HIGH COURT OF AUSTRALIA

KIEFEL, BELL, GAGELER, NETTLE AND GORDON JJ

ECOSSE PROPERTY HOLDINGS PTY LTD APPELLANT

AND

GEE DEE NOMINEES PTY LTD RESPONDENT

Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd
[2017] HCA 12
29 March 2017
M143/2016

ORDER

1. *Appeal allowed with costs.*

2. *Set aside orders 2 to 5 of the Court of Appeal of the Supreme Court of Victoria made on 4 March 2016 and in their place order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of Victoria

Representation

M J Colbran QC with G D Bloch for the appellant (instructed by Goldhirsch & Shnider)

N C Hutley SC with A Hanak for the respondent (instructed by SBA Law)

CATCHWORDS

Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd

Contract – Construction and interpretation of contracts – Long-term lease – Standard form contract – Where parties entered lease because unable to effect sale and purchase of land due to planning restrictions – Where standard form lease amended by parties – Where clause pertaining to payment of rates, taxes, assessments and other outgoings ambiguous – Whether parties intended lease to resemble sale and purchase of land – Whether lessee liable to pay all rates, taxes, assessments and other outgoings or only liable to pay those payable in lessee's capacity as tenant.

Words and phrases – "commercial purpose and objects", "commercial sense", "deletions from standard form contract", "in respect of the said premises", "payable by the tenant", "reasonable businessperson".

1 KIEFEL, BELL AND GORDON JJ. The facts surrounding the making of the lease that is the subject of this appeal and its terms are set out in Gageler J's reasons. The original lessor was the owner of land which included the land the subject of the lease. Had it not been for town planning restrictions, a subdivision of that land would have taken place and the land the subject of the lease sold to the original lessee. When the parties were unable to achieve a sale and purchase they entered into a lease for a long term, ninety-nine years. The rental for the entire term was paid on entry into the lease.

2 The issue on which the Court of Appeal of the Supreme Court of Victoria divided concerned the significance of cl 13 of the lease to the construction of an ambiguous provision governing liability for the payment of rates, taxes and other outgoings.

3 Clause 13 contained the following information:

> "The parties acknowledge that it was the intention of the Lessor to sell and the Lessee to purchase the land and improvements hereby leased for the consideration of $70,000.00 and as a result thereof the parties have agreed to enter into this Lease for a term of ninety-nine years in respect of which the total rental thereof is the sum of $70,000.00 which sum is hereby acknowledged to have been paid in full."

4 It is common ground that the consideration there mentioned was more or less equivalent to the market value of the land.

5 The clause on which the appellant relied in bringing the proceedings in the courts below as lessor, for recovery of rates, taxes and other outgoings, from the respondent as lessee, is cl 4, which is in these terms:

> "AND [the Lessee] also will pay all rates taxes assessments and outgoings whatsoever ~~excepting land tax~~ which during the said term shall be payable by the ~~Landlord or~~ tenant in respect of the said premises (~~but a proportionate part to be adjusted between Landlord and Tenant if the case so requires~~)."

6 On the appellant's case, cl 4 obliges the lessee to pay all rates, taxes, assessments and outgoings in respect of the land. On the respondent's case, cl 4 obliges the lessee to pay only those imposts that are levied on it in its capacity as the tenant, leaving the lessor liable to pay those imposts that may be levied on it as owner of the land. For the reasons to be given, the appellant's construction is to be preferred and it follows that the appeal must be allowed.

7 The appellant's argument focuses on cl 13, which is said to identify the genesis and aim of the transaction between the original lessor and lessee[1]. Adopting what was said by Kyrou JA, who dissented in the Court of Appeal[2], it is said that it was clearly the intention of the parties to recreate, as far as possible, in a lease, the conditions which would have obtained following a sale. On that approach, the position of the lessee under the lease would have more closely resembled that of a purchaser, upon whom liability for rates, taxes and other outgoings would fall.

8 The respondent denies cl 13 the effect for which the appellant contends, observing that the clause does not contain a statement that it was the parties' intention to replicate the conditions of sale and purchase. The respondent points to other reasons for inclusion of cl 13: it was necessary to state the amount of the rent (a need created by the deletion of cl 2), and it was prudent to record that the sum had been paid in full. More generally, the respondent's submission, which found favour with the Court of Appeal majority, is that when the lease is read as a whole there is no warrant for treating cl 13 as an instruction as to its interpretation.

9 It was not disputed in the Court of Appeal that cl 4, as settled by the parties, is ambiguous[3] and argument in this Court proceeded upon that acceptance. And it was not disputed that in the circumstances it is open to the court to take account of the words crossed out of the standard form as an aid to the proper construction of the clause[4]. The deletions do not evidence a prior

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1 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 350 per Mason J; [1982] HCA 24.

2 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879.

3 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879 at 65,303 [92].

4 *Postle v Sengstock* [1994] 2 Qd R 290 at 298 per McPherson JA; *Esso Australia Ltd v Australian Petroleum Agents' & Distributors' Association* [1999] 3 VR 642 at 647-648 [19] per Hayne J; *A Goninan & Co Ltd v Direct Engineering Services Pty Ltd [No 2]* (2008) 15 ANZ Insurance Cases ¶61-779 at 76,946 [38]-[40]; and see Lewison and Hughes, *The Interpretation of Contracts in Australia*, (2012) at 65-66; *Timber Shipping Co SA v London & Overseas Freighters Ltd* [1972] AC 1 at 15-16 per Lord Reid; *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd* [1975] 2 Lloyd's Rep 197 at 209.

intent, which could have changed, but rather they identify a matter which, on the face of the document, was rejected by both parties[5].

10 The respondent's argument draws on the structure and language of cl 4. The words "Landlord" and "tenant" in the unamended text are not found elsewhere in the lease. Their employment here is suggested to reflect the function of the clause in allocating liability for such enforceable obligations as arise independently of the lease to the lessor and lessee in their respective capacities as landlord and tenant.

11 In the original form of cl 4, the words "AND also will pay", when read with cl 3, identified the party to whom the obligation applied. The words "all rates taxes assessments and outgoings whatsoever excepting land tax" identified the subject of the clause. The words "which during the said term shall be payable by the Landlord or tenant in respect of the said premises" identified the characteristics of the imposts to which the clause applied. The amendments are said by the respondent not to have altered the grammatical structure of the clause, which remains adjectival. The imposts to which the clause applies must have two characteristics: they must be "in respect of the said premises" and they must be "payable by the tenant". It is said the words "payable by the tenant", in their natural and ordinary sense, convey a liability which the tenant is under an enforceable obligation to pay, and which arises independently of the lease.

12 The respondent's construction lays emphasis on the deletion of the words "Landlord or" as signifying the parties' intention that the lessee's obligation be confined to those imposts levied on it as tenant. The respondent also contends that, given the land formed part of a larger parcel, it is to be expected that the mechanism for apportionment contained in parentheses would have been retained had it been the parties' intention to make the lessee liable for the payment of all rates, taxes and other outgoings.

13 The last-mentioned submission directs attention to the concluding words of the clause, "in respect of the said premises". The appellant observes that on the respondent's construction, these words are redundant: if the lessee's liability is confined to the payment of those imposts that are "payable by the tenant" they will necessarily be imposts "in respect of the said premises". The appellant's argument points to the retention of this phrase as a recognised means of conveying that the lessee's liability to pay land tax assessed on the whole of the

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5 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352-353 per Mason J.

lessor's landholdings is confined to the demised land[6]. On the appellant's construction, the words "payable by the tenant in respect of the said premises" reiterate the lessee's obligation, tying it to the leased premises. It is a construction which the appellant submits rendered the reference to the landlord and the mechanism for apportionment in parentheses in the standard form unnecessary and confusing.

14 The choice to amend cl 4 by crossing out words in the printed text is apt to lessen the force of arguments that depend upon analysis of its grammatical structure. This standard form of farm lease imposed liability on the lessee for the payment of all imposts on the land, save for land tax. As amended, cl 4 reads:

> "AND [the Lessee] also will pay all rates taxes assessments and outgoings whatsoever which during the said term shall be payable by the tenant in respect of the said premises."

15 As each of the judges below rightly acknowledged, each of the constructions proposed by the parties is plausible. The determination of the proper construction is not advanced by observing that on the appellant's case the phrase "payable by the tenant" is redundant or that on the respondent's case the phrase "in respect of the said premises" is redundant. The amendments to the standard form of lease were poorly crafted. The only explanation for the deletion of the lessee's covenant to the lessor (in relation to all succeeding covenants) in cl 2 and for the retention of cl 3, which in light of the deletion of cl 2 is redundant, is inadvertence. In the circumstances it hardly assists the determination of the proper construction of cl 4 to observe that the effect for which the appellant contends might have been achieved economically by simply deleting the words "excepting land tax".

16 It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract[7]. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from

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6 *Tooth & Co Ltd v Newcastle Developments Ltd* (1966) 116 CLR 167 at 170-171; [1966] HCA 57; *Centrepoint Custodians Pty Ltd v Lidgerwood Investments Pty Ltd* [1990] VR 411; *112 Acland Street Pty Ltd v Australia and New Zealand Banking Group Ltd* (2002) 4 VR 372 at 376 [13] per Ormiston and Phillips JJA; *Halsbury's Laws of England*, 5th ed, vol 62, par 424.

7 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656 [35] and the cases at fn 58; [2014] HCA 7.

that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it[8].

17 Clause 4 is to be construed by reference to the commercial purpose sought to be achieved by the terms of the lease. It follows, as was pointed out in the joint judgment in *Electricity Generation Corporation v Woodside Energy Ltd*[9], that the court is entitled to approach the task of construction of the clause on the basis that the parties intended to produce a commercial result, one which makes commercial sense. It goes without saying that this requires that the construction placed upon cl 4 be consistent with the commercial object of the agreement.

18 Consideration of that object invites attention to cl 13. Clause 13 identifies the term of the lease and the amount of the total rental for that term and contains an acknowledgement that it has been paid in full. These statements form part of the operative terms of the lease. What is said at the commencement of cl 13 stands in a different position. It is an explanation of why the parties entered into a lease rather than a sale and purchase, which had been intended. Although expressed in the past tense it may be understood to convey that the circumstances leading to the lease remained unchanged at the time of its execution. Clause 13 explains that in circumstances in which the parties were unable to convey a freehold estate in the land, they had chosen instead to convey a leasehold estate for almost a century for a fixed sum. It is readily to be inferred that this was as close an approximation to their desired outcome as they thought they could arrange.

19 Even without cl 13, the surrounding facts and circumstances which a reasonable businessperson in the position of the parties may be taken to have known would have pointed to that conclusion. Clause 13 itself does not explain how the parties' desire for a sale and purchase was thwarted, but it is a fact that it was the impossibility of subdivision of the land the subject of the lease. The length of the term, prepayment of a sum equivalent to the market value of the land, and the removal of the covenants restricting the lessee's user of and

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8 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35] and the cases at fn 60.

9 (2014) 251 CLR 640 at 656-657 [35].

capacity to deal with the land[10] and the lessor's rights of inspection[11] and termination for breach and re-entry[12], support the conclusion that the parties' intention was, as Kyrou JA stated it[13], to recreate, as far as possible, in a lease, the conditions which would have existed following a sale. The addition of the words "whatever purpose is allowable by law" to the chapeau also supports that conclusion. Clause 13 puts that conclusion beyond doubt.

20 The Court of Appeal majority acknowledged the express statement in cl 13 of the parties' intention, before entering the lease, to effect a freehold sale[14]. Their Honours considered this explained why the rental for the whole term was paid in a single instalment at the commencement of the lease and why the lessor was given no power to terminate for breach and no power of re-entry. Their Honours considered that it also served to explain the lessee's unfettered rights of assignment and transfer and to build on the land[15]. Nonetheless, reading the lease as a whole, their Honours were not prepared to find that it was the parties' intention to achieve a transaction that approximated a freehold sale. Their Honours' reservation took into account: (i) that the lessee was burdened by

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10 Clause 5, the lessee's covenant to keep the premises in good repair; cl 11, to use the land as a farm in a proper and husband like manner; and cl 13 in its original form, to cultivate the land; see also the addition of cl 16, the lessee's right to repair, rebuild or replace any dwellings or other improvements whether for personal, commercial purposes or otherwise; and cl 15, the lessee's right to assign, transfer, sub-let or grant licences without the consent of the lessor.

11 Clause 8.

12 Clause 10, deletion of the words "or sooner determination"; see also the addition of cl 14.

13 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879 at 65,293 [29], 65,298 [66].

14 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879 at 65,307 [112].

15 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879 at 65,307 [112].

continuing obligations[16]; (ii) the retention of the final proviso[17]; and (iii) the absence of an option to purchase or a right of renewal, or any provision respecting the improvements at the end of the term[18].

21 As Kyrou JA observed, the fact that the rights of the lessee under the lease are not co-extensive with the rights of the owner of the land is not inconsistent with the intention to place the lessee in a position as close as possible to that of the purchaser of a freehold estate[19]. As Kyrou JA also observed, the retention of the lessee's covenants in cll 6, 7, 10 and 12 serves to protect the lessor's interest in the adjoining land[20]. They impose limitations of the kind found in restrictive covenants on the subdivision of land.

22 This standard form of farm lease is evidently an old precedent. The final proviso confers on the lessor power to pay any unpaid "rates agreed to be paid by the Lessee as aforesaid" and "distrain sue for or recover" them as if they were arrears of rent under the *Landlord and Tenant Acts*. As the primary judge

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16 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879 at 65,307 [113]. See cl 6, the lessee's covenant to use best endeavours to keep the land free from rabbits and other vermin and noxious weeds; cl 7, not to destroy timber except for fencing and domestic purposes; cl 10, to deliver up possession of the premises in good repair at the expiration of the term; and cl 12, not to commit any nuisance or suffer anything to be done that might prejudice any insurance in respect of the premises.

17 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879 at 65,307 [113]. The final proviso is in these terms:

> "PROVIDED LASTLY and it is hereby agreed and declared that in the event of any rates agreed to be paid by the Lessee as aforesaid being unpaid at any time or times when due to the Shire or Borough or otherwise it shall be lawful for the Lessor to make payment thereof and to distrain sue for or recover as if same were rent in arrears under the *Landlord and Tenant Acts*."

18 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879 at 65,307 [116].

19 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879 at 65,293 [33].

20 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879 at 65,293-65,294 [34].

observed, distress for rent was abolished in Victoria in 1948[21]. The evident purpose of the final proviso was to make summary proceedings for the recovery of rent available as an additional remedy to an ordinary action on the covenants in the lease. The reference to the rates "agreed to be paid by the Lessee" is to cl 4, which the appellant contends is apt to support its construction. However, again, the haphazard amendments made to the printed text lessen the force of that submission. The primary judge was right to consider that the retention of the final proviso is consistent with either construction of the obligation imposed by cl 4[22]. It suffices to observe that its retention does not argue against Kyrou JA's conclusion as to the parties' intention.

23 The Court of Appeal majority's analysis lacks any reason that sounds in commercial sense for the parties to have chosen to amend the usual covenant respecting liability for rates, taxes and other outgoings contained in the standard form with a view to increasing the potential financial burden imposed on the lessor[23]. The respondent seeks to meet this criticism by submitting that there is insufficient evidence of the "extrinsic details of the transaction" to permit a determination as to the commercial common sense of the Court of Appeal majority's construction. The respondent illustrates the submission by contending that assessment of the commerciality of the agreement would need to take into account the value of the reversion. It would also need to take into account, in the respondent's submission, that at the time the lease was entered into, a lessee in occupation might be levied in relation to rates and land tax.

24 While land tax at that time was usually levied on the owner in respect of the unimproved value of land[24], in a case in which the Commissioner of Land Tax was of the opinion that the owner's interest was lessened by the covenants in a lease, he or she was empowered to determine that part of the assessed land tax would be payable by the lessee[25]. It may be accepted that this lease would have

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21 *Landlord and Tenant Act* 1958 (Vic), s 12.

22 *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2014) ANZ ConvR ¶14-020 at 880 [26].

23 See generally, Chernov, *Tenancy Law and Practice: Victoria*, 2nd ed (1980) at 103-104; and *Woodfall's Law of Landlord and Tenant*, vol 1 (Release 106) at [12.078].

24 *Land Tax Act* 1958 (Vic), s 6.

25 *Land Tax Act* 1958 (Vic), s 42(1) and (3).

supported such an assessment[26]. General rates were levied on the occupier of rateable property and were recoverable from the owner absent agreement to the contrary[27]. Water and sewerage rates could also have been levied on the lessee in occupation[28]. Again, absent contrary provision in an agreement, sewerage rates were recoverable from the owner[29]. Water rates, subject to a limited exception, were not recoverable[30]. Acceptance that at the time the lease was entered into the lessee may have been levied for land tax and rates and may have had limited rights of recovery against the lessor (any agreement apart) does not explain the commercial sense of amending the clause to increase the lessor's financial obligations. Among other matters, reasonable businesspersons may be taken to appreciate the likelihood that the incidence of rates, taxes and other outgoings on land may be subject to legislative change over the course of a century.

25 Notwithstanding that the consideration was the market value of the land, the lease does not provide an option to renew or to purchase for a nominal sum at the end of the term. The significance of this omission is suggested to favour the conclusion that the parties bargained for the lessor to bear the expense of any imposts levied on it as owner taking into account the value to the lessor of the reversion. An alternative view is the omission was inadvertent; neither the parties nor their advisers turning their minds to how matters might stand in 2087. Kyrou JA was drawn to that explanation[31]. So are we. A surrounding circumstance of which the reasonable businessperson would be aware is that the lessor company was in receivership. It must be accounted highly unlikely that a receiver would agree to burden the lessor company with uncertain financial obligations over the term of a ninety-nine year lease.

26 The Court of Appeal majority's conclusion failed to give effect to the clear statement of the parties' objective in entering the agreement. It makes no commercial sense, having regard to that objective, for the lessor to remain liable

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26 *112 Acland Street Pty Ltd v Australia and New Zealand Banking Group Ltd* (2002) 4 VR 372 at 376 [13] per Ormiston and Phillips JJA.

27 *Local Government Act* 1958 (Vic), ss 267(1) and 342(1).

28 *Melbourne and Metropolitan Board of Works Act* 1958 (Vic), ss 106, 176.

29 *Melbourne and Metropolitan Board of Works Act* 1958 (Vic), s 177.

30 *Melbourne and Metropolitan Board of Works Act* 1958 (Vic), ss 106, 108.

31 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879 at 65,299 [71].

for the payment of rates, taxes and other outgoings over the term of the lease. That is especially so where the lessor has taken as consideration for the lease the land value, with no provision for future adjustments. The lessor would have been exposed to uncertainties including the effect that any change of (lawful) land use by the lessee might have had on the amount of any rates, taxes and other outgoings.

27 On its proper construction cl 4 imposes on the lessee the obligation to pay all rates, taxes, assessments and outgoings whatsoever that are payable during the term of the lease in respect of the land. This construction accords with the commercial aim of the parties that the lessee assume the position of owner, so far as a lease may provide, with all of an owner's liabilities.

Orders

28 For these reasons, there should be the following orders.

1. Appeal allowed with costs.

2. Set aside orders 2 to 5 of the Court of Appeal of the Supreme Court of Victoria made on 4 March 2016 and in their place order that the appeal to that Court be dismissed with costs.

29 GAGELER J. This appeal concerns the construction of an ambiguous term of an unusual and very long lease. The question is whether the term obliges the Lessee to pay all rates, taxes, assessments and outgoings in respect of the leased land or instead only obliges the Lessee to pay those rates, taxes, assessments and outgoings that are levied on the Lessee.

30 In my view, the answer given by the primary judge[32] is to be preferred to that given by the majority in the Court of Appeal of the Supreme Court of Victoria[33]. The answer is that the term obliges the Lessee to pay all rates, taxes, assessments and outgoings in respect of the leased land. The Lessee is accordingly liable to the Lessor for rates and land tax in respect of the leased land that have been levied on the Lessor.

The Lease

31 The lease in question was entered into on 19 November 1988, between Westmelton (Vic) Pty Ltd ("Westmelton") as Lessor and Mr Peter Morris as Lessee. The lease is a registered lease for a term of 99 years of 12.15 hectares of land near Melton in Victoria. The 12.15 hectares was at that time part of a larger parcel of nearly 112 hectares of land of which Westmelton was registered proprietor of the estate in fee simple. Subdivision for sale of that larger parcel of land was then prohibited by local planning restrictions. Westmelton was then in receivership. Mr Morris was the stepson of the receiver and manager of Westmelton.

32 The terms and conditions of the lease are set out in a three page memorandum of agreement which was executed by the receiver as agent for Westmelton and by Mr Morris. The memorandum of agreement was evidently prepared by the solicitors instructed by the receiver and the solicitors instructed by Mr Morris adapting the terms of a standard form memorandum of agreement for a farm lease. Taking the printed text of the standard form as their starting point, the solicitors made handwritten deletions and typewritten additions. The result is that the memorandum of agreement as executed is something of a pastiche.

33 The chapeau to the memorandum of agreement first identifies the Lessor and the Lessee. The chapeau next states that "in consideration of the rent hereinafter reserved and of the covenants conditions and agreements hereinafter contained and on the part of the said Lessee to be respectively performed and

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32 *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2014) ANZ ConvR ¶14-020.

33 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879.

observed the said Lessor doth hereby demise and lease" the 12.15 hectares of land identified on an attached plan to the Lessee "in the occupation of whatever purpose is allowable by law with dwellings out-houses and all improvements to have and to hold the same for a term of Ninety-nine (99) years upon the following terms and conditions".

34 The terms and conditions of the lease are then set out in the memorandum of agreement in a series of numbered clauses. Deletions from the printed text of the standard form of cll 1 to 13 are shown as struck through. Additions of a substituted cl 13 and of cll 14 to 16 are shown in typewritten italics.

35 The terms and conditions of the lease as so set out in the memorandum of agreement (omitting only some provisos at the end, which for present purposes are irrelevant) are in their totality as follows:

> "1. THE term of the tenancy hereby created shall be from the First day of November 1988 ~~to the day of~~
>
> ~~2. THAT rent for the said term shall be at the clear rental of the first of the said payments to be made on the day of next. And the said Lessee covenants with the Lessor as follows~~:-
>
> 3. THAT the Lessee will pay the rent hereinbefore reserved on the days and in manner hereinbefore appointed for payment hereof. And in the event of the said term being determined by re-entry under the proviso hereinafter contained will pay to the Lessor a proportionate part of the said rent for the fraction of the current year up to the day of such re-entry.
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> 4. AND also will pay all rates taxes assessments and outgoings whatsoever ~~excepting land tax~~ which during the said term shall be payable by the ~~Landlord or~~ tenant in respect of the said premises (~~but a proportionate part to be adjusted between Landlord and Tenant if the case so requires~~).
>
> ~~5. AND also will at all times during the said term well and substantially repair maintain scour cleanse and keep in good repair and condition the said premises hereby demised and all fences walls gates hedges ditches drains water courses water holes and other improvements of or belonging to the said demised premises fair wear and damage by fire only excepted~~.
>
> 6. AND also will at his own cost and expense during the said term destroy and use his best endeavours to keep the said land free from rabbits and other vermin thistles and other noxious weeds and will comply with the *Vermin and Noxious Weeds Act* 1958 and any statutory amendments or re-enactments thereof for the time being respectively and without any notice or notices or order or orders to be served or made thereunder respectively.

7. AND also will not cut down fell ring-bark damage or destroy any timber or trees now or hereafter during the said term growing or standing on the said land except for fencing and domestic purposes.

~~8. AND also will permit and power is hereby given to the Lessor or its agent with or without workmen or others twice or oftener in every year to enter into and upon the said demised premises or any part thereof to examine the condition thereof and the Lessee agrees to forthwith repair according to notice.~~

~~9. AND also will not assign transfer sublet or otherwise part with possession of the said premises or any part thereof without on each occasion first obtaining the consent in writing of the Lessor~~.

10. AND also will at the expiration ~~or sooner determination~~ of the said term quit and deliver up possession of the said premises in good repair and condition and generally in such state and condition as shall be consistent with the due performance and observance of the foregoing covenants.

~~11. AND also will use the said land and premises as a farm in a proper and husband like manner and subject to all usual terms covenants and agreements contained in a lease of a farm in addition to those specially contained herein.~~

12. AND also will not commit any nuisance on the said land nor do nor suffer to be done anything that might prejudice any insurance of the said premises or any part thereof or render necessary the payment of any additional premium beyond the ordinary rate.

~~13. AND also will cultivate of the said land during the currency of this Agreement.~~

13. The parties acknowledge that it was the intention of the Lessor to sell and the Lessee to purchase the land and improvements hereby leased for the consideration of $70,000.00 and as a result thereof the parties have agreed to enter into this Lease for a term of ninety-nine years in respect of which the total rental thereof is the sum of $70,000.00 which sum is hereby acknowledged to have been paid in full.

14. Notwithstanding anything contained herein or any act of Parliament Federal or State Regulation or By-law whether as a result of any breach or default of the Lessee or otherwise the Lessor shall not have the power of earlier determination of this Lease or have any power of right of re-entry whatsoever thereby allowing the Lessee quiet and peaceful enjoyment of the land and improvements as aforesaid for the full term of this Lease, regardless of whether or not the Lessee is in breach or default herein.

> *15. The Lessee shall have the right to assign, transfer, sub-let or grant licences in respect of the premises without obtaining the consent of the Lessor.*
>
> *16. The Lessee shall without obtaining the consent of the Lessor have the right to repair, rebuild or replace any dwellings, out-houses or other improvements or build further dwellings and out-houses upon the land whether for personal, commercial purposes or otherwise.*"

36 In 1993, Ecosse Property Holdings Pty Ltd ("Ecosse") purchased the land from Westmelton subject to the lease, thereby becoming the Lessor. In 2004, Gee Dee Nominees Pty Ltd ("Gee Dee") took a transfer of the lease from Mr Morris, thereby assuming the rights and obligations of the Lessee.

The proceeding and the outcome below

37 In 2013, Ecosse commenced a proceeding against Gee Dee in the Supreme Court of Victoria. Ecosse claimed a declaration that the lease, on its proper construction, provides that the Lessee is to pay all rates, taxes, assessments and outgoings whatsoever in respect of the land, including land tax. Relying on the construction reflected in that declaration, Ecosse claimed judgment in an amount which it alleged Gee Dee was indebted to it, for rates and land tax levied on it in respect of the land since 2005, together with interest.

38 Gee Dee counterclaimed in the proceeding for a declaration that the lease, on its proper construction, provides that the Lessee is not liable to pay rates, taxes, assessments and outgoings levied on the Lessor in respect of the land.

39 The primary judge (Croft J) made the declaration sought by Ecosse. His Honour adjourned the proceeding insofar as it concerned Ecosse's money claim.

40 Gee Dee appealed to the Court of Appeal, which, by majority (Santamaria and McLeish JJA, Kyrou JA dissenting), allowed the appeal. The Court of Appeal set aside the orders of the primary judge and, in their place, made the declaration sought by Gee Dee.

The division of opinion on the central issue

41 Dividing Santamaria and McLeish JJA, on the one hand, and Kyrou JA and Croft J, on the other hand, was the proper construction of cl 4 of the lease.

42 Santamaria, Kyrou and McLeish JJA and Croft J all accepted that the competing constructions advanced by Ecosse and Gee Dee were open on the language of cl 4. All accepted that the proper construction of cl 4 was to be determined by reference to what a reasonable person in the position of the original parties would have understood by that language. All accepted that the language was to be read for that purpose in the context of the memorandum of

agreement as a whole and in light of knowledge which the parties can be taken to have had at the time of its execution.

43 Treating the striking through of the words "Landlord or" in the printed text of cl 4 as indicating that the parties considered and rejected the possibility that the Lessee should pay rates, taxes, assessments and outgoings levied on or otherwise payable by the Lessor in respect of the land, Santamaria and McLeish JJA preferred the construction advanced by Gee Dee[34]. Their Honours emphasised that cl 4 was not tautologous on that construction. The clause served the purpose of enabling the Lessor to hold the Lessee liable to account for failure to satisfy liabilities imposed on the Lessee which might lead to third parties obtaining rights against the land[35].

44 Treating cl 13 as indicating that the parties intended the lease to place the Lessee in a position as close to the position of an owner and occupier of the leased land as was possible within the constraints of a lease transaction, Kyrou JA took the same view as Croft J in preferring the construction advanced by Ecosse[36]. His Honour considered that the words "shall be payable by the tenant", which were left untouched in the standard form of cl 4, were redundant on that construction. He pointed out, however, that the whole of cl 3 (dealing with non-payment of rent) was similarly redundant in light of cl 13's acknowledgement that rent had been paid in full. The redundancy in cl 3 and in cl 4 did nothing more than illustrate the obvious fact that the terms and conditions of the lease as a whole were clumsily drafted[37].

The appeal to this Court

45 Whatever might have been anticipated at the time of the grant of special leave to appeal, it became apparent from the submissions of the parties in the appeal by Ecosse to this Court that the outcome of the appeal was not going to turn on any contested question of contractual or interpretative principle, let alone

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34 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879 at 65,289 [5], 65,308 [121]-[125].

35 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879 at 65,289 [1], 65,307-65,308 [118].

36 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879 at 65,293 [33], 65,294-65,295 [40]-[42], 65,298 [66]; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2014) ANZ ConvR ¶14-020 at 878-879 [20], 885 [39].

37 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879 at 65,294 [35]-[38].

on any question of public importance. Both parties accepted that cl 4 is to be construed by reference to what a reasonable person in the position of the original parties to the lease would have understood by its language, considered in the context of the memorandum of agreement as a whole and against the background of the knowledge which the original parties to the lease can be taken to have had at the time of its execution. Neither party suggested that the language could be understood other than by taking into account that the text was in a printed standard form from which words had been struck through.

46 Gee Dee argued that cl 4 maintains the linguistic structure of the text in the original printed standard form. The opening words – "AND also will pay" – impose an obligation on the Lessee. The rest of the clause is devoted to identifying the content of that obligation: what the Lessee is to pay. What the Lessee is to pay is "all rates taxes assessments and outgoings whatsoever ... which during the [99-year] term shall be payable by the ... tenant in respect of the said premises". Had the original parties intended the Lessee's obligation to the Lessor to extend to paying all rates, taxes, assessments and outgoings, Gee Dee argued, they could easily have expressed that intention unambiguously: by also striking through the words "by the tenant".

47 Gee Dee argued that the clause reflects a choice by the original parties that the Lessee's obligation to the Lessor was instead to be limited to paying those rates, taxes, assessments and outgoings that would become payable during the term of the lease by the Lessee in its capacity as the tenant of the land. That choice is hardly surprising, Gee Dee argued, given that applicable land tax, council rates and water and sewerage rates were in 1988 potentially payable by the tenant of the land[38] and that only later did some become payable by the owner[39].

48 Had the original parties intended the Lessee's obligation to the Lessor to extend to paying all rates, taxes, assessments and outgoings in respect of the land, Gee Dee went on to argue, there would have been no reason for them to have struck through the concluding words which appeared in parentheses in the original text in the printed standard form of the clause. Gee Dee argued that those words were directed to ensuring that the Lessee paid a proportionate part of rates, taxes, assessments and outgoings payable by the Lessor by reason of its ownership of the larger parcel of land. The same process of apportionment, it

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38 *Land Tax Act* 1958 (Vic), s 42; *Local Government Act* 1958 (Vic), s 267(1)(b); *Melbourne and Metropolitan Board of Works Act* 1958 (Vic), ss 98, 176.

39 *Local Government Act* 1989 (Vic), s 156.

argued, might be implicit in the words "in respect of the said premises"[40], which remain, but it would be odd to delete an express provision only to achieve the same result by implication.

49 Ecosse argued that the striking through of the words "Landlord or" resulted in an alteration of the linguistic structure of cl 4 from that of the text in the printed standard form. The words "which during the [99-year] term shall be payable by the ... tenant in respect of the said premises" – originally an adjectival clause qualifying the phrase "all rates taxes assessments and outgoings whatsoever" – have become additional words of obligation. Those additional words of obligation serve to reiterate the intention of the original parties that all rates, taxes, assessments and outgoings that would become payable in respect of the land by the Lessor or the Lessee during the term of the lease would be payable by the Lessee alone. The words in parentheses in the original printed standard form, Ecosse argued, were always redundant in light of the words "in respect of the said premises". Their deletion changed nothing of substance.

50 Given that the lease was for 99 years, Ecosse argued, the original parties were unlikely to have been content to leave the incidence of rates, taxes, assessments and outgoings to the vagaries of legislative variation. They opted instead for the certainty of casting the obligation to pay invariably on the Lessee.

The preferable construction of cl 4

51 Clause 4 can only be so construed for what it is: a clumsily tailored variation of an ill-fitting off-the-shelf precedent. To bring linguistic and grammatical precision to its construction would be to burden the clause with more weight than its jumble of words will bear.

52 The competing constructions of cl 4 being open on its language, and the textual indications in favour of each being at best equivocal and at worst conjectural, the choice between them comes down to deciding which is more reasonable considered as a matter of "commercial efficacy or common sense"[41].

53 This is a lease for 99 years. The lease is without any restriction as to the purpose to which the land may be put by the Lessee. That is made clear by the chapeau and is spelt out further in cl 16. The lease is also without restriction as to the ability of the Lessee to transfer or to sublet. That is spelt out in cl 15. The

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40 See for example *Tooth & Co Ltd v Newcastle Developments Ltd* (1966) 116 CLR 167 at 170-171; [1966] HCA 57.

41 *Gollin & Co Ltd v Karenlee Nominees Pty Ltd* (1983) 153 CLR 455 at 464; [1983] HCA 38.

Lessor is to have no ability to determine the lease or to re-enter the land during the 99-year term even if the Lessee is in breach or default. So says cl 14.

54 Clause 13 reveals that the lease resulted from earlier intended sale of the land by Westmelton to Mr Morris. Clause 13 also reveals that the single lump sum rental payment of $70,000 was of the amount which had earlier been agreed as the price for that sale. The clause indicates that the commercial purpose of the parties in entering into the lease for 99 years was to replicate the sale which planning restrictions evidently thwarted. That the replication was imperfect, because the transaction had to take a different form, does not detract from the significance of the commercial purpose so indicated.

55 Had the intended sale proceeded, Westmelton would obviously have had no responsibility for any rates, taxes, assessments and outgoings that might at any time afterwards have become applicable in respect of the land. For Westmelton under the lease to assume contractual responsibility for all rates, taxes, assessments and outgoings to which it might as Lessor become statutorily liable in respect of the land for the next 99 years, without any corresponding increase in the lump sum amount it was to receive from Mr Morris, would have been for Westmelton to assume an ongoing commercial risk to which it would not have been exposed if the transaction had gone ahead as a sale. One consequence of the transaction taking the form of a lease was, of course, that Westmelton would hold the reversion. But the value of the reversion under a lease for such a long period cannot without evidence readily be inferred to have been commercially significant. Nothing in the terms of the lease or the context in which the lease was executed suggests that assumption of the risk might be commercially explicable as to the *quid pro quo* for the value of the reversion.

56 The fact that a receiver acted as agent for Westmelton in entering into the transaction makes attribution of an intention to expose Westmelton to such risk even more problematic. Kyrou JA explained[42]:

> "This is because a receiver's duty is to act promptly to take control of the secured property and to take all reasonable care to sell such of that property as is required to pay the secured debt for not less than the market price of the property. Where, as in the present case, part of the secured property cannot be sold, it is understandable that a receiver and manager might agree to a long-term lease involving prepayment of the entire rent in substitution for a proposed sale. However, it would not make any commercial sense for a receiver and manager of a company who enters into such a substituted transaction to burden the company – which would

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42 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879 at 65,295 [47] (footnote omitted).

not have been in the best financial health – with long-term obligations to pay Imposts pursuant to a bespoke lease in circumstances where those obligations would not apply if a pro forma lease were entered into."

57 Having regard to those considerations of commercial purpose and commercial context, I think that the view which makes the most commercial sense is that cl 4 was intended to place Westmelton, as Lessor, in a position in relation to rates, taxes, assessments and outgoings in respect of the land that was as near as possible to the position in which Westmelton would have stood as vendor had it sold and not leased the land to Mr Morris. On that basis, I consider that Ecosse's construction is preferable.

Orders

58 I agree with the form of orders proposed by Kiefel, Bell and Gordon JJ.

59 NETTLE J. This is an appeal from a decision of the Court of Appeal of the Supreme Court of Victoria[43] on appeal from a decision of a judge of the Supreme Court of Victoria[44]. It concerns the correct construction of a lease of land. The question is whether, upon its proper construction, cl 4 of the lease obliges the Lessee to pay "all rates taxes assessments and outgoings whatsoever" (hereinafter "rates and taxes") imposed in respect of the leased land during the term of the lease or to pay only those rates and taxes for which the Lessee is liable *qua* tenant. The primary judge (Croft J) held in favour of the former construction. On appeal, a majority of the Court of Appeal (Santamaria and McLeish JJA, Kyrou JA dissenting) held in favour of the latter. For the reasons which follow, the majority in the Court of Appeal were correct and the appeal should be dismissed.

The facts

60 The facts emerge from the judgment of McLeish JA. The lease was entered into on 19 November 1988 between Westmelton (Vic) Pty Limited (receiver and manager appointed) ("Westmelton") as Lessor and Mr Peter Morris as Lessee for a term of 99 years at a total rent of $70,000 payable in full at the commencement of the lease. In about 1993, Ecosse Property Holdings Pty Ltd ("the appellant") acquired the leasehold reversion from Westmelton. By a transfer of lease dated 15 October 2004, Mr Morris assigned and transferred the term of the lease to Gee Dee Nominees Pty Ltd ("the respondent"). Accordingly, the parties to the appeal are successors in title to the parties who entered the lease.

61 The lease, which is a printed standard form "farm lease", was extensively amended by the parties before it was executed. Various parts of the printed provisions were struck out and some clauses added. A number of those amendments were to reflect the fact that the lease was granted for a term of 99 years and that the rent for the whole of the term was paid in full at the commencement of the lease.

62 The leased land comprises 12.15 hectares and was part of a larger parcel of land described in Certificate of Title Volume 7484 Folio 127. At the time of entry into the lease, the larger parcel of land was one of three contiguous "broadacre" lots that Westmelton was subdividing in stages for residential development. At that time, the extant planning scheme restrictions on freehold subdivision prevented the freehold sale of the leased land. On 7 November 2011,

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43 *Gee Dee Nominees Pty Ltd v Ecosse Property Holdings Pty Ltd* (2016) V ConvR ¶54-879.

44 *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2014) ANZ ConvR ¶14-020.

a separate title was issued in respect of the leased land. Since then, the leased land has been assessed separately for rates and land tax. The leased land has not been subdivided, however, and, until the lease expires, it cannot be. It remains rural farming land.

The provisions of the lease

63 The relevant provisions of the lease are as follows. The italicised words and clauses indicate amendments or additions to the printed standard form lease. The parts of the lease that are struck through indicate the intended deletions.

> "1. THE term of the tenancy hereby created shall be from the *First* day of *November 1988* ~~to the [blank] day of [blank]~~
>
> ~~2. THAT rent for the said term shall be at the clear [blank] rental of [blank] the first of the said [blank] payments to be made on the [blank] day of [blank] next. And the said Lessee covenants with the Lessor as follows~~: –
>
> 3. THAT the Lessee will pay the rent hereinbefore reserved on the days and in manner hereinbefore appointed for payment hereof. And in the event of the said term being determined by re-entry under the proviso hereinafter contained will pay to the Lessor a proportionate part of the said rent for the fraction of the current year up to the day of such re-entry.
>
> 4. AND also will pay all rates taxes assessments and outgoings whatsoever ~~excepting land tax~~ which during the said term shall be payable by the ~~Landlord or~~ tenant in respect of the said premises (~~but a proportionate part to be adjusted between Landlord and Tenant if the case so requires~~).
>
> ~~5. AND also will at all times during the said term well and substantially repair maintain scour cleanse and keep in good repair and condition the said premises hereby demised and all fences walls gates hedges ditches drains water courses water holes and other improvements of or belonging to the said demised premises fair wear and damage by fire only excepted.~~
>
> 6. AND also will at *his* own cost and expense during the said term destroy and use *his* best endeavours to keep the said land free from rabbits and other vermin thistles and other noxious weeds and will comply with the *Vermin and Noxious Weeds Act* 1958 and any statutory amendments or re-enactments thereof for the time being respectively and without any notice or notices or order or orders to be served or made thereunder respectively.

7. AND also will not cut down fell ring-bark damage or destroy any timber or trees now or hereafter during the said term growing or standing on the said land except for fencing and domestic purposes.

~~8. AND also will permit and power is hereby given to the Lessor or *its* agent with or without workmen or others twice or oftener in every year to enter into and upon the said demised premises or any part thereof to examine the condition thereof and the Lessee agrees to forthwith repair according to notice.~~

~~9. AND also will not assign transfer sublet or otherwise part with possession of the said premises or any part thereof without on each occasion first obtaining the consent in writing of the Lessor.~~

10. AND also will at the expiration ~~or sooner determination~~ of the said term quit and deliver up possession of the said premises in good repair and condition and generally in such state and condition as shall be consistent with the due performance and observance of the foregoing covenants.

~~11. AND also will use the said land and premises as a farm in a proper and husband like manner and subject to all usual terms covenants and agreements contained in a lease of a farm in addition to those specially contained herein.~~

12. AND also will not commit any nuisance on the said land nor do nor suffer to be done anything that might prejudice any insurance of the said premises or any part thereof or render necessary the payment of any additional premium beyond the ordinary rate.

~~13. AND also will cultivate [blank] of the said land during the currency of this Agreement.~~

13. The parties acknowledge that it was the intention of the Lessor to sell and the Lessee to purchase the land and improvements hereby leased for the consideration of $70,000.00 and as a result thereof the parties have agreed to enter into this Lease for a term of ninety-nine years in respect of which the total rental thereof is the sum of $70,000.00 which sum is hereby acknowledged to have been paid in full.

14. Notwithstanding anything contained herein or any act of Parliament Federal or State Regulation or By-law whether as a result of any breach or default of the Lessee or otherwise the Lessor shall not have the power of earlier determination of this Lease or have any power of right of re-entry whatsoever thereby allowing the Lessee quiet and peaceful enjoyment of the land and

improvements as aforesaid for the full term of this Lease, regardless of whether or not the Lessee is in breach or default herein.

15. The Lessee shall have the right to assign, transfer, sub-let or grant licences in respect of the premises without obtaining the consent of the Lessor.

16. The Lessee shall without obtaining the consent of the Lessor have the right to repair, rebuild or replace any dwellings, out-houses or other improvements or build further dwellings and out-houses upon the land whether for personal, commercial purposes or otherwise.

~~PROVIDED ALWAYS and these presents are upon the express condition that in case the said rent hereby reserved or any part thereof shall at any time be in arrear for fourteen days after becoming due although no legal or formal demand shall have been made for payment thereof or in case of the breach or non-observance of any of the covenants by the Lessee herein contained or if the Lessee shall become insolvent or liquidate his estate by arrangement or execute any deed or arrangement within the meaning of the *Bankruptcy Act* 1924-66 it shall be lawful for the Lessor or [blank] agent or any person authorized by [blank] in his behalf thereupon at any time thereafter notwithstanding the waiver or non-exercise of any previous default or right of re-entry to distrain for such rent or proportionate part thereof as aforesaid and to re-enter upon the said premises or any part thereof with a view to determine this lease and thereupon the lease and the term hereby granted shall cease and determine accordingly but without releasing the Lessee from any liability in respect of the breach or non-observance of any covenants on the Lessee's part herein contained.~~

PROVIDED LASTLY and it is hereby agreed and declared that in the event of any rates agreed to be paid by the Lessee as aforesaid being unpaid at any time or times when due to the Shire or Borough or otherwise it shall be lawful for the Lessor to make payment thereof and to distrain sue for or recover as if same were rent in arrears under the *Landlord and Tenant Acts.*"

The proceedings at first instance

64 The primary judge considered that cl 13 of the lease, coupled with the absence from the lease of some of the onerous obligations commonly imposed on lessees, signified that the document was intended to be, in effect, a conveyance of the freehold title[45]. It followed, in his Honour's view, that cl 4 of the lease should

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45 *Ecosse* (2014) ANZ ConvR ¶14-020 at 882 [33], 885 [39].

not be construed as imposing obligations on the Lessor that would be inconsistent with the position that would have obtained if the parties had achieved a conveyance of freehold title. Consequently, cl 4 should not be construed as imposing an obligation on the Lessor to pay rates and taxes imposed in respect of the land throughout the term of the lease[46].

65 The primary judge accepted that the terms of cl 4 of the lease were ambiguous, and accordingly that it was permissible to have regard to the deleted words and clauses appearing on the face of the lease in order to assist in the construction of cl 4[47]. But his Honour rejected the respondent's submission that the deletion from cl 4 of the phrase "excepting land tax" signified that the parties had turned their attention to the issue of liability to land tax to be borne by the Lessee and that the deletion of the words "Landlord or" signified that rates and taxes (including land tax) payable by the Lessor had been deliberately excluded from what should be payable by the Lessee[48].

66 The primary judge held that the deletion from cl 4 of the phrase "excepting land tax" showed only that the expression "all rates taxes assessments and outgoings whatsoever" included land tax, and that deletion of the words "Landlord or" was consistent with a contractual intention that the Lessor pay nothing by way of rates and taxes, whether or not those amounts were levied on the Lessor *qua* owner[49]. In his Honour's view, it was apparent that such amounts were intended to be "payable by the tenant". He found that the likelihood of that being the contracting parties' intention was supported by the deletion of the words "but a proportionate part to be adjusted between Landlord and Tenant if the case so requires". He reasoned that, if it were intended that the Lessee alone was liable to pay regardless of the party on whom the rates and taxes were levied, there would be no need for any adjustment, and thus that the parties had determined that there was no need of a provision for adjustment[50].

67 On that basis, his Honour declared that, upon its proper construction, cl 4 of the lease provided that the Lessee shall pay all rates and taxes whatsoever in respect of the leased land, including land tax.

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46 *Ecosse* (2014) ANZ ConvR ¶14-020 at 887 [47].

47 *Ecosse* (2014) ANZ ConvR ¶14-020 at 876 [15].

48 *Ecosse* (2014) ANZ ConvR ¶14-020 at 886 [42], 887 [44]-[45].

49 *Ecosse* (2014) ANZ ConvR ¶14-020 at 881 [30], 887 [45].

50 *Ecosse* (2014) ANZ ConvR ¶14-020 at 887 [45].

The proceedings before the Court of Appeal

68 In the Court of Appeal, McLeish JA, with whom Santamaria JA agreed[51], accepted that cl 4 is ambiguous[52] and susceptible of each of the two meanings for which the parties respectively contended[53]. On the respondent's construction, it imposes an obligation on the Lessee confined to the payment of rates and taxes payable by the Lessee *qua* tenant in respect of the leased premises. On the appellant's construction, it imposes an obligation on the Lessee to pay *all* rates and taxes in respect of the leased premises. But, as his Honour observed, there are a number of reasons to prefer the respondent's construction.

The appellant's contentions

69 Before this Court, the appellant's contentions largely followed the dissenting reasoning of Kyrou JA. It was submitted that it is necessary to read cl 4 as a reasonable businessperson would read it, having regard to the genesis of the transaction and its context, and so as to avoid commercial nonsense and inconvenience. It was said to be apparent from cl 13 of the lease that the genesis of the transaction was a thwarted intention to enter into a sale and purchase of the land, and thus that to construe cl 4 as the majority in the Court of Appeal did would be productive of a commercial nonsense and inconvenience. It would mean that the Lessor would be liable to pay rates and taxes for a term of 99 years for land which, in substance, is enjoyed by the Lessee as if the Lessee were the owner. By contrast, it was submitted, the construction of cl 4 for which the appellant contends accords with what a reasonable bystander would inevitably adopt. Given that the Lessee's use and enjoyment of the leased land far exceeds the use and enjoyment available under a conventional lease, and is in effect tantamount to ownership, it makes commercial sense to suppose that the contracting parties intended the Lessee to be liable for all rates and taxes imposed in respect of the land. And, in the appellant's submission, the nature of the leased land and the fact that it is held for the purpose of eventual subdivision, together with the fact that Westmelton was in receivership at the time of entry into the lease (and so would not have been likely to accept a long-tail burden in respect of land of which it was seeking to divest itself), makes it even more appropriate that the lease be construed as rendering the Lessee liable for all rates and taxes in respect of the leased land.

70 By contrast, in the appellant's submission, the construction of cl 4 adopted by the majority in the Court of Appeal is capricious, unreasonable, inconvenient

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51 *Gee Dee Nominees* (2016) V ConvR ¶54-879 at 65,289 [1].

52 *Gee Dee Nominees* (2016) V ConvR ¶54-879 at 65,305-65,306 [99]-[103].

53 *Gee Dee Nominees* (2016) V ConvR ¶54-879 at 65,307-65,308 [118]-[119].

and unjust, and ignores the effect of relevant provisions. The majority were in error in treating cl 13 of the lease as a mere statement of past intention[54]. It should properly be seen as a statement of the genesis of the transaction and a declaration of intent "to place the Lessee as close as possible to the position of an owner/occupier of the Leased Land within the constraints of a lease transaction"[55]. And, according to the appellant, the majority further erred in treating the absence of an option to purchase and a right of renewal as significant indicators of an absence of that intention[56]. In the appellant's submission, it is just as likely that, because the parties were committing to such a long-term lease, they were not concerned to deal with what would follow at the end of that term. To ask why such options were not included was an exercise in speculation that could shed no light on the constructional choice.

71 Further, in the appellant's submission, the provisions of the lease which oblige the Lessee to keep the land free of vermin and noxious weeds; not to damage timber or trees except for fencing and domestic purposes; not to commit any nuisance or do anything which might prejudice or increase the cost of insurance; and to deliver up the land in good repair and condition at the end of the term, do not suggest an absence of intention to make the transaction as far as possible equivalent to a sale and purchase of the land. Those terms are explicable by the fact that Westmelton retained all of the land adjoining the leased land and was seeking to protect that adjoining land, rather than the reversion in the leased land.

72 Finally, it was said that the majority in the Court of Appeal erred in concluding[57] that there was no evidence, and that it could not be assumed, that the burden of the rates and taxes that might be imposed on the Lessor according to the respondent's preferred construction would transform the asset of the lease into a liability for the Lessor. In the appellant's submission, there was evidence, to which the primary judge had regard[58], that the financial consequences of the construction of cl 4 for which the respondent contends would impose a burden on the Lessor running to millions of dollars over the term of the lease. It would have been self-evident to the contracting parties that the right of the Lessee to build on the land for commercial purposes without the consent of the Lessor (cl 16) might lead to an increase in the statutory charges and the rateable value of

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54 *Gee Dee Nominees* (2016) V ConvR ¶54-879 at 65,307 [114].

55 *Gee Dee Nominees* (2016) V ConvR ¶54-879 at 65,293 [33] per Kyrou JA.

56 *Gee Dee Nominees* (2016) V ConvR ¶54-879 at 65,307 [116].

57 *Gee Dee Nominees* (2016) V ConvR ¶54-879 at 65,306 [107], 65,309 [128]-[129].

58 *Ecosse* (2014) ANZ ConvR ¶14-020 at 881 [29].

the leased land. That makes it all the more likely that the parties intended that the Lessee should be liable for all such rates and taxes. Any other view of the matter was so uncommercial and so unlikely that it should have been rejected.

Construction of the lease

Relevant principles of construction

73 As the majority in the Court of Appeal recognised[59], it is necessary to construe cl 4 objectively by reference to what a reasonable person in the position of the contracting parties would have understood to be the meaning of its language[60] when read in light of the document as a whole and the surrounding circumstances known to the parties at the time of the transaction[61]. As the majority also recognised, it is permissible to have recourse to words and clauses deleted from a standard form or common form agreement, but which remain legible on the face of the document, for the purposes of construing ambiguous language in the executed agreement[62]. Neither party contended otherwise. Essentially, the appellant's submissions were confined to the way in which the majority applied those principles and, in particular, to the conclusions to which their Honours came.

The significance of cl 13

74 Contrary to the appellant's submissions, there is no error in the significance which the majority in the Court of Appeal attributed to cl 13 of the lease. As McLeish JA remarked[63], it is telling that cl 13 refers in the past tense to

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59 *Gee Dee Nominees* (2016) V ConvR ¶54-879 at 65,302-65,303 [88].

60 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-462 [22]; [2004] HCA 35; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40]; [2004] HCA 52.

61 *Pacific Carriers* (2004) 218 CLR 451 at 461-462 [22]; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35] per French CJ, Hayne, Crennan and Kiefel JJ; [2014] HCA 7; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116 [46]-[47] per French CJ, Nettle and Gordon JJ; [2015] HCA 37.

62 *A Goninan & Co Ltd v Direct Engineering Services Pty Ltd [No 2]* (2008) 15 ANZ Insurance Cases ¶61-779 at 76,945-76,946 [37]-[40] per Buss JA (Martin CJ and McLure JA agreeing at 76,935 [1], [2]), and the authorities cited therein. See generally *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352-353 per Mason J; [1982] HCA 24.

63 *Gee Dee Nominees* (2016) V ConvR ¶54-879 at 65,307 [115].

the intention of the Lessor to sell, and of the Lessee to purchase, the land for $70,000. It is inapt to describe that as evidencing an intention to replicate as far as possible a conveyance of the land. The natural and ordinary meaning of the clause is that, although it was previously the parties' intention to enter into a sale and purchase agreement in respect of the land, once that proved impossible, the parties resolved instead to enter into a lease for a term of 99 years for a total rent of $70,000. As McLeish JA observed, that falls "well short of stating that the parties intend to replicate, so far as possible, a sale and purchase" of the land[64].

75 Further, if it had been the intention of the parties that the lease resemble as nearly as possible a sale and purchase of the land, the Lessee would surely have insisted on being granted, and the Lessor would have been prepared to grant the Lessee, an option to purchase the land for nominal consideration, or at least an option to renew the lease for a further extended term at nominal rent. Instead, in utter opposition to the notion of making the transaction resemble as far as possible a sale and purchase of the land, the lease imposed an unqualified obligation on the Lessee to deliver up the land at the expiration of the term in good repair and condition without any provision for compensation in respect of improvements made in the meantime.

76 Furthermore, even allowing for the duration of the lease, the idea that the parties overlooked the need to provide for what was to occur at the end of it is unrealistic. These were commercial parties, who were professionally advised, dealing with land which, as the appellant admitted, had "potential for development as a residential subdivision", in an area of Melton, on the outskirts of metropolitan Melbourne, where, at the time of entry into the lease, development for the purpose of residential subdivision was being actively pursued. The natural inference is that, so far from overlooking the need to provide for what was to occur at the end of the lease, the parties intendedly retained the express unqualified obligation for the Lessee to deliver up the land at the expiration of the term in good repair and condition without compensation for improvements.

77 As was earlier observed, a commercial contract is to be construed objectively according to business commonsense. So construed, it presents as probable that, when the parties amended the standard form lease as they did, an option to purchase and a right of renewal were not included in (or added to) the lease, and a covenant for the Lessee to deliver up the land at the end of the term was included (or not deleted), because the Lessor was not prepared to give up the reversion. The clear implication is that the parties did not intend to make the transaction in effect equivalent to a sale and purchase of the land.

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64 *Gee Dee Nominees* (2016) V ConvR ¶54-879 at 65,307 [114]-[115].

78 The appellant sought to resist that conclusion by calling attention to the quantum of the rent in cl 13. But the fact that the total rent paid was commensurate with the parties' estimate of the market freehold value of the land at the time of entry into the lease[65] does not point unambiguously in favour of a construction of cl 13 that imputes to the parties an intention to effect a transaction as close as possible to a sale and purchase of the land. Under the lease, both the Lessor and the Lessee accrued benefits which they would not have accrued under a contract of sale. As has just been noted, the Lessor obtained the value of the reversion and, as will be discussed below, the Lessee avoided liability for any future rates and taxes that might be levied upon the owner of the land. Such rates and taxes did, in fact, eventuate and, in the appellant's submission, have been significant. Viewed objectively, however, it is not improbable that $70,000 represented the figure arrived at and agreed upon as rent after the contracting parties balanced their various interests.

The significance of other covenants

79 There was also no error in the significance which the majority in the Court of Appeal attributed[66] to the provisions of the lease that oblige the Lessee to keep the land free of vermin and noxious weeds (cl 6); not to damage timber or trees except for fencing and domestic purposes (cl 7); not to commit any nuisance and not to do anything which might increase the cost of insurance (cl 12); and to keep the premises in good repair and condition for the purpose of delivery up at the end of the lease (cl 10). It is true that the covenants comprised in cll 6, 10 and 12 (although less so the covenant in cl 7) might provide as much benefit to the Lessor in terms of protecting the Lessor's interests in the adjoining lands as they do in protecting the Lessor's reversion in the leased land. But it does not follow that they can be ignored as significant indicators of the parties' intention that the essential nature of the relationship established by the lease should be one of landlord and tenant. They are just the kind of covenants to be expected in a lease of land, regardless of whether they also serve to protect the Lessor's interests in the adjoining lands. As such, they are an objective indicator of the nature of the lease-like relationship that the parties intended to achieve which points away from an intention to create a transaction which as far as possible resembles a sale and purchase of the land.

Evidence of financial consequences

80 The appellant's contention that there was evidence as to the financial consequences of the respondent's preferred construction of cl 4, and that it would involve "millions and millions of dollars", is overstated. The primary judge

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65 See *Ecosse* (2014) ANZ ConvR ¶14-020 at 882 [33].

66 *Gee Dee Nominees* (2016) V ConvR ¶54-879 at 65,307 [113].

made no finding as to the financial consequences of either construction, and his Honour was not asked to do so[67]. Still less was it established that it would have been evident to the parties at the time of entry into the lease that, if the Lessor were required to bear all rates and taxes except those payable by the Lessee *qua* tenant, it would necessarily render the lease a liability for the Lessor. At the time of entry into the lease, general rates imposed by municipal councils were levied, subject to some limited exceptions, on a lessee as the occupier of land[68]; and, although there was a statutory right for a person "rated as occupier of any rateable property ... to recover" a paid amount from the person to whom the former was liable to pay rent, there was no entitlement to recover where a lease provided otherwise[69], as cl 4 did. Further, although the larger parcel of land of which the leased land formed part was also rateable property for the purposes of s 251(1), s 254(3) of the *Local Government Act* 1958 (Vic) provided that general rates could be determined in respect of land "which forms portion of a larger property" and levied on the occupier of that portion. As was earlier mentioned, a lessee "rated as occupier" could not recover that amount from a lessor if such rates were payable by the lessee under the relevant lease, as was the case here.

81 Water and sewerage rates were recoverable by the relevant authority from the occupier of land[70]. In relation to water rates, an occupier could only recover from rent payable to a lessor an amount that exceeded "the rate charge or sum due by him for the period of his occupancy"[71]. In relation to sewerage rates, an occupier could recover amounts paid "unless otherwise provided by lease or agreement"[72], as cl 4 did.

82 Land tax was levied on the total unimproved value of all land of which a person was the owner[73]. But s 42 of the *Land Tax Act* 1958 (Vic) deemed a lessee of land to be liable for land tax "as if owner", and to the exclusion of the legal owner, in circumstances where, in the opinion of the Commissioner, the interest of the legal owner "is lessened by the covenants of any lease", as, for example, might be said of a 99 year lease which expressly precludes a power of

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67 *Ecosse* (2014) ANZ ConvR ¶14-020 at 871 [7].

68 *Local Government Act* 1958 (Vic), s 267(1)(b).

69 *Local Government Act* 1958, s 342(1).

70 *Melbourne and Metropolitan Board of Works Act* 1958 (Vic), ss 98, 106, 176.

71 *Melbourne and Metropolitan Board of Works Act*, s 108.

72 *Melbourne and Metropolitan Board of Works Act*, s 177.

73 *Land Tax Act* 1958 (Vic), s 8(1).

earlier determination and right of re-entry. In such circumstances, the Commissioner would determine the amount of land tax payable as between the lessee and the legal owner respectively. Accordingly, at the time the lease was entered into, the effect of cl 4 was to ensure that general rates, water and sewerage rates and land tax were payable by the Lessee, and that those amounts could not otherwise be recovered by the Lessee from the Lessor.

83 There were documents before the primary judge and the Court of Appeal that recorded rates and taxes levied in respect of the leased land between 2005 and 2015. They showed a significant liability incurred by the Lessor. But, as the respondent submitted, and the majority in the Court of Appeal concluded, that was not the position when the lease was entered into in 1988[74]. Nor was it a state of affairs that the contracting parties could have anticipated with any degree of precision. At the time of entry into the lease, the leased land was not zoned residential. It was only later when the appellant took steps to have the leased land rezoned to permit residential development, and did so despite the lease preventing development of the land by the Lessor (cl 14) and restricting the extent to which the land could be altered for the purpose of residential development (cl 7), that the tax burden was increased. The increases in rates and land tax from 2005 were a direct consequence of an increase in the land's value upon its rezoning.

84 Certainly, as McLeish JA observed[75], "[t]he incidence of statutory charges is notoriously liable to change over time". Legally represented parties may be taken to have known as much, especially in circumstances like these where the lease explicitly adverts to the changeability of other sorts of statutory obligations (cl 6). But it does not follow, on the construction for which the respondent contends, that the financial consequences of cl 4 would have appeared uncommercial or otherwise unreasonable at the time of entry into the lease[76].

The proper construction of cl 4

85 The striking out in cl 4 of the words "excepting land tax", "Landlord or" and "but a proportionate part to be adjusted between Landlord and Tenant if the case so requires" is significant. Given the ambiguity in cl 4, it aids in the construction of what remains[77].

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74 *Gee Dee Nominees* (2016) V ConvR ¶54-879 at 65,306 [107], 65,309 [128]-[129].

75 *Gee Dee Nominees* (2016) V ConvR ¶54-879 at 65,309 [128].

76 *Gee Dee Nominees* (2016) V ConvR ¶54-879 at 65,309 [127]-[128].

77 *Codelfa* (1982) 149 CLR 337 at 352-353 per Mason J; *Esso Australia Ltd v Australian Petroleum Agents' & Distributors' Association* [1999] 3 VR 642 at

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86 Before the words "excepting land tax" were deleted, their clear effect would have been to exclude land tax from the rates and taxes which the Lessee was liable to pay under cl 4. Hence, the Lessee would not have been liable to pay any land tax in respect of the leased land, whether assessed to the Lessor or at all. The natural and ordinary effect of deleting the words "excepting land tax" was to reverse the exclusion and so to subject the Lessee to a liability to pay such amount of land tax as might be assessed in respect of the leased land and levied upon the Lessee "as if owner"[78].

87 Before deletion of the words "Landlord or", the expression "rates taxes assessments and outgoings whatsoever which during the said term shall be payable by the Landlord or tenant" meant rates and taxes which during the said term the Landlord or the tenant becomes liable to pay. The natural and ordinary effect of deleting the words "Landlord or" was to limit the rates and taxes which the Lessee was liable to pay to those for which during the said term the tenant becomes liable.

88 The probability that those two deletions were intended to have their plain and ordinary effect is fortified by the deletion from cl 4 of the express provision for apportionment appearing in parentheses. Since the Lessee was no longer required to pay a proportion of any rates and taxes that the Lessor might become liable to pay *qua* owner, but was required to pay all rates and taxes that the Lessee might become liable to pay *qua* tenant, there was no longer need for an apportionment provision. By contrast, if cl 4 had the meaning for which the appellant contends, the deletion of the apportionment provision would be nonsensical. It is not realistic to suppose that the Lessee would have agreed to pay rates and taxes in respect of the land on anything other than a single holding basis[79]. Given the possibility that, because of the Lessor's other landholdings, the rate of land taxes and other outgoings imposed in respect of the leased land might be assessed on a higher basis than that of a single holding, there would still have been a need for apportionment[80].

89 Counsel for the appellant argued that the kind of apportionment necessary to achieve that result was implicit in the lease by the use of the words "in respect

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647-648 [19]; *Goninan* (2008) 15 ANZ Insurance Cases ¶61-779 at 76,945-76,946 [37]-[40] per Buss JA (Martin CJ and McLure JA agreeing at 76,935 [1], [2]).

78 *Land Tax Act* 1958, s 42.

79 See *Tooth & Co Ltd v Newcastle Developments Ltd* (1966) 116 CLR 167 at 170-171; [1966] HCA 57.

80 Cf *Gee Dee Nominees* (2016) V ConvR ¶54-879 at 65,308 [123].

of the said premises". But, even if that were so[81], it is objectively not in the least likely that the parties considered it to be so clear as to make the express parenthetical apportionment provision excess to needs. On any view of the matter, the words "in respect of the said premises" could not be regarded as functioning as an implied apportionment provision unless the expression "which during the said term shall be payable by the tenant in respect of the said premises" were properly to be understood as continuing to operate as an adjectival clause descriptive of the rates and taxes which the Lessee is liable to pay. The appellant's construction of cl 4 requires the opposite. It necessitates acceptance of the proposition that, by reason of the deletion of the words "Landlord or" and the deletion of the express parenthetical apportionment provision, the expression "which during the said term shall be payable by the tenant in respect of the said premises" was transformed from an adjectival clause descriptive of the obligations which the Lessee was required to meet into a reiteration of the earlier imperative that "the Lessee ... will pay".

90 The majority in the Court of Appeal were correct to reject[82] the appellant's argument that the words "payable by the tenant" should be construed as a reiteration of the obligation to pay imposed on the Lessee by the previous imperative. Clause 4 is the only provision of the lease that uses the expression "the tenant" in contradistinction to "the Lessee". On the appellant's construction, that distinction is inexplicable. There is no point in changing from "the Lessee" to "the tenant" if the purpose of the phrase "payable by the tenant" is merely to repeat the obligation that "the Lessee ... will pay". By contrast, on the respondent's construction, the distinction is readily explicable. The phrase "payable by the tenant" delimits the kinds of rates and taxes to which the clause applies, namely, those for which the Lessee is liable *qua* tenant[83].

91 Further, given that the parties were legally represented in the preparation of the lease, the idea that "payable by the tenant" was meant to operate as a reiteration of the earlier obligation on the Lessee to pay presents as a remarkably inapt and improbable way for the drafters of the document to have gone about achieving the result contended for. Consequently, despite such other difficulties with the lease as there may be, the appellant's construction of cl 4 is improbable. By contrast, the natural and ordinary meaning of the adjectival clause "which during the said term shall be payable by the tenant in respect of the said premises" is so apt to limit the kind of rates and taxes which the Lessee is liable to pay to those rates and taxes in respect of the leased land that the Lessee is liable to pay *qua* tenant that it is most probably what was intended.

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81 *Tooth & Co* (1966) 116 CLR 167 at 170-171.

82 *Gee Dee Nominees* (2016) V ConvR ¶54-879 at 65,305 [101], 65,308 [124].

83 *Gee Dee Nominees* (2016) V ConvR ¶54-879 at 65,305-65,306 [102].

92 Moreover, as the majority in the Court of Appeal observed, if the parties' intention had been to produce the result for which the appellant contends, it is obvious, and it would have been obvious to the parties entering into the lease, that all that needed to be done was to delete the words "excepting land tax". There is no apparent explanation for why that was not done if the objective were as the appellant contends. The highest the appellant can put its case is that, in view of other unfortunate aspects of the document, and because of the need to construe the document as an honest and reasonable businessperson would do in light of what the appellant contends is the conveyance-like nature of the transaction described in cl 13, all other changes that were made to cl 4 should be treated as being, in effect, meaningless or explicable solely on the basis of inadvertent clumsiness on the part of the drafters.

Commercial good sense

93 Much of the appellant's argument before this Court focussed on the commercial consequences for the appellant of the construction of cl 4 adopted by the majority in the Court of Appeal. The thrust of those submissions was that the consequences would be so onerous that, judged according to the standards of an honest and reasonable businessperson, it cannot rationally be supposed that the parties intended to bring about that result. Given the idiosyncratic nature of the lease, the majority's hermeneutic analysis of the words of cl 4 was misplaced and would lead to a conclusion that flouts business commonsense. Commercial reality demanded a construction which yields to what business commonsense requires[84].

94 Those submissions are unpersuasive. It has not been established that the parties would necessarily, or even probably, have considered that the Lessor would be worse off by requiring the Lessee to pay all of the rates and taxes, including land tax, which the Lessee might become liable *qua* tenant to pay in respect of the leased land than by requiring the Lessee to pay a proportion of all rates and taxes, other than land tax, incurred in respect of the land, as the lease initially provided[85]. The position has changed since the lease was entered into. But that is because of subsequent developments brought about by the unilateral actions of the appellant, and, to some extent, by legislative amendments to the regimes imposing rates and taxes[86]. There is nothing to suggest that such

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84 *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 201 per Lord Diplock (the other members of the House of Lords agreeing at 207-209).

85 See [84] above.

86 See *Local Government Act* 1989 (Vic), s 156; *Land Tax Act* 2005 (Vic), ss 8, 18, 45.

changes were foreseen at the time of entry into the lease. The appellant did not adduce any evidence directed to that point.

95 Counsel for the appellant submitted that, whether or not changes of the kind that eventuated were foreseen, it is axiomatic that the mere possibility that such changes could occur over time would have been enough to cause a reasonable businessperson in the Lessor's position to insist upon the Lessee paying all rates and taxes levied in respect of the land, and, consequently, that it would be commercially unreal and unreasonable to interpret cl 4 as providing for anything else.

96 That submission is also unpersuasive. It is not at all clear that a reasonable businessperson in the Lessor's position at the time of entry into the lease would have been so concerned about the prospect of future legislative amendments and tax increases as to insist upon a complete indemnity. Still less is it clear that a reasonable businessperson in the Lessee's position at the time of entry into the lease would have agreed to that open-ended liability; especially given that such increases could be brought about – as in fact has occurred – by the unilateral actions of the Lessor or a successor acquiring the leasehold reversion. For all one can say at this stage of remove from the entry into the lease, it would not have been commercially irrational for the Lessor to accept those uncertainties (particularly in light of its holding the reversion in the land) or for the Lessee to yield to the Lessor no more than a liability to pay rates and taxes, including land tax, payable by the Lessee *qua* tenant.

97 Finally, it is to be observed that, even if the resultant lease were considered to be a remarkably poor deal from the Lessor's point of view (and, to repeat, it is not obvious that it should be so regarded), the precept that commercial contracts be construed as it is thought an honest and reasonable businessperson would construe them will stretch only so far. As Lord Mustill observed in *Charter Reinsurance Co Ltd v Fagan*[87]:

> "There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court."

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87 [1997] AC 313 at 388 (Lord Goff of Chieveley, Lord Griffiths and Lord Browne-Wilkinson agreeing at 381).

98 Poor drafting may justify a court in being more ready to depart from the natural and ordinary meaning of the terms of a contract[88], and no doubt, the poorer the drafting, the less willing a court should be to be "driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention"[89]. But poor drafting provides "no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language they have used interpreted in the light of the relevant factual situation in which the contract was made"[90]. Where there is ambiguity which permits of two alternative and semantically not improbable interpretations, construction in accordance with what it may be supposed would be the approach of honest and reasonable businesspersons may assist in choosing one such alternative over the other. But where, as here, the language and surrounding circumstances of a commercial contract present a choice between, on the one hand, a plain, ordinary and commercially not irrational meaning of a clause and, on the other, a meaning which is significantly removed from the natural and ordinary meaning of the terms of the clause, which ill-accords with other provisions of the agreement, and which in the end produces an outcome that is more commercially acceptable from one of the parties' point of view only, the precept runs out of application. Unless the Anglo-Australian objective theory of contract is now to be cast aside, the commercial approach to construction[91] is not a licence to alter the meaning of a term that is "clear and fairly susceptible of one meaning only" to achieve a result that the court may think to be reasonable[92].

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88 *Arnold v Britton* [2015] AC 1619 at 1628 [18] per Lord Neuberger of Abbotsbury PSC, with whom Lord Sumption and Lord Hughes JJSC agreed (Lord Hodge JSC agreeing at 1637 [66]).

89 *Mitsui Construction Co Ltd v Attorney General of Hong Kong* (1986) 33 BLR 1 at 14, cited with approval in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299 at 306 [13] per Mance LJ.

90 *Mitsui Construction* (1986) 33 BLR 1 at 14. See also *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at 2910 [26] per Lord Clarke of Stone-cum-Ebony JSC, with whom Lord Phillips of Worth Matravers PSC, Lord Mance, Lord Kerr of Tonaghmore and Lord Wilson JJSC agreed; [2012] 1 All ER 1137 at 1147-1148.

91 *Cohen & Co v Ockerby & Co Ltd* (1917) 24 CLR 288 at 300 per Isaacs J; [1917] HCA 58; *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429 at 437 per Barwick CJ; [1968] HCA 8. Cf *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 770-771 per Lord Steyn; *Society of Lloyd's v Robinson* [1999] 1 WLR 756 at 763 per Lord Steyn (the other Law Lords agreeing at 758, 767-768).

92 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 851 per Lord Diplock. See also *Arnold v Britton* [2015] AC 1619 at 1628 [18] per

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The court is not authorised under the guise of construction to make a new contract for the parties at odds with the contract to which they have agreed[93]. Where, as here, all things considered, the words of a clause are fairly susceptible of only one meaning, they must be given that effect.

Conclusion and orders

99 In the result, the appeal should be dismissed with costs.

Lord Neuberger PSC, with whom Lord Sumption and Lord Hughes JJSC agreed (Lord Hodge JSC agreeing at 1637 [66]).

93 *Johnson v American Home Assurance Co* (1998) 192 CLR 266 at 272 [19] per Kirby J; [1998] HCA 14; *Charter Reinsurance* [1997] AC 313 at 388 per Lord Mustill (Lords Goff, Griffiths and Browne-Wilkinson agreeing at 381).