[HIGH COURT OF AUSTRALIA.]

HUME STEEL LIMITED . . . . . APPELLANT: PLAINTIFF,

AND

THE ATTORNEY-GENERAL FOR VICTORIA . RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1927.

MELBOURNE, *May* 16, 30.

Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Crown Land—Lease—Construction—Resumption by Crown—Compensation—Inconsistency.

By a lease made under the *Land Act* 1915 (Vict.) the Crown leased to the predecessor of the appellant certain land. The lease, which was partly printed and partly written, contained the two following covenants by the lessee :— "(12) And" the lessee "shall and will observe and perform and fulfil . . . the conditions stipulations covenants and provisions which are contained in the schedule hereto." "(16) Provided always that in the event of the land hereby demised or any part thereof being required for any public purpose or purposes whatsoever it shall be lawful for His said Majesty . . . to resume possession thereof . . . but the lessee . . . shall be entitled to receive and shall be paid by His said Majesty . . . compensation for the value of its or their interest in the land so resumed." The schedule, which was written, contained the following among other covenants by the lessee : "(D) In the event of the said land or any part thereof being required by the Victorian Railways Commissioners for railway purposes it shall be lawful for His said Majesty . . . on giving to the lessee . . . at least six months' previous notice in writing of his . . . intention so to do to resume possession thereof . . . and the lessee . . . shall not be entitled to or be paid any money or compensation for the said land or such part thereof as will have been resumed." The land having been resumed by the Crown pursuant to clause D of the schedule as being required by the Victorian Railways Commissioners for railway purposes,

H. C. OF A. 1927.

HUME STEEL LTD. v. ATTORNEY-GENERAL (VICT.).

Held, that the lessee was not entitled under clause 16 to compensation for the resumption of the land. If there were any inconsistency between clause 16 and clause D of the schedule, the latter should prevail, for (1) clause D, being incorporated in clause 12, was prior to clause 16; (2) the grantor being the Crown, the lease should be construed most strongly against the lessee, and (3) clause D was written while clause 16 was printed. But there was no inconsistency, since clause 16 applied generally to resumptions for public purposes and clause D applied specifically to resumptions for railway purposes.

Decision of the Supreme Court of Victoria (*McArthur* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

On 1st January 1920, by two indentures made in accordance with the provisions of the *Land Act* 1915 (Vict.), the Governor in Council of Victoria, for and on behalf of His Majesty the King, leased to the Poole Patent Wool Scouring Co. Ltd., for the term of twenty-one years, the surface and down to the depth of fifty feet below the surface of two adjoining allotments of land, each of which was to be used as a site for a fellmongery and stores and for no other purpose whatsoever.

Each lease was, so far as material, in identical terms. Each contained the following reservation and exception: "And also reserving and excepting the use of all such parts of the said land as shall be required for making railways canals watercourses reservoirs drains or sewers over in upon or through the same with full and free right of ingress and regress into out of and upon the said land for such purposes but nevertheless so as not to do or occasion by the carrying out of any of such purposes any unnecessary damage to the land hereby demised or any buildings or works thereon and making compensation for such damage as may be done or occasioned by the carrying out of the same." Each lease then proceeded:—"And the lessee for itself and its permitted assigns doth hereby covenant with His said Majesty his heirs and successors in manner following that is to say . . . (3)" that the lessee or its assigns "shall and will use the said land and premises as and for a site for a fellmongery and stores and for no other purpose whatsoever and that if the lessee or its permitted assigns shall fail at any time during the said term to use the said land and premises bona fide for the purposes aforesaid these presents shall be voidable at the will of the

Governor in Council . . . (5) And shall and will at its or their own expense during the continuance of this lease as often as need shall be and to the satisfaction of the Board of Land and Works (hereinafter called 'the Board') without being thereunto required repair maintain and keep in good order and substantial repair and condition all buildings erections extensions and improvements for the time being on the land hereby demised (6) And that it shall be lawful for His said Majesty his heirs or successors . . . to enter into and upon the land and premises hereby demised or any part thereof to view and examine the state and condition thereof and of all defects and wants of repair to the said demised premises or any part thereof there found to give notice in writing as often as may be required to the lessee or its permitted assigns . . . to repair and make good such defects and wants of repair . . . and that the lessee or its permitted assigns shall and will within such period repair and make good all such defects and wants of repair as shall be mentioned in such notice and that if the lessee or its permitted assigns shall refuse neglect or fail to repair and make good such defects and wants of repair it shall from time to time be lawful for the Board . . . by its officers agents servants and workmen to enter upon the said land and premises and make and do all works necessary for remedying and making good the said defects and wants of repair at the expense of the lessee or its permitted assigns . . . (7) And shall and will at its or their own expense insure and during the continuance of this lease keep insured . . . all buildings erections extensions and improvements for the time being on the land hereby demised against loss or damage by fire . . . and all moneys which may be received under or by virtue of any such insurance shall be laid out and expended in making good the loss or damage caused or suffered by fire . . . (11) And shall and will at the expiration or sooner determination of the term hereby granted peaceably and quietly yield and deliver up to His said Majesty his heirs or successors the said land and premises hereby demised together with all buildings erections extensions and improvements thereon (except machinery and appliances which can be removed without material injury to the said land buildings erections

H. C. OF A. 1927.

HUME STEEL LTD. v. ATTORNEY-GENERAL (VICT.).

extensions and improvements) in good order and substantial repair and condition in all respects reasonable wear and tear only excepted (12) And shall and will observe perform and fulfil or cause to be observed performed and fulfilled the conditions stipulations covenants and provisions which are contained in the schedule hereto . . . (15) And it is hereby agreed and declared that upon the expiration or sooner determination of the term hereby granted all the land hereby demised with all buildings erections extensions and improvements (except machinery and appliances which can be removed without material injury to the said land buildings erections extensions and improvements) now built erected constructed or made or hereafter to be built erected constructed or made on the said land . . . shall absolutely revert and belong to His said Majesty his heirs or successors it being the intent and meaning of this agreement and declaration that all buildings erections extensions and improvements of whatsoever nature (except machinery and appliances as aforesaid) and whether resting by their own weight or otherwise upon the land hereby demised . . . shall as aforesaid absolutely revert and belong to His said Majesty his heirs or successors and the lessee or its permitted assigns shall not be entitled to any valuation or compensation whatsoever for such land buildings erections extensions and improvements or any part thereof or to any renewal of this lease (16) Provided always that in the event of the land hereby demised or any part thereof being required for any public purpose or purposes whatsoever it shall be lawful for His said Majesty his heirs or successors to resume possession thereof by any officer or agent appointed for that purpose by the Governor in Council but the lessee or its permitted assigns shall be entitled to receive and shall be paid by His said Majesty his heirs or successors compensation for the value of its or their interest in the land so resumed" &c.

The schedule referred to in clause 12 was as follows:—"The lessee for itself and its permitted assigns hereby covenants with His said Majesty his heirs and successors as follows: . . . (D) In the event of the said land or any part thereof being required by the Victorian Railways Commissioners for railway purposes it shall be lawful for His said Majesty his heirs or successors on giving to

the lessee or its permitted assigns at least six months' previous notice in writing of his or their intention so to do to resume possession thereof by any officer or agent appointed for that purpose by the Governor in Council and the lessee or its permitted assigns shall not be entitled to or be paid any money or compensation for the said land or such part thereof as will have been resumed; (E) that the lessee or its permitted assigns shall not in any way interfere with any railway electric cables on in or under the land hereby demised or any land adjacent thereto; (F) that the lessee or its permitted assigns shall not make or provide any access to the land hereby demised from Dynon Road shown on the map in the margin of these presents except in accordance with a scheme or plan and specifications which will have been first submitted to and approved by the Victorian Railways Commissioners; (G) that in the event of the tidal channel shown on the said map being widened at any time during the term hereby granted the lessee or its permitted assigns shall and will at its or their own expense and to the satisfaction of the Victorian Railways Commissioners lengthen and enlarge the bridge shown on the said map."

On 15th April 1924 the leases were by permission of the Governor, dated 25th February 1924, transferred to Hume Steel Ltd. On 29th November 1926 written notices were given to Hume Steel Ltd. stating that, in consequence of the land being required by the Victorian Railways Commissioners for railway purposes, His Majesty intended, upon the expiration of six months from 1st December then next, to resume possession of both allotments.

On 10th December 1926 Hume Steel Ltd. took out an originating summons in the Supreme Court for the determination of certain questions which, as amended at the hearing, were as follows:—

Upon the resumption of the said land by His Majesty after the expiration of six months' previous notice in writing, the said land being required by the Victorian Railways Commissioners for railway purposes, is the lessee precluded upon the proper construction of the said leases from recovering any money or compensation for such loss as it may actually suffer in respect of—

(1) The loss of the use of buildings on the land during the remainder of the original term of the lease ?

H. C. OF A. 1927.

HUME STEEL LTD. v. ATTORNEY-GENERAL (VICT.).

(2) The loss of the use of the improvements other than buildings on the land during the remainder of the original term of the lease ?

(3) The cost of re-establishing the manufacture on another site ?

(4) The interruption of its operations and the delay in re-establishing the manufacture on another site and the continuance meanwhile of overhead expenses wages and fixed charges ?

(5) The loss of profits caused by the interruption of work consequent on re-establishing the manufacture on another site ?

The defendant to the summons was the Attorney-General for Victoria.

The summons was heard by *McArthur* J., who answered all the questions in the negative.

From that decision the plaintiff now appealed to the High Court.

Owen Dixon K.C. (with him *C. Gavan Duffy*), for the appellant. By clause 16 of the leases a general right of compensation is given where the land is resumed. That right extends to every element of loss sustained by reason of the resumption. Clause D of the schedule should be construed strictly and as applying only to deprivation of the lessee's bare interest in the land—the lessee's occupation of the land as vacant land. [Counsel referred to *Doe d. Willson* v. *Phillips* (1).]

Gregory (*Ham* K.C. with him). Clause D of the schedule is clear in its meaning and deprives the lessee of any right whatever to compensation. If there is any conflict between clause 16 and clause D the latter should prevail for several reasons. Clause D is written and clause 16 is printed (*Robertson* v. *French* (2)). Clause D, being incorporated in clause 12, is prior to clause 16. Clause 16 is a general provision and clause D is a specific exception.

Cur. adv. vult.

(1) (1824) 2 Bing. 13.

(2) (1803) 4 East 130, at p. 136.

The following written judgments were delivered :—

ISAACS J. The contention for the appellant, put shortly, is that the expression in clause 16, " compensation for the value of its interest in the land so resumed," includes money compensation in respect of the various matters set out in the questions submitted, and that the right to such compensation exists notwithstanding clause D of the schedule, inasmuch as the expression in clause D of the schedule, " money or compensation for the said land or such part thereof as will have been resumed," is limited to the soil itself. The contention would be obviously hopeless if it rested merely upon the distinction between the inherent meaning of the phrases quoted ; and there is nothing in the internal context of the two clauses mentioned to affect that result. But reliance was placed upon the context of other clauses when the instrument is read as a whole. Various portions of the leases were referred to where, in addition to the " land " itself, specific mention is made of buildings and other improvements and of the business of fellmongery and stores. It was urged that the lessee's " interest in the land " was therefore recognized as extending to the buildings, &c., and to carrying on the business of the lessee or its permitted assignees, and was therefore larger than the lessee's mere right to the land itself. When the lease is looked at as a whole, as it must be, there is no substance in the contention. It recites that it is made under Division 9 of Part I. of the *Land Act* 1915. The relevant sections are secs. 125 and 126. The latter section provides that " every lease so granted as aforesaid shall be subject to such covenants and conditions . . . as the Governor in Council may think fit to impose," &c. The lease, on inspection, is seen to be mainly a printed form intended to provide for all the varieties of purpose enumerated in sec. 125, including the drag-net provision in par. 11 of that section. The covenant of the lessee as printed, No. 12, is in these terms : " And shall and will observe perform and fulfil or cause to be observed performed and fulfilled the conditions stipulations covenants and provisions which are contained in the schedule hereto." As it is stated in print, that covenant has nothing to operate upon, because there is no printed schedule. It is simply a peg for possible provisions. It is manifestly included for the purpose of inserting in a schedule

H. C. OF A. 1927.

HUME STEEL LTD. v. ATTORNEY-GENERAL (VICT.).

Isaacs J.

to the covenant, and therefore, by referential incorporation, as part of the covenant itself, any special terms which the Governor in Council may think distinctively appropriate with respect to the particular lease dealt with. There may be none. There may be covenants without conditions, or there may be conditions without covenants. In this instance a schedule is added in writing, and clause D already referred to is part of it.

I do not rely on the contention for the respondent that clause D, dealing with a specific matter, narrows the *meaning* of clause 16 and limits its subject matter. No doubt a principle is stated by Lord *Alvanley* C.J. in *Hesse* v. *Stevenson* (1) that "however general the words of a covenant may be if standing alone, yet if, from other covenants in the same deed it is plainly and irresistibly to be inferred that the party could not have intended to use the words in *the general sense* which they import, the Court will limit the operation of the general words. The question therefore always has been, whether such an irresistible inference does arise." I cannot see my way to apply that doctrine in order to alter the *meaning* of clause 16, because I see nothing either in the subject matter or in the context to cut down irresistibly the plain meaning of the words of that clause. There is no dominating consideration to affect the *interpretation* of the clause as it stands. I could not, for instance, exclude the power of resumption for making new railways. Clause 16 expressly applies to resumption for "any public purpose or purposes whatsoever"—no words can be wider or more explicit, and they unquestionably include the resumption that has taken place in this case. But, while the *meaning* of clause 16 is unaffected by clause D of the schedule, the *effect* of the latter clause on the rights of the parties in cases falling within it is quite another question, and is the question that arises here. It will be observed from what has been said that clause D is, in point of construction, prior to clause 16, and is a clause specially inserted in writing for this particular lease. Each of these circumstances gives it, in case of conflict, superior force in comparison with clause 16. The circumstance that it is prior gives rise to a principle of construction which I indicated in *Leggo* v. *Brown & Dureau Ltd.* (2) on the authority

(1) (1803) 3 Bos. & P. 565, at p. 574. (2) (1923) 32 C.L.R. 95, at p. 109.

of *Forbes* v. *Git* (1). The circumstance of clause D being in writing raises another consideration supported by the case of *Glynn* v. *Margetson & Co.* (2), acted on by *Griffith* C.J., *O'Connor* J. and myself in *Ryan* v. *Fergerson* (3). The conflict or inconsistency which exists is not total, but is a qualification, applicable to the circumstances predicated in clause D. As in *Ringstad* v. *Gollin & Co. Pty. Ltd.* (4), on the authority of *Forbes* v. *Git* and in parallel circumstances, I read the two clauses so as to reconcile them as far as possible, and in so doing I necessarily give controlling force to clause D where it applies. I bring to the interpretation of the two clauses, that is, to discover the meaning of the words of the respective clauses themselves, the methods ordinarily employed. But as to their *construction*, that is, their mutual legal effect when read in conjunction, to which the maxim *Generalia specialibus non derogant* properly applies, as explained fully in *Bank Officials' Association (South Australian Branch)* v. *Savings Bank of South Australia* (5), I apply the law laid down for Crown grants in *Feather* v. *The Queen* (6) and *Viscountess Rhondda's Claim* (7). In the result, I take the effect of the two clauses so far as relevant to this case to be as follows:—Resumption of the land for railway purposes is permissible under clause 16, with or without notice, and, if with notice, then the length of the notice may be less than six months, and may be independently of the Victorian Railways Commissioners. In that case the lessee would be entitled under clause 16 to be compensated for "the value of its interest in the land so resumed," that is, for the value represented in money of the unexpired term of the lease, whatever that connotes. But by the special term of clause D, if the Crown at the instance of the Victorian Railways Commissioners gives not less than six months' notice of resumption—I presume to permit the lessees to make other arrangements—then the Crown is not bound to pay "any money or compensation for the said land or such part thereof as will have been resumed"—whatever that connotes.

(1) (1922) 1 A.C. 256, at p. 259.
(2) (1893) A.C 351.
(3) (1909) 8 C.L.R. 731.
(4) (1924) 35 C.L.R. 303, at p. 310.
(5) (1923) 32 C.L.R. 276, at pp. 289, 290.
(6) (1865) 6 B. & S. 257.
(7) (1922) 2 A.C. 339, at pp. 352, 353.

H. C. OF A. 1927.

HUME STEEL LTD. v. ATTORNEY-GENERAL (VICT.).

ISAACS J.

But I have no doubt the two expressions connote the same thing. If the one expression includes buildings, &c., so does the other; for I see nothing in any of the special references to buildings, &c., which attach rather to clause 16 than to clause D. In view of some aspects of the argument, I do not desire to say more on that point. The result, however, is that the questions have been correctly answered by *McArthur* J., and this appeal should be dismissed.

HIGGINS J. The only question put to us is as to the construction of these two leases, both in the same terms, one lease relating to allotment 4, the other to allotment 5: is the lessee entitled to any compensation on the resumption (under the provisions of the lease) for railway purposes of the land leased?

The lease reserves and excepts "the use" of such parts of the land as are required for making railways, canals, drains, &c., and if damage be done by so using the land compensation has to be paid. But this is not a case of mere *use* for such purposes: it is a case of the resumption of the land under clause D of the schedule (incorporated in clause 12 of the lease)—a case of the whole title to the land leased reverting to the Crown. We have therefore to consider the clauses which do relate to resumption—clause 12 (with D) and clause 16.

Clause 16 provides that, if the land or any part thereof be required for *any public purpose whatsoever*, the Crown may resume possession, but that the lessee (or its assigns) is then to be entitled to receive compensation for the value of its interest in the land so resumed; whereas clause D provides that, if the land or any part thereof be required by the Victorian Railways Commissioners *for railway purposes*, the Crown, *on giving at least six month's notice*, may resume possession, and the lessee (or its assigns) "shall *not* be entitled to . . . any money or compensation for the said land or such part thereof as will have been resumed." So, if we treat, as we must treat, the Victorian railways as a public purpose, clause 16 would seem to entitle the lessee (or its assigns) to compensation if there were no clause D; but clause D provides that, if six months' previous notice be given, there is to be no compensation. "Land" in clause D as well as in clause 16 includes the buildings and other fixtures, as

there is no clear intention shown to the contrary (*Thresher* v. *East London Waterworks Co.* (1)). The difficulty arises from the fact that clause 16 would allow compensation if there were no clause D.

Now, there are certain rules, more or less artificial, which are treated as applicable where one part of an instrument contradicts another part. One is that, if an earlier clause in a deed be followed by a later inconsistent clause, the earlier clause prevails (*Forbes* v. *Git* (2)); and here clause 12, which incorporates clause D, precedes clause 16. Another is that the words of an instrument shall be taken most strongly against the party employing them *except in the case of the Crown* (*Viscountess Rhondda's Claim* (3)); and here the lease is the lease of the Crown. Another is that where part of the instrument is printed, and part written, greater effect is to be given to the written words (*Baumwoll Manufactur von Carl Scheibler* v. *Furness* (4); *Glynn* v. *Margetson & Co.* (5)); and here clause 16 is printed and clause D is written. But such rules are only to be applied as a matter of last resort, when the words used cannot be fairly reconciled; and it is our duty to find whether the words are not capable of reconciliation, so as to give to each set of words full and equal weight, and yet give a consistent effect to the instrument as a whole. In my opinion, the words are reconcilable on their face, if we treat clause 16 as giving the general rule where the land is resumed for public purposes, and clause D as giving a special rule where the land is resumed for the specific purpose of railways, and six months' previous notice is given before resumption. There are indications in the lease itself that at its date the likelihood of the land being required for railways —public railways—specifically, was before the minds of the parties (see the references to the Victorian railways in clauses E, F, G of the schedule as well as D); and that the Government consented to give the lease on the terms that it was to be subject to the need for railways; and that the lessee (or its assigns) was to be liable to lose the land without payment of compensation if and when six months' notice should be given. Clause 16 and clause D are not

(1) (1824) 2 B. & C. 608.
(2) (1922) 1 A.C. 256.
(3) (1922) 2 A.C., at p. 353.
(4) (1893) A.C. 8, at p. 16.
(5) (1893) A.C., at pp. 357, 358.

H. C. OF A. 1927.

HUME STEEL LTD. v. ATTORNEY-GENERAL (VICT.).

Higgins J.

necessarily inconsistent, one with another; but if they were the principle expressed in the maxim *Generalibus specialia derogant, generalia specialibus non derogant, generi per speciem derogatur*, is based on sound common sense and appeals to everyone, layman or lawyer.

Stress has been laid in argument on the difference between clause 15 and the words of clauses 16 and D; for clause 15 provides that upon the expiration or sooner determination of the term "all the land hereby demised with all buildings erections extensions and improvements . . . whether resting by their own weight or otherwise upon the land . . . shall . . . revert and belong to His said Majesty . . . and the lessee . . . shall not be entitled to any valuation or compensation whatsoever for such land buildings erections extensions and improvements." These additional words "buildings," &c., are not found in clause 16 or in clause D; but the reason is obvious. Clause 15 is framed so as to show expressly that any fixtures (with certain extensions of the word) are to belong to the Crown on the expiration of the lease without payment (see also clauses 5, 6, 7, &c.), but if, before the expiration of the lease, the land or part of it be *resumed* for a public purpose compensation is to be paid for the value of the interest of the lessee (or its assigns) in the land so resumed; with the further exception (clause D) that if the public purpose be that of railways, with six months' notice before resumption, there is to be no compensation.

Perhaps I ought to add that no question has been raised as to the power of the Crown to alter the purposes of the land from "fellmongery and stores" to "factory," &c. Such difficulty as has arisen appears to be due to an effort to save trouble to the draughtsman by using an existing common form and adding clauses without recasting the instrument so as to fit precisely the particular circumstances.

In my opinion, the judgment of the learned Judge (*McArthur* J.) was right, and the appeal should be dismissed.

GAVAN DUFFY J. I agree that the appeal should be dismissed for the reasons given by my brother *Higgins*.

POWERS J. I agree that the appeal should be dismissed for the reasons stated by *Isaacs* J.

RICH J. The question raised on this appeal resolves itself into one of construction. It appears as if one person drafted the printed or common form and another hand at a later date, to suit the occasion and without any regard to the main provisions, added the type-written covenants. The result is a kind of palimpsest. Neither cases nor well-known maxims serve any purpose in this matter of construction. Stated shortly, it amounts to this:—The reservation clause does not apply to cases of resumption. As to the relevant clauses: 16 provides for the case of resumption for general purposes —with compensation; clause D provides for the case of resumption by the Victorian Railways Commissioners for railway purposes— without compensation. There is no collision: nothing to reconcile. The case no doubt is a hard one but the conclusion arrived at by the learned primary Judge is right. This opinion, however, does not conclude the question whether the appellant is entitled to remove from the demised land the buildings, &c.

Appeal dismissed with costs.

Solicitors for the appellant, *A. Phillips, Pearce & Just.*

Solicitor for the respondent, *F. G. Menzies*, Crown Solicitor for Victoria.

B. L.