guarantee is ordinarily construed *strictissimi juris*[21], such a provision is ordinarily to be expected. That does not imply that the definition of "Land" in the Lease should be taken to include not only former Lot 6 but also such other land as might be amalgamated with former Lot 6 from time to time. If anything, it suggests the contrary.

56 Clause 6.8 of the Lease provided that the lessee and the lessee's employees may use the Common Areas and must obey all reasonable directions given by the lessor relating to their use and must not obstruct the Common Areas or the Car Park. Clause 6.13 provided that the lessee must not park or permit the lessee's employees to park motor vehicles in the Car Parking Area other than areas set aside for staff parking[22], and that the lessee must pay the lessor, upon demand, an amount of one hundred dollars by way of liquidated damages for each daily usage by each motor vehicle of the lessee or the lessee's employees which is parked in areas of the Car Parking Area not set aside for staff parking.

57 There is nothing in those provisions, however, which suggests that the definition of "Land" in the Lease should be taken to include not only former Lot 6 but also such other land as with which former Lot 6 might be amalgamated from time to time. As drafted, the Lease confines the lessee's interest, including in Common Areas and use of the Car Parking Area, to the land comprised in former Lot 6. As with cl 16.4, it would be opposed to business common sense to suppose a common intention that, if the lessor acquired additional land and amalgamated it with the Land, the lessee should thereby and without additional consideration be granted an interest by way of additional Common Areas and access to any Car Parking Area over the additional land or equally be subjected

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21 *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 561 per Mason ACJ, Wilson, Brennan and Dawson JJ; [1987] HCA 15; *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 256 per Mason CJ, Brennan, Deane and McHugh JJ; [1989] HCA 63.

22 "Car Parking Area" is defined in cl 1.2 of the Lease as "that part of the Land sealed, marked and set aside for the prime purpose of the parking of cars".

to additional obligations in respect of the additional Common Areas and Car Parking Area.

58 More generally, there is nothing in the Lease which implies that it is necessary to construe the Lease otherwise than in accordance with the natural and ordinary effect of its terms[23], or that to construe the Lease in accordance with the natural and ordinary effect of its terms would be productive of a result which is suggestive of commercial nonsense or even commercial inconvenience[24]. The Lease is capable of working efficaciously in the manner in which it was evidently intended to operate by treating the definition of "Land" as drafted as confined to that part of new Lot 1 which was previously comprised in former Lot 6. "Land" for the purposes of the Lease means the land comprised in former Lot 6 and therefore excludes so much of any Common Areas as may have been comprised in the remainder of new Lot 1.

The application of the RSLA

59 That leaves for consideration Mekpine's alternative claim to have an "interest" in the Resumed Land based on the provisions of the RSLA.

60 Counsel for Mekpine argued that because the RSLA definition of "common areas" applied to the Lease, Mekpine had a "right, power or privilege"[25] over the part of new Lot 1 that was resumed and therefore was entitled to compensation under s 12(5) of the ALA.

61 The argument should be rejected. Since there is no operative provision of the RSLA that expressly incorporates the definition of "common areas" into retail shop leases, the definition of "common areas" in the RSLA must prima facie be read as confined to the RSLA. As Barwick CJ, McTiernan and Taylor JJ held in *Gibb v Federal Commissioner of Taxation*[26], definitions in a statute ordinarily do

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23 Cf *Currie v Glen* (1936) 54 CLR 445 at 458-459 per Dixon J; [1936] HCA 1.

24 Cf *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 313-314 per Kirby P; *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 559 [82] per Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ; [2004] HCA 56.

25 AIA, s 36, definition of "interest".

26 (1966) 118 CLR 628 at 635; [1966] HCA 74.

"no more than define the meaning to be assigned to [a] word ... as used in the Act", and that[27]:

> "The function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense – or are to be taken to include certain things which, but for the definition, they would not include. Such clauses are, therefore, no more than an aid to the construction of the statute and do not operate in any other way."

62 Of course the "general principle"[28] may be modified by a clear contrary legislative intent. But the RSLA does not display any such contrary intent.

63 Counsel for Mekpine argued that the contrary intent did arise from the fact that the RSLA definition of "common areas" was an Extended definition, as opposed to a Standard definition, and that the implication was supported by ss 3 and 20 of the RSLA; the implication of the RSLA's provisions in all retail shop leases; ss 7(1)(a)(ii) and 38(2) of the RSLA and s 40(1)(a) of the RSLA. It is apparent, however, upon examination of those provisions that that is not so.

64 "Standard definitions" are defined by s 5 of the RSLA as being the definitions of various terms which appear in the Dictionary in the Schedule. "Extended definitions" are definitions which by and large are more extensive than Standard definitions and appear in Div 2 of Pt 3 of the RSLA. There is nothing in the distinction or more generally about the structure or terms of any of the Extended definitions which suggests that the Extended definition of "common areas" serves any function other than defining the expression for the purposes of the RSLA[29].

65 Section 3 of the RSLA provides that the object of the RSLA is "to promote efficiency and equity in the conduct of certain retail businesses in Queensland". Evidently, it is the purpose of the RSLA to achieve that objective by requiring compliance with the various operative provisions of the RSLA. But there is nothing about the definition of "common areas" in the RSLA which

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27 *Gibb* (1966) 118 CLR 628 at 635.

28 *Mekpine Pty Ltd v Moreton Bay Regional Council* (2014) 206 LGERA 120 at 133 [37].

29 Cf *Gibb* (1966) 118 CLR 628 at 635.

suggests that it is the purpose of the RSLA to achieve the objective of efficiency and equity by substituting the statutory definition of "common areas" for the definition in a lease wherever it occurs. Of itself, the statutory definition of "common areas" does no more than define the meaning to be assigned to the term "common areas" as it is used in the RSLA[30].

66 Section 20 of the RSLA might be thought to be significant in that it provides that, if a provision of the RSLA is inconsistent with a provision of a retail shop lease, the provision of the lease is void to the extent of the inconsistency. But, logically, there is no relevant inconsistency between definitions unless there is a difference between them that is productive of a difference in the effect of an operative provision according to which definition is applied; and, in this case, there are no relevant provisions of which the effect would differ according to which definition of "common areas" is applied. Nor are there any other provisions of the RSLA which appear to require that the statutory definition of "common areas" be substituted for the definition of Common Areas in the Lease.

67 The "intended wide application"[31] of the RSLA is also essentially beside the point. Regardless of how wide the RSLA's ambit of application may be, its operative provisions take effect according to their terms, and there is no inconsistency between any of the operative provisions of the Lease and the operative provisions of the RSLA with respect to common areas.

68 The "implication of the Act's provisions in all retail shop leases"[32] falls into a similar category; and the prohibition on contracting out of the RSLA, which appears in s 19, has no relevant effect except where the operative provisions of a lease are inconsistent with the operative provisions of the RSLA. In this case, there is no inconsistency.

69 Section 7(1)(a)(ii) of the RSLA defines "outgoings" as including the lessor's "reasonable expenses directly attributable to the operation, maintenance or repair" of "areas used in association with the centre"; and the expression "areas used in association with the centre" embraces the broader definition of "common

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30 *Gibb* (1966) 118 CLR 628 at 635.

31 *Mekpine Pty Ltd v Moreton Bay Regional Council* (2014) 206 LGERA 120 at 133 [37] per McMurdo P.

32 *Mekpine Pty Ltd v Moreton Bay Regional Council* (2014) 206 LGERA 120 at 133-134 [37] per McMurdo P.

areas" in the Act. Section 38(2) provides that the lessee's proportion of apportionable outgoings must not exceed an amount calculated on the basis of "the proportion that the area of the lessee's leased shop bears to the total area of all premises in the centre"; and that "the total area of all premises in the centre" comprises areas "leased to or occupied by lessees" or "available for lease to or occupation by lessees" who "enjoy or share the benefit resulting from the outgoing". In Mekpine's submission, if the Lease's definition of Common Areas were applied, the effect of those provisions would be that the common areas within former Lot 1 would not be included in the calculation of the lessee's proportion of the outgoings, even though the lessor's actual outgoings include the costs of maintaining those areas; and, therefore, that the extent of the common areas directly affected the lessee's contribution to outgoings.

70 That submission is misplaced. The effect of the provisions would be that, if the Lease provided for the lessee to pay apportionable outgoings on a different basis from that which is provided for in s 38(2), s 38(2) would prevail *pro tanto* over the Lease. But, in fact, the Lease does not provide for the lessee to pay any outgoings. It specifically provides in cl 4.1 that the lessee is not liable to pay or contribute to outgoings.

71 Finally, s 40(1)(a) operates where a lessee is required to pay amounts towards a sinking fund for the "maintenance of, or repairs to ... areas used in association with ... the retail shopping centre". For present purposes, that is also beside the point. As was earlier noticed, "areas used in association with" the retail shopping centre embrace the "common areas" as defined in s 6. Hence, if the Lease had provided for the lessee to make payments towards a sinking fund on a different basis from the provision for payments in s 40(1), s 20 would apply to make s 40(1) prevail. In fact, however, the Lease does not provide for the lessee to make any payments towards a sinking fund for maintenance. The effect of cl 4.1 is that the lessee is not liable to pay anything towards maintenance.

72 In short, the RSLA definition of "common areas" did not supplant the definition of Common Areas in the Lease, and Mekpine does not have a compensable "interest" in the Resumed Land[33].

Conclusion

73 For these reasons, the appeal should be allowed. Orders 2 and 3 of the Court of Appeal made on 2 December 2014 should be set aside. In lieu, it should

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33 ALA, s 12(5).

be ordered that the appeal to the Court of Appeal is dismissed with costs. Mekpine should pay the Council's costs in this Court.

74 GAGELER J. The orders proposed in the joint reasons for judgment will have the effect of reinstating the negative answer given by the Land Appeal Court to the question of whether Mekpine had an interest which was compensable under the ALA on the resumption of the Resumed Land. I agree with those orders.

75 In relation to the construction and application of the RSLA, I agree with the joint reasons for judgment and have nothing to add. In relation to the construction and application of the LTA, I prefer to state my own reasons.

76 The LTA adopts the conventional design of providing for title by registration as distinct from registration of title[34]. It defines "lot" to mean "a separate, distinct parcel of land created", relevantly, on "the registration of a plan of subdivision"[35]. It provides that "[a] lot or part of a lot may be leased by registering an instrument of lease for the lot or part"[36]. It defines "instrument" not only specifically to include a "plan of survey"[37], of which a plan of subdivision is a kind[38], but also to extend to any "document that deals with a lot and may be registered"[39]. It provides in s 182 that "[o]n registration of an instrument that is expressed to ... create an interest in a lot, the interest ... is ... created in accordance with the instrument ... and ... vests in the person identified in the instrument as the person entitled to the interest". It defines "registered proprietor" to mean a person recorded in the register as "a person entitled to an interest in a lot"[40], and it provides subject to immaterial exceptions that "[a] registered proprietor of an interest in a lot holds the interest subject to registered interests affecting the lot but free from all other interests"[41].

77 On the registration of a plan of subdivision which provides for "amalgamation of 2 or more lots to create a smaller number of lots"[42], "[a] lot

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34 *Peldan v Anderson* (2006) 227 CLR 471 at 480 [20]; [2006] HCA 48.

35 Schedule 2 to the LTA, "lot". See also s 49A of the LTA.

36 Section 64 of the LTA.

37 Schedule 2 to the LTA, "instrument".

38 Section 49 of the LTA.

39 Schedule 2 to the LTA, "instrument".

40 Schedule 2 to the LTA, "proprietor" and "registered proprietor".

41 Section 184(1) of the LTA.

42 Section 49(b) of the LTA.

defined in the plan is created as a lot"[43]. It is implicit in the definition of a lot as a separate and distinct parcel of land that lots amalgamated must cease to exist. That is because the definition does not admit of the coexistence of overlapping lots.

78 It follows that, on registration of the Plan of Subdivision, new Lot 1 was brought into existence as a separate and distinct parcel of land. It also follows that, on registration of the Plan of Subdivision, former Lot 6 and former Lot 1 each ceased to exist as a separate and distinct parcel of land.

79 By reason of registration of the Plan of Subdivision, Mekpine and other registered proprietors of leases of the equivalent parts of former Lot 6 therefore lost their existing leasehold interests, in that the parcel of land part of which they had leased no longer existed. But for registration of their existing instruments of lease for parts of new Lot 1, Mekpine and other registered proprietors of leases of the equivalent parts of former Lot 6 would have obtained no new leasehold interests, in that new Lot 1 was brought into existence free from all unregistered interests[44].

80 On that basis, Mekpine and other registered proprietors of leases of the equivalent parts of former Lot 6 were, in my opinion, "registered proprietors whose interests [were] affected by" the Plan of Subdivision within the meaning of s 50(1)(j) of the LTA and whose consent to the Plan of Subdivision was for that reason required by that provision.

81 That said, and despite the division of opinion on that topic between Holmes JA and Morrison JA in the Court of Appeal, I do not think that anything can turn for present purposes on whether or not it might be inferred that Mekpine consented to the Plan of Subdivision. The LTA makes plain that consent necessary for dealing with a lot need not always appear on the face of the relevant instrument[45]. The existence or non-existence of consent on the part of Mekpine is a question of fact, which was not in issue before the Land Court or the Land Appeal Court and about which no evidence was given and no findings were made by the Land Court or the Land Appeal Court. The appeal to the Court of Appeal was relevantly confined to an appeal on the ground of error or mistake of law on the part of the Land Appeal Court[46].

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43 Section 49A(2) of the LTA.

44 Cf *Medical Benefits Fund of Australia Ltd v Fisher* [1984] 1 Qd R 606 at 607-610.

45 Section 12 of the LTA.

46 Section 74(1)(a) of the *Land Court Act* 2000 (Q).

82 The appeal from the Land Appeal Court to the Court of Appeal necessarily turned on the correctness in law of the Land Appeal Court's construction of Mekpine's instrument of lease – the Lease – and on the relevant effect, if any, under s 182 of the LTA of the recording of the Lease on the Plan of Subdivision as one of the "existing lease allocations" which "encumbered" new Lot 1. So too does the appeal from the Court of Appeal to this Court.

83 The recording of the Lease on the Plan of Subdivision as one of the existing lease allocations which encumbered new Lot 1 constituted registration for new Lot 1 of the Lease previously registered for former Lot 6. That new registration did nothing to alter the terms in which the Lease was expressed.

84 The Lease was expressed to create a leasehold interest in the Premises. The Premises, originally part of former Lot 6, became by reason of the registration of the Plan of Subdivision part of new Lot 1. The recording of the Lease on the Plan of Subdivision as an existing lease allocation encumbering new Lot 1 had the effect under s 182 of the LTA of creating a leasehold interest in that part of new Lot 1 designated as the Premises and of vesting that newly created leasehold interest in Mekpine. By that operation of s 182, Mekpine became the registered proprietor of a leasehold interest in that part of new Lot 1 which corresponded to the description in the Lease of the Premises.

85 Clause 6.8 of the Lease was not, however, expressed to create a leasehold interest in the Common Areas, which the Lease defined as "those areas of the Building [meaning 'the building of which the Premises forms part'] or the Land [meaning 'the lot described in Item 2 of the Form 7 in [the] Lease', being former Lot 6] which have not been leased or licensed by the Lessor". Clause 15 made clear that the Common Areas remained the property of the lessor, that the lessor might alter or deal with the Common Areas at any time as the lessor saw fit, and that the Lease did not give the lessee any rights to the Common Areas other than those specifically provided for in the Lease. The right conferred on Mekpine as lessee by cl 6.8 was confined to a contractual licence to use the Common Areas as those Common Areas might exist from time to time.

86 On the authority of *Sorrento Medical Service Pty Ltd v Chief Executive, Department of Main Roads*[47], the correctness of which was not in issue in the appeal, Mekpine's contractual licence to use the Common Areas as conferred by cl 6.8 of the Lease was a "right ... over, or in relation to" land so as to fall within the definition of an "interest, in relation to land" in s 36 of the AIA and so as to be compensable on the resumption of the land in question under the ALA. Although it can on that basis be taken for present purposes to have been a "right ... over, or in relation to" land within the meaning of s 36 of the AIA, that

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47 [2007] 2 Qd R 373.

contractual licence to use the Common Areas was not an interest in land within the meaning of s 182 of the LTA, and nothing in *Sorrento* suggests to the contrary[48].

87 Because it was not apt to give rise to an interest in land, cl 6.8 of the Lease cannot be characterised as having been expressed to create an interest in any lot. For that reason, cl 6.8 of the Lease did not, in my opinion, engage s 182 of the LTA.

88 Turning finally to the question of construction, it is important to recognise that the contractual licence conferred by cl 6.8 of the Lease was a contractual licence to use a geographical area. That geographical area was relevantly defined to mean part of former Lot 6, the metes and bounds of which were depicted in a "Plan for Lease Purposes" attached to the Lease. The ability of the lessor to expand or contract the applicable geographical area consistently with cl 15 tells against reading the definition as, in some way, automatically expanding or contracting if former Lot 6 were to cease to exist or if the Lease came to be registered for another lot. The Land Appeal Court was right to conclude that, notwithstanding registration of the Lease for new Lot 1, cl 6.8 applied "only to the area of what was once Lot 6", which did not include the Resumed Land[49].

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48 [2007] 2 Qd R 373 at 378 [10], 380 [18], 383-385 [35]-[41], 387 [52].

49 *Moreton Bay Regional Council v Mekpine Pty Ltd* [2013] QLAC 5 at [57].