SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2014 0131

GEE DEE NOMINEES PTY LTD — Appellant

v

ECOSSE PROPERTY HOLDINGS PTY LTD — Respondent

JUDGES:	SANTAMARIA, KYROU and McLEISH JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	19 November 2015
DATE OF JUDGMENT:	4 March 2016
MEDIUM NEUTRAL CITATION:	[2016] VSCA 23
JUDGMENT APPEALED FROM:	*Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2014] VSC 479 (Croft J)

CONTRACT – Long term farm lease – Planning scheme restrictions prevented freehold sale – Parties entered into 99 year lease for total rental of $70,000 paid in full at commencement of lease – Clause 13 referred to intention of lessor to sell and lessee to purchase freehold for consideration of $70,000 – Clause 4 provided that lessee to pay 'all rates taxes assessments and outgoings whatsoever ~~excepting land tax~~ … payable by the ~~Landlord or~~ tenant' – Construction – Whether regard may be had to struck out words – Whether cl 4 ambiguous – Whether cl 13 shows intention to replicate sale and purchase – Commercial sense – Appeal allowed.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Dr A Hanak	Norton Gledhill
For the Respondent	Mr M J Colbran QC with Mr G D Bloch	Goldhirsch & Shnider

SANTAMARIA JA:

1 In this case, I have had the opportunity of reading in draft the reasons of McLeish JA. I agree with them.

2 The law enforces the agreements that parties make not those that they might have made. For that reason, when it is called upon to construe a written agreement, it eschews consideration of earlier drafts of that agreement that might have been exchanged between the parties. The present case involves a difficulty. The executed agreement is a standard form agreement to which alterations have been made by the parties. But, those alterations remain on the face of the executed agreement. The reader cannot avoid them. In a sense, a reader is confronted with both the executed agreement and the penultimate draft of it. However, unless some principle of interpretation permits it, the alterations themselves are to be ignored. Attention must only be given to what remains, not what has been deleted.

3 Clause 4 of the agreement is ambiguous. That ambiguity is expressed by McLeish JA in paragraph 103 of his reasons: the clause can be read as imposing on the lessee an obligation to pay all rates etc; it can also be read as confining that obligation to those that are payable by the tenant.

4 As explained by McLeish JA, in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales,*[1] Mason J identified one situation in which the pre-contractual negotiations of the parties may be considered: evidence of their 'mutual concurrence' may be admitted to 'negative an inference sought to be drawn from surrounding circumstances'.[2] Where there is evidence that they agreed to exclude a possibility open as a matter of construction, the court may consider that evidence to

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1 (1982) 149 CLR 337, 352–3.

2 Ibid.

exclude that construction.

5 In the present case, the striking out of the words 'Landlord or' from cl 4 is an indication that, by mutual concurrence, the parties rejected the possibility that the lessee should pay rates etc payable by the landlord. Here the deleted words may be referred to in order to negative an alternative possible construction.

KYROU JA:

Introduction and summary

6 I have had the benefit of reading the judgment of McLeish JA in draft. I gratefully adopt his Honour's summary of the facts, the reasons of the primary judge and the submissions of the parties. For convenience, I will refer to the 'rates taxes assessments and outgoings' in cl 4 of the Lease collectively as 'Imposts' except where that phrase appears in a quotation.

7 I have assumed, without deciding, that leave to appeal was not required.

8 For reasons that follow, I have concluded that the judge did not err in his construction of cl 4 of the Lease and that the appeal should be dismissed.

First to fourth grounds of appeal

9 The first to fourth grounds of appeal can be considered together, as they concern the proper construction of cl 4 of the Lease and whether the judge erred in his construction of that clause.

10 The legal principles governing the interpretation of commercial contracts were not in dispute at trial or on appeal. It suffices for me to refer to the following statement of the majority[3] of the High Court in in *Electricity Generation Corporation v*

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3 French CJ, Hayne, Crennan and Kiefel JJ.

Woodside Energy Ltd:[4]

[4] (2014) 251 CLR 640 ('*Woodside*').

> [T]his Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'. As Arden LJ observed in *Re Golden Key Ltd*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption 'that the parties … intended to produce a commercial result'. A commercial contract is to be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience'.[5]

11 Before this Court, it was common ground that cl 4 of the Lease is ambiguous.

12 The appellant submitted that cl 4 should be read literally as meaning that the Lessee was obliged to pay all Imposts whatsoever which during the term of the Lease became payable by the Lessee in respect of the Leased Land. On the appellant's construction, the word 'payable' meant due for payment pursuant to a statutory, contractual or other legal obligation arising independently of the Lease and was not confined to monetary obligations levied pursuant to a statutory power. On this construction, cl 4 constituted a contractual promise by the Lessee to pay to third parties Imposts which became legally payable by the Lessee, independently of the Lease, in respect of the Leased Land.

13 The respondent submitted that cl 4 meant that, during the term of the Lease, the Lessee was obliged to pay all Imposts whatsoever in respect of the Leased Land irrespective of by whom they were payable. On the respondent's construction, the words 'shall be payable by the tenant' were merely repetitive of the words 'will pay' and did not limit the contractual promise made by the Lessee under cl 4 to payment of Imposts which became legally payable by the Lessee, independently of the Lease, in respect of the Leased Land. This construction was said to follow from the words 'shall be payable by the tenant' being treated as redundant or from the need to pause

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5 *Woodside* (2014) 251 CLR 640, 656–7 [35] (citations omitted).

after the word 'whatsoever'. On this construction, cl 4 constituted a contractual promise by the Lessee to pay to third parties Imposts which became legally payable by either the Lessor or the Lessee, independently of the Lease, in respect of the Leased Land.

14 The parties were right to agree that cl 4 is ambiguous. In my opinion, each of the competing constructions of cl 4 is open. The question is which of them is correct.

15 It was common ground that, as cl 4 is ambiguous, in determining its meaning, this Court can have regard to the surrounding circumstances known to the original contracting parties at the time the Lease was executed,[6] as well as to the deletions from the pro forma printed lease document.[7]

16 The appellant submitted that the surrounding circumstances that were known to the original contracting parties at the time the Lease was executed included the following:

(a) The details of the Leased Land, as described in para 3 of the decision below.[8] That paragraph relevantly stated:

> The land the subject of the lease is delineated and coloured red on a plan annexed to the Lease, being part of the land described in Certificate of Title volume 7484 Folio 127 ('the leased land'). The area of the leased land is 12.15 hectares, which was part of a larger area of land. This larger area of land was, in turn, one of three larger contiguous areas of land. These larger, 'broadacre' lots, were, in the 1980s, being subdivided by Westmelton (Vic) Pty Ltd ('Westmelton') in staged developments. The relationship of the leased land to these three broadacre lots is not of significance save as part of the story of broadacre subdivisions and residential development in the Melton area … The … leased land is part of a broadacre lot which was described in a plan of the three broadacre lots as section 'C'. … [T]he leased land … [is] rural land

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6 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 352; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 325 ALR 188, 198 [52], 209–210 [108]–[113], 211 [118]–[120], 212 [123].

7 *A Goninan & Co Pty Ltd v Direct Engineering Services Pty Ltd [No 2]* [2008] WASCA 112 [40]. In my opinion, there is nothing in *Esso Australia Ltd v Australian Petroleum Agents' & Distributors' Association* [1999] 3 VR 642, 647–8 [19]–[20] which prevents the words deleted from the pro forma lease document being considered for all purposes relevant to the resolution of the ambiguity in cl 4 of the Lease.

8 *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2014] VSC 479 ('Reasons').

on which … is erected a nineteenth century farmhouse …[9]

(b) Lot C, of which the Leased Land formed part, could not be subdivided because of restrictions in the applicable planning scheme.

(c) At the time the Lease was executed, the Lessor, Westmelton (Vic) Pty Ltd ('Westmelton'), was in receivership and Ernest Niemann was its receiver and manager.

(d) The Lessee, Peter Morris, was the stepson of Mr Niemann.

(e) The then current statutory scheme for the imposition of Imposts.[10]

17 The respondent emphasised that, as reflected in new cl 13[11] of the Lease, the surrounding circumstances that were known to the original contracting parties included the fact that they intended that the Leased Land be sold by Westmelton to Mr Morris for a price of $70,000 but they could not achieve such a sale because of the restrictions in the planning scheme. The respondent contended that the original contracting parties then entered into the Lease for the purpose of achieving indirectly the substance of what they could not achieve directly, namely, a sale of the Leased Land to Mr Morris.

18 The agreed summary document that the parties filed with this Court included a statement that the amount of $70,000 that Westmelton received as prepayment of rent at the time the Lease was executed 'was more or less equivalent to the market freehold value of the Leased Land'.

19 In order to decide which of the competing constructions of cl 4 is correct, in accordance with the principles in *Woodside*,[12] I will examine the text of that clause (including the deleted words), the context provided by the Lease as a whole, the

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9 Reasons [3].

10 The judge did not consider the then current legislative scheme because the parties did not draw it to his attention or make any submissions in relation to it.

11 As discussed at [30] below, the original cl 13, which contained a covenant by the Lessee to cultivate the Leased Land for a nominated item, had been deleted.

12 See [10] above.

purpose of the Lease, and the known surrounding circumstances.

Text of cl 4 of the Lease including the deleted words

20 What is immediately apparent about cl 4 is that it is not self-contained and thus does not make any sense when read on its own. This is because it does not identify who 'will pay'. As cl 2, including the concluding sentence 'And the said Lessee covenants with the Lessor as follows:—', has been deleted, the only way to identify the grammatical subject of cl 4 is to read it in conjunction with cl 3 which commences with the words 'THAT the Lessee will pay'. The balance of cl 3 is redundant because it deals with the subjects of periodical payment of rent and re-entry by the Lessor, both of which are rendered otiose by the prepayment of the entire rent under new cl 13 and the deletion of the first proviso, which provided for re-entry by the Lessor. The fact that cl 3 has been retained in its entirety even though it is redundant apart from providing context for the operation of cl 4 is relevant to the construction of the latter clause for the reasons discussed at [35] to [38] below.

21 Once it is ascertained that the grammatical subject of cl 4 is the Lessee, the text of that clause, ignoring the deletions, lends itself to the appellant's preferred construction. That is because the operative words state that the Lessee '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.' On this construction, the contractual promise made by the Lessee is coextensive with the Lessee's independent legal obligations to third parties to pay Imposts. That is, the Lessee promises to the Lessor that it will meet those legal obligations as and when they arise, independently of the Lease, during the term of the Lease.

22 The deletion of the words 'excepting land tax' and '(but a proportionate part to be adjusted between Landlord and Tenant if the case so requires)' from cl 4 of the Lease is neutral. The deletion of the first phrase is neutral on the appellant's preferred construction because the Lessee would be liable to pay all Imposts that became payable by the Lessee in respect of the Leased Land, with no exception for land tax.

The deletion of the first phrase is also neutral on the respondent's preferred construction because the Lessee would be liable to pay all Imposts that became payable by either the Lessor or the Lessee in respect of the Leased Land, with no exception for land tax. The deletion of the second phrase is neutral on either construction because, in either case, the Lessee's obligation to pay the Imposts in accordance with cl 4 — irrespective of the scope of that obligation — would be that of the Lessee alone. As such, there is no need for words prescribing apportionment as between the Lessor and the Lessee.

23 The deletion of the words 'Landlord or' from cl 4 is capable of favouring the appellant's preferred construction. This is because, as the original phrase 'payable by the Landlord or tenant' made it clear that the Lessee promised to pay Imposts which became payable by either the Lessor or the Lessee, the deletion of 'Landlord or' suggests that the Lessee's promise in the final version of cl 4 is to pay only those Imposts which became payable by it. On the other hand, the deletion of the words 'Landlord or' is consistent with the respondent's preferred construction that the opening words of cl 4 impose an absolute obligation on the Lessee to pay all Imposts irrespective of by whom they became payable and that the words 'shall be payable by the tenant' are redundant.

24 In summary, although both of the competing constructions are open if one has regard only to the text of cl 4, including the deleted words, the appellant's preferred construction is more persuasive. Of course, cl 4 cannot be read in isolation but must be considered in the context of the Lease as a whole and having regard to its purpose.

Context of Lease as a whole and purpose of Lease

25 The only provision of the Lease which potentially supports the appellant's preferred construction of cl 4 is the retained proviso. This states that, if any rates agreed to be paid by the Lessee under the Lease remain unpaid when due, the Lessor may pay them and seek to recover the relevant amount as if it were rent in arrears

under the '*Landlord and Tenant Acts*'. When the Lease was executed in 1988, the failure by a lessee to pay rates levied on it could result in a charge on the leased land.[13] Accordingly, it made sense for Westmelton to retain the proviso so that it could pay the outstanding rates — in order to prevent a charge from arising — and then take advantage of the statutory mechanism for recovering the relevant amount from Mr Morris.[14]

26 On closer examination, however, the retention of the proviso does not provide much support for the appellant's preferred construction of cl 4. There are two reasons for this.

27 First, a failure by the Lessee to pay land tax could also result in a charge on the Leased Land.[15] In the original form of cl 4, land tax was not an issue because the clause had the effect that land tax was payable by the Lessor. But once the words 'excepting land tax' were deleted, even on the appellant's preferred construction of cl 4, the Lessee became obliged to pay any land tax levied on it. In these circumstances, if the appellant's preferred construction had been intended, one would have expected the proviso to be replaced by a proviso that applied to all Imposts that fell within cl 4 or, at the very least, to all rates and taxes.

28 Secondly, retention of the proviso is equally consistent with the respondent's preferred construction of cl 4. This is because the Lessor's desire to avoid the Leased Land being subject to a charge due to unpaid Imposts, by obtaining a contractual promise from the Lessee to pay them, would not be confined to Imposts payable by the Lessee but logically would extend to Imposts payable by the Lessor.

29 In my opinion, when the Lease — including deleted words — is read as a whole, the respondent's preferred construction becomes very persuasive. In this context,

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13 See s 387(1) of the *Local Government Act 1958* and ss 176 and 239D of the *Melbourne and Metropolitan Board of Works Act 1958*.

14 See *112 Acland Street Pty Ltd v Australia and New Zealand Banking Group Ltd* (2002) 4 VR 372, 380 [22] ('*112 Acland Street*').

15 See s 66 of the *Land Tax Act 1958*.

the new cl 13 is very significant because it sets out the original contracting parties' intention in entering into the Lease. Although the phrase 'it was the intention' is couched in the past tense, when it is read with the phrase 'and as a result thereof', it is clear that the parties entered into the pro forma lease agreement, as modified by them, in order to give effect to the intention stated in cl 13. Read in this manner, cl 13 in substance states that, as the parties could not give effect to their intention to enter into a sale of the Leased Land for $70,000, they entered into a 99 year lease for prepaid rental of $70,000 in order to achieve indirectly through a lease transaction what they could not achieve directly through a sale transaction.

30 The intention referred to at [29] above is also reflected in the deletion of cl 5 (the Lessee's covenant to repair), cl 8 (the Lessor's right to inspect the Leased Land), cl 9 (the Lessee's covenant not to assign the Lease), cl 11 (the Lessee's covenant to use the Leased Land as a farm), the original cl 13 (the Lessee's covenant to cultivate the Leased Land for a nominated item) and the first proviso (the Lessor's right of re-entry). The structure of the pro forma lease document suggests that a number of other clauses between the old cl 13 and the first proviso may have been deleted. However, it is not possible to verify this or to ascertain the content of any further deleted clauses.

31 The intention referred to at [29] is also reflected in the addition of the words 'whatever purpose is allowable by law' after the words 'occupation of' in the opening paragraph, and the insertion of cl 14 (removal of the Lessor's right of re-entry), cl 15 (conferral on the Lessee the right to assign the Lease and otherwise deal with the Lease without the Lessor's consent) and cl 16 (conferral on the Lessee the right to construct buildings on the Leased Land without the Lessor's consent).

32 The deletions referred to at [30] above and the insertions referred to at [31] above mean that the Lessee's use and enjoyment of the Leased Land far exceeds the use and enjoyment available to a lessee under a conventional lease, and approximates the use and enjoyment of an owner of the freehold title who occupies the relevant

land. In this context, the respondent's preferred construction of cl 4 makes more sense than that of the appellant. This is because, consistently with the Lease conferring on the Lessee rights over the Leased Land which approximate those of an owner/occupier, the Lease also imposes on the Lessee the obligation for the payment of Imposts to which an owner/occupier is normally subject.

33 It is true, of course, that the Lessee's use and enjoyment of the Leased Land are not coextensive with those of an owner/occupier. This is because the Lessee's rights subsist for only the 99 year term of the Lease and are subject to the Lessor's reversion. However, the fact that the Lessee's rights under the Lease are less than those of an owner/occupier is not inconsistent with the intention in cl 13 of the Lease, as that intention is to place the Lessee as close as possible to the position of an owner/occupier of the Leased Land within the constraints of a lease transaction.

34 On first impression, the retention of cl 6 (the Lessee's covenant to keep the Leased Land free from vermin and noxious weeds), cl 7 (the Lessee's covenant not to cut down timber), cl 10 (the Lessee's covenant to deliver up possession of the Leased Land in good repair and condition at the expiration of the Lease) and cl 12 (the Lessee's covenant not to commit any nuisance or prejudice any insurance of the Leased Land) is inconsistent with the intention set out at [29] above. This is because the covenants in those clauses are typical covenants binding on a lessee in order to protect the lessor's reversion. However, the retention of those clauses is explicable by the fact that the Lessor retained all the land in Lot C which adjoins the Leased Land. Compliance with the Lessee's covenants in those clauses had the effect of protecting the Lessor's interest in the land in Lot C and not merely its reversion in respect of the Leased Land.

35 It must also be borne in mind that the Lease as a whole has been drafted very clumsily, with no apparent rationale as to why some provisions have been deleted and some have been retained. Reference has already been made at [20] above to an example of words that have been inexplicably deleted, namely, the last sentence in

cl 2 which stated: 'And the said Lessee covenants with the Lessor as follows: —'. As this sentence served to introduce the Lessee's covenants in the original cls 3 to 13, I have no doubt that it has been deleted inadvertently.

36 Reference has also been made at [20] above to the inexplicable retention of cl 3 which is clearly redundant because of the replacement of the covenant to pay rent by the prepayment of rent under new cl 13 and the removal of the Lessor's right of re-entry. The deletion of cl 2 in which the amount of the rental and the frequency of payment would have been specified, means that cl 3 does not make sense. This is because cl 3 is dependent on words which no longer have any reference point or meaning. Those words are 'the rent hereinbefore reserved on the days and in manner hereinbefore appointed for payment hereof' and 'the said term being determined by re-entry under the proviso hereinafter contained'. Accordingly, the only purpose that is currently served by cl 3 is to indicate that the liability to pay Imposts in cl 4 is imposed on the Lessee. However, if the last sentence in cl 2 had been retained, as logically it should have been, cl 3 would have served no purpose and would have been completely redundant. Further, while, for the reasons set out at [34] above, retention of cls 6, 7, 10 and 12 can be explained, it is possible that some of them were considered to be redundant and were not deleted through error rather than intentionally.

37 The Lease also contains internal inconsistencies. For example, although Westmelton is defined as 'Lessor', it is also referred to as 'Landlord'. Likewise, although Mr Morris is defined as 'Lessee', he is also referred to as 'tenant' and 'Tenant'.

38 The discussion at [36] above concerning the retention of provisions of the Lease that are redundant or possibly redundant supports the respondent's preferred construction. As the Lease contains redundant provisions and as the imposition of an obligation on the Lessee to pay all Imposts in respect of the Leased Land irrespective of whether they became payable by the Lessor or the Lessee is consistent

with the intention in cl 13, it makes good commercial sense to treat the words 'shall be payable by the tenant' in cl 4 as redundant.

39 A comparison of the original wording of cl 4 with its final wording also favours the respondent's preferred construction when regard is had to the intention in cl 13. The original wording of cl 4 would have imposed an obligation on the Lessee to pay all Imposts other than land tax which during the term of the Lease became payable by either the Lessor or the Lessee, with any necessary adjustments for Imposts which were not confined to the Leased Land but were imposed on the entire land within Lot C. As the amendments to the pro forma lease document were made with a view to achieving the intention set out in cl 13 — that is, to place the Lessee closer to the position of an owner/occupier — one would have expected the amendments to cl 4 to impose a greater burden on the Lessee rather than the Lessor to pay Imposts that became payable in respect of the Leased Land. Having regard to the intention in cl 13, it does not make any commercial sense for the amended final version of cl 4 to be construed as having the opposite effect of imposing a lesser burden on the Lessee and a correspondingly greater burden on the Lessor in relation to such Imposts.

40 In accordance with the principles in *Woodside*,[16] the meaning of cl 4 must be determined by reference to what a reasonable businessperson would have understood it to mean and so as to avoid commercial nonsense or inconvenience. An understanding of the genesis of the transaction and its context facilitates an appreciation of the commercial purpose which in turn is highly relevant to what a reasonable businessperson would understand cl 4 to mean.

41 In the present case, the genesis of the transaction was a proposed sale of the Leased Land. When the Lease is read as a whole, it is readily apparent that the deletions and insertions to the pro forma lease document were made with the aim of conferring on Mr Morris key attributes of an owner/occupier. In these circumstances, it does not make any commercial sense for Westmelton to agree to

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16 See [10] above.

amendments to cl 4 that would have the effect of increasing its liability to pay Imposts in respect of the Leased Land from that which would have applied if cl 4 were left in its original form. It must follow that a reasonable businessperson would have understood cl 4 as imposing on Mr Morris an obligation to pay all Imposts in respect of the Leased Land during the term of the Lease irrespective of whether, from the point of view of the third party imposing them, they are payable either by Westmelton or Mr Morris. Such a construction would avoid the Lease making commercial nonsense and working commercial inconvenience.

42 In summary, when the Lease is read as a whole and regard is had to its purpose as disclosed in cl 13, the respondent's preferred construction of cl 4 is much more persuasive than that of the appellant.

Surrounding circumstances

43 I will now consider the known surrounding circumstances set out at [16] to [18] above.

44 As I have already stated, at the time that the Lease was executed, the Leased Land formed part of Lot C which remained in the ownership of Westmelton. No farming activity was undertaken on any part of the land in Lot C. Rather, the land comprised broadacre lots and was earmarked for ultimate subdivision and sale. According to the plan attached to the Lease, Lot C comprised 111.70 hectares and the Leased Land comprised 12.15 hectares. Accordingly, the Leased Land represented 10.87 per cent of Lot C. It is common ground that, had it not been for the restrictions in the applicable planning scheme, Lot C would have been subdivided and the Leased Land would have been sold to Mr Morris rather than being leased to him.

45 The fact that Westmelton held the land in Lot C for the purpose of subdivision and sale rather than for ongoing primary production renders it more likely that, when it entered into the Lease with Mr Morris as a substitute for the proposed sale, the parties intended that liability for Imposts be shifted from Westmelton to

Mr Morris. This is because, as Westmelton was seeking to divest itself of the land, it would not have wanted to be subject to ongoing liabilities in relation to the land.

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

47 The fact that Westmelton was in receivership at the time the Lease was executed also favours the respondent's preferred construction of cl 4. This is because a receiver's duty is to act promptly to take control of the secured property and to take all reasonable care to sell such of that property as is required to pay the secured debt for not less than the market price of the property.[17] Where, as in the present case, part of the secured property cannot be sold, it is understandable that a receiver and manager might agree to a long-term lease involving prepayment of the entire rent in substitution for a proposed sale. However, it would not make any commercial sense for a receiver and manager of a company who enters into such a substituted transaction to burden the company — which would not have been in the best financial health — with long-term obligations to pay Imposts pursuant to a bespoke lease in circumstances where those obligations would not apply if a pro forma lease were entered into. It would make more commercial sense to amend the pro forma lease to ensure that only the Lessee is liable to pay Imposts.

48 I reject the appellant's submission that its preferred construction of cl 4 of the Lease makes good commercial sense because payment of Imposts by the Lessor represented consideration for the reversion. In the absence of any evidence of what was known at the time the Lease was executed about the quantum of the Imposts that would be payable over the 99 year term of the Lease and of the value of the reversion, it is speculative to link the two in the manner contended.

49 The judge found that, although Mr Morris was the stepson of the receiver and manager of Westmelton, there was no suggestion that there was anything improper

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17 See generally *Boz One Pty Ltd v McLellan* (2015) 105 ACSR 325, 349–55 [153]–[177].

about the Lease arising from this relationship.[18] Accordingly, this relationship does not favour either of the competing constructions of cl 4.

50 I will now consider the last of the surrounding circumstances upon which the parties relied, namely, the statutory scheme for the imposition of Imposts that was current at the time the Lease was executed. As the original contracting parties were legally represented, they can be taken to have known of that scheme.[19]

51 For present purposes the relevant components of the 1988 statutory scheme for the imposition of Imposts were the *Local Government Act 1958* ('LG Act'), the *Melbourne and Metropolitan Board of Works Act 1958* ('MMBW Act') and the *Land Tax Act 1958* ('LT Act').

52 Section 266(1) of the LG Act required municipal councils to 'make and levy rates to be called "general rates" upon either or both the unimproved capital value and the net annual value of each rateable property within the municipal district as shown in the valuation then in force'. Section 251(1) provided that, subject to exceptions which are not presently relevant, '[a]ll land shall be rateable property within the meaning of [the LG] Act'.

53 Section 267(1) of the LG Act provided that every general rate 'shall be … levied … upon every person who occupies any rateable property whatsoever' within the relevant municipality and, save for certain exceptions which are not presently relevant, if there was no occupier then the rate was to be levied 'upon the owner of that rateable property'. Section 3(1) defined 'owner of any property' as the person for the time being entitled to receive the rent for the property. Section 305(1) provided that the right of appeal conferred by s 304 in respect of rates could be exercised by '[a]ny owner of rateable property … notwithstanding that the occupier is the person rated'.

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18 Reasons [4].

19 It is well-established that, for the purposes of construing a contract, regard may be had to the legislative background in which the contract was executed: see, eg, *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241, 253 [30], 255 [40], 258 [50], 261 [64].

54 Section 342(1) of the LG Act provided as follows:

> Any person rated as occupier of any rateable property who pays any rates due in respect thereof shall (unless under any agreement such rates are payable by him) be entitled to recover before any magistrates' court or by action of debt in any court of competent jurisdiction from the person to whom he is liable to pay rent or to deduct from any rent payable or to become payable by him, the amount so paid by or recovered from him.

55 The broad definition of 'rateable property' in s 251 of the LG Act and the provisions of s 254(3) dealing with the valuation of 'any rateable property … which forms portion of a larger property' made it clear that a general rate could be imposed on parts of land that were not on a separate title.[20]

56 The effect of the above provisions of the LG Act was that, where an owner of land also occupied it, rates were levied on the owner/occupier and, where the land was subject to a lease, rates were levied on the lessee. In the latter case, unless the lease provided that the rates were payable by the lessee, the lessee was entitled to recover the rates from the owner. In my opinion, these provisions are equally supportive of the competing constructions of cl 4 of the Lease. This is because both constructions have the effect of ensuring that the rates remain payable by the Lessee, being the entity upon which the rates are levied in accordance with the LG Act.

57 I turn now to the MMBW Act. Part II, which comprised ss 66 to 128, dealt with water supply and pt III, which comprised ss 129 to 184AB, dealt with sewerage. In relation to the supply of water, s 98 empowered the Melbourne and Metropolitan Board of Works to 'levy rates upon the occupiers or owners of land and tenements (being rateable property)'. In relation to sewerage, s 176 provided that '[a]ll rates made under the provisions of [pt III] shall be paid by and recoverable from the owner of the property for the time being or the occupier or person using the property for the time being'.

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20 In *A-G (Vic) v Black* [1959] VR 45, 50-2, Monahan J held that, for rating purposes, the defendant was the occupier of the dining room of a house owned by others who resided at that house. This was because the arrangements between the parties were such that the defendant's occupation of the dining room had the qualities of exclusiveness and continuity.

58 In relation to the supply of water, ss 106 and 108 of the MMBW Act provided as follows:

> **Rates to be recoverable from occupier or person using water.**
>
> **106.** Except where it is otherwise expressly provided in this Part or in any by-law or agreement made under this Part all rates and charges for water and all sums due to the Board under the provisions of this Part shall be paid by and be recoverable from the person requiring receiving or using the water or from the owner or occupier of the land tenement or premises to which the water is supplied.
>
> All charges and sums due to the Board by any person may if not paid on demand be recovered by the Board or its collector in any magistrates' court or any other court of competent jurisdiction.
>
> …
>
> **Occupier may recover from owner certain payments.**
>
> **108.** If the occupier of any premises upon demand made by the Board—
>
> pays or is distrained for a greater sum than the rate charge or sum due by him for the period of his occupancy or if such greater sum is recovered from him by the Board;
>
> pays or is distrained for any sum due for laying down to the premises any service pipe which it was the duty of the owner of the premises to lay down or if such sum is recovered from him by the Board—
>
> he may from the rent due or becoming due by him to the owner of the premises deduct any sum so paid by or recovered from him or he may after demand recover the same from the owner in any court of competent jurisdiction.

59 In relation to sewerage, s 177 of the MMBW Act provided as follows:

> **Rights of occupier paying rates.**
>
> **177.** In the event of any rates being paid by or recovered from the occupier or person using the property for the time being … such occupier or person may deduct all sums of money so paid by him out of the rent unless otherwise provided by lease or agreement from time to time becoming due in respect of the said property as if the same had been actually paid to the owner as part of such rent, or such occupier or person may at his option sue the owner therefor before any court of competent jurisdiction or may recover the same in a summary way.

60 The effect of the above provisions of the MMBW Act was that although sewerage rates were levied on both an owner and an occupier, in the absence of an agreement

to the contrary in a lease, an occupier who paid those rates could recover them from the owner. An occupier's right to recover water rates from the owner was more limited. Nevertheless, for the reasons set out at [56] above in relation to the LG Act, the provisions of the MMBW Act are equally supportive of the competing constructions of cl 4 of the Lease.

61 Finally, I turn to the provisions of the LT Act. Section 6 provided that, for 'each owner of land' there shall be 'levied … a duty of land tax upon land for every dollar of the unimproved value thereof'. Section 3(1) defined 'owner' as including any person deemed by the Act to be an owner and 'taxpayer' as any person who was the owner of land. Section 3(2) made it clear that land tax could be assessed and be 'attributable to any portion of any land'.

62 Sections 42 and 69 of the LT Act relevantly provided:

> **Lessee liable as if owner.**
>
> **42.** (1) Save as hereinafter provided any person entitled to any leasehold estate in land whether legal or equitable (other than under any lease from the Crown) shall be deemed for the purposes of this Act (though not to the exclusion of the liability of any other person) to be the owner of the fee-simple of the land, and shall be assessed and liable for land tax accordingly.
>
> (2) Whenever any person entitled to any leasehold estate is assessed under the provisions of this section there shall be deducted from the tax payable by the owner of the freehold estate in respect of the same land the amount of tax payable by the person entitled to the leasehold estate.
>
> (3) Nothing in this section shall operate to relieve the legal owner of the fee-simple from the payment of tax except in so far as in the opinion of the Commissioner his interest in the unimproved value of the land is lessened by the covenants of any lease thereof and in every such case the Commissioner shall determine the amount of the tax payable by the owner and by the person entitled to the leasehold estate respectively.
>
> …
>
> **Remedy against lessee mortgagee or occupier if taxpayer makes default.**
>
> **69.** Where a taxpayer makes default in the payment of tax then without in any way releasing him from his liability therefor the following provisions shall apply so long as such default continues:

> (*a*) If the tax is payable in respect of land subject to any lease or mortgage or occupied by any person then the lessee mortgagee or occupier shall be responsible for the payment of tax and the same may be recovered from him as if he were the defaulting taxpayer;
>
> (*b*) All payments made under this section by any such lessee mortgagee or occupier as aforesaid shall be deemed to be made on behalf of the defaulting taxpayer.

63 Although s 42(1) deemed a lessee to be an owner and thus subject to land tax, this deeming provision only applied where, pursuant to s 42(3), the Commissioner of Land Tax formed the opinion that the owner's interest in the unimproved value of the land was lessened by the covenants of the lessee's lease and determined that part of the assessed land tax was payable by the lessee.[21] In *112 Acland Street Pty Ltd v Australia and New Zealand Banking Group Ltd*,[22] Ormiston and Phillips JJA stated that a 99 year lease for a fixed rent and a lease for a peppercorn rent were examples of leases whose covenants significantly diminished the value of the owner's interest in the fee simple.[23] Where s 42(3) did not apply, the deeming provision in s 42(1) did not operate and therefore no land tax was payable by the lessee.

64 Where the Commissioner of Land Tax made a determination under s 42(3) of the LT Act, the owner and occupier became separately liable to pay their proportion of the assessed land tax. However, under s 69, if the owner did not discharge his or her obligation to pay land tax, then the lessee became liable to pay the tax.

65 In my opinion the above provisions of the LT Act support the respondent's preferred construction. This is because, in so far as the effect of the provisions is that land tax was levied upon, and was payable by, the Lessee, both that construction and the appellant's preferred construction ensure that the liability remained with the Lessee. However, in so far as the effect of the provisions was that some land tax was levied on the Lessor, the respondent's preferred construction more accurately reflects

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21 *Commissioner of Land Tax v City of Melbourne* [1994] 1 VR 486, 490; *112 Acland Street* (2002) 4 VR 372, 376 [13].

22 (2002) 4 VR 372.

23 *112 Acland Street* (2002) 4 VR 372, 376 [13].

the purpose of the Lease.

66 This is because, knowing that land tax could be levied on the Lessor, the deletion of the exception for land tax that was in the pro forma version of cl 4 (which had the effect of aligning the position of land tax with the other Imposts) indicates that the original contracting parties intended to make the Lessee liable for all land tax levied in respect of the Leased Land. This is not surprising given the intention of those parties to place the Lessee as close as possible — within the constraints of a lease transaction — to the position of an owner/occupier of the Leased Land. Having regard to the abovementioned intention of the original contracting parties, the appellant's preferred construction of cl 4 does not make commercial sense. The reason for this is that the Lessor would be obliged to pay land tax for 99 years in respect of land that it would not have a right to use or control during that period.

67 Overall, the statutory scheme for the payment of Imposts that was in force in 1988 when the Lease was executed favours the respondent's preferred construction of cl 4.

Other considerations bearing on the construction of cl 4 of the Lease

68 Both parties made submissions to the effect that, if the opposing party's preferred construction of cl 4 had been intended, Westmelton and Mr Morris would have been expected to draft it differently. Both parties gave examples of alternative drafting. Submissions such as these are commonly made where a contractual provision is ambiguous and are usually not helpful. The submissions were particularly unhelpful in the present case because of the clumsiness in the drafting of the Lease to which I have already referred.[24] It is also relevant to note that the three mechanisms for amendment that the original contracting parties adopted were the deletion of existing clauses as a whole, the insertion of entirely new clauses and the deletion of parts of clauses. They eschewed the mechanism of making additions to existing

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[24] See [35]–[37] above.

clauses other than by way of filling in blanks in incomplete clauses with typed text.[25] The fact that the original contracting parties limited the amending techniques that they employed constrained the types of amendments that they could make. Accordingly, the failure of those parties to adopt particular wording may reflect the limitations of the amending techniques that they employed and may not provide any insight into the meaning of any clause.

69 The respondent sought to draw some support for its preferred construction of cl 4 from the evidence of Malcolm Hastings. He is the solicitor who acted for Mr Morris at the time the Lease was executed. There is considerable doubt as to whether some aspects of Mr Hastings's evidence were admissible, particularly his evidence about the intention of the original contracting parties. I have not relied on any aspect of Mr Hastings's evidence.

70 On the appeal, extensive submissions were made on whether the judge's reasons wrongly attributed to the appellant a submission that the word 'payable' in cl 4 of the Lease meant 'levied'. As this meaning was pleaded in the appellant's defence and reference was made to it by its counsel at trial, the judge did not misstate the appellant's position. In any event, for the reasons I have already set out, the proper construction of cl 4 of the Lease cannot be affected by whether 'payable' means 'levied' as distinct from 'due for payment pursuant to a statutory, contractual or other legal obligation'.[26]

71 I accept the appellant's submission that the inclusion in the Lease of an option to renew for another 99 years for nominal consideration would have brought the position of the Lessee closer to the position of an owner/occupier. However, I do not agree that the absence of such an option undermines the respondent's preferred construction of cl 4 of the Lease. There are many possible reasons why such an option was not added to the Lease, including — in common with other features of

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25 The only gap that was completed in hand-writing was the date of the Deed.

26 See [12] above.

the Lease — inadvertence. Speculation about the reasons would not assist in resolving the issue of construction.

Conclusion in relation to the first to fourth grounds of appeal

72 For the above reasons, the first to fourth grounds of appeal must be rejected.

Fifth ground of appeal

73 In my opinion, there is no substance to the fifth ground of appeal. The judge reached his conclusion on the construction of cl 4 of the Lease by applying conventional principles for the construction of commercial contracts. He then made reference to some post-contractual conduct and stated that that conduct was consistent with his construction of cl 4. However, he did not rely on such conduct for the purpose of construing the clause.[27]

Conclusion

74 As the judge did not err in his construction of cl 4 of the Lease, I would dismiss the appeal.

McLEISH JA:

75 This appeal raises a question of construction under a lease of land for a term of 99 years. The issue is whether the tenant is liable under the lease to pay the costs of rates, taxes, assessments and outgoings levied on the landlord. In resolving the issue, much turns on the significance to be attached to various parts of the printed form constituting the lease agreement which were struck out by the parties but remain legible in the executed document.The lease was entered into on 19 November 1988 between Westmelton (Vic) Pty Ltd (receiver and manager appointed) as landlord and Mr Peter Morris, as tenant. In about 1993, the respondent acquired the leasehold reversion. By a transfer of lease dated 15 October 2004, Mr Morris assigned and transferred the term of the lease to the appellant.

76 The lease is a printed standard form 'farm lease' which was extensively amended, primarily by striking out various parts, before it was executed. Many of

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27 Reasons [34].

the amendments reflect the fact that the lease was granted for a term of 99 years and the entire rental was paid in full at the commencement of the lease.

77 The land which is the subject of the lease is part of the land described in Certificate of Title volume 7484, folio 127 in the Melton area. The area of land subject to the lease is 12.15 hectares. The land is part of a larger area of land which in turn was one of three larger contiguous 'broadacre' lots. In the 1980s, these lots were being subdivided for residential development in stages. That process is yet to affect the leased land, which remains rural farming land.

78 On 7 November 2011, a separate title was issued in respect of the leased land. Since that time, the leased land has been assessed separately for rates and land tax.

79 In order to understand the issue for determination regarding the payment of rates, taxes, assessments and outgoings, it is necessary to set out the relevant provisions of the lease, along with those provisions which were struck out. Clauses 13 to 16, and other words in italics, were added to the standard form:

> 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.
>
> 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 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.*

~~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 agent or any person authorized by 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.*

80 The reference in cl 13 to the intention of the parties having been to enter into a sale and purchase of the land is explained by the fact that planning scheme restrictions on freehold subdivision of the land prevented its freehold sale at the relevant time.

81 In proceedings commenced by the respondent seeking declaratory relief and orders for the payment of a monetary sum for accrued rates, etc a judge in the Trial Division heard evidence and argument as to the proper construction of cl 4 of the lease. After reserving judgment, he made a declaration that the lease on its proper construction provided that the appellant shall pay all rates, taxes, assessments and outgoings whatsoever in respect of the leased land, including land tax. The question

of quantum with respect to the relevant amounts payable was adjourned. By implication, the declaration made by the judge entailed refusing an application the appellant had made by way of counterclaim for a declaration to the contrary effect.

82 Without conceding that leave to appeal is required, the appellant seeks such leave. That application has been heard along with full argument on the appeal. I would grant leave to appeal to the extent necessary. I do not enter into consideration of the question whether leave to appeal was required in the present case, in view of the fact that s 14A of the *Supreme Court Act 1986* now requires leave in respect of all civil appeals (subject to presently irrelevant exceptions).

83 Apart from the lease itself, no other documents concerning the preparation and execution of the lease were tendered at the hearing. Oral evidence was led by the appellant from the solicitor who had acted for Mr Morris in relation to the lease at the time of its preparation and execution. It appears that little if anything turned on that evidence in the reasons for decision of the judge. However, the judge held that the evidence reinforced what, in his view, appeared from cl 13 of the lease, namely that the intention of the parties and the purpose of the transaction was, in effect, to achieve a sale of freehold.[28] To that extent, the oral evidence was relied upon to support the case of the respondent.

84 Clause 4 of the lease contains the obligation to pay rates, taxes, assessments and outgoings. The trial judge was of the opinion that the provisions of cl 4 of the lease were ambiguous.[29] He held that it was permissible to have regard to the deleted words and clauses in the lease as an aid to construing cl 4.[30] The judge held that the appellant's submissions effectively treated the phrase 'payable by the tenant' in cl 4 as meaning 'levied on the tenant'.[31] He held that the expressions bear significantly

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28 *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2014] VSC 479 [40] ('Reasons').

29 Reasons [23], [24].

30 Ibid [13]–[14], relying on *Centrepoint Custodians Pty Ltd v Lidgerwood Investments Pty Ltd* [1990] VR 411; *A Goninan & Co Ltd v Direct Engineering Services Pty Ltd [No 2]* [2008] WASCA 112 [37]–[40]. See also *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603, 616 [14].

31 Reasons [35].

different meanings and that the word 'levied' denotes something different from the word 'payable'. He further held that the absence of the onerous obligations on the tenant that are commonly found in leases, together with the provisions of cl 13 of the lease, indicated that the document was intended to be, in effect, a conveyance of freehold title.[32] As such, cl 4 should not be construed as imposing an obligation on the landlord, for nearly a century, which would be wholly at odds with the result that would have been produced had the parties been able to give effect to their intention of transacting a freehold conveyance by way of sale.

85 The appellant had placed reliance on the deletions in cl 4. For example, it submitted that the deletion of the words 'excepting land tax' showed that the parties considered the question of liability to land tax, while the deletion of the words 'Landlord or' showed that rates, taxes, assessments and outgoings (including land tax) payable by the landlord were deliberately excluded.

86 As to the deletions in cl 4, the judge held that the deletion of the words 'excepting land tax' showed only that the expression 'all rates taxes assessments and outgoings whatsoever' included land tax.[33] As to the deletion of the words 'Landlord or', the judge held that, particularly when regard was had to the difference in meaning between the expressions 'payable by' and 'levied on', the deletion of the words 'Landlord or' was consistent with the position that the landlord was to pay nothing by way of 'rates taxes assessments and outgoings whatsoever', such amounts instead being 'payable by the tenant'.[34] Finally, the judge held that the deletion of the words '(but a proportionate part to be adjusted between Landlord and Tenant if the case so requires)' was supportive of the view that the deletion of the words 'Landlord or' indicated that the landlord was to pay nothing by way of rates, taxes, assessments and outgoings, regardless of whether or not they were 'levied on' the landlord

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32 Ibid [39].

33 Ibid [44].

34 Ibid [45].

initially.[35] The judge said that, put simply, if only one party (the tenant) is liable to pay, regardless of the initial levying, then there was nothing to adjust proportionately or otherwise between them.

87 The appellant filed a notice of appeal containing five grounds, consisting of headings supported by short argument as to errors the trial judge is said to have made. In the end, the first four grounds amount to reasons for contesting the interpretation of cl 4 reflected in the judge's declaration. In those circumstances, it is not profitable to deal with those various grounds individually. The arguments may instead be addressed in the course of examining the proper construction of cl 4. The fifth and final ground asserts that the judge impermissibly relied on post-contractual conduct as an aid to interpreting cl 4.

Principles of interpretation

88 It is necessary to construe cl 4 of the lease objectively, by reference to what a reasonable person in the position of the parties would have understood by the language used.[36] In doing so, the language used is generally to be given its natural and ordinary meaning, read in the light of the document as a whole and the surrounding circumstances known to the parties at the time of the transaction.[37]

89 As already mentioned, there was little if any relevant evidence (aside from what was stated in the contract itself) as to the surrounding circumstances known to the parties at the time of the transaction. However, the following matters are relied on as objective facts which a reasonable person in the position of the parties is to be taken as knowing:

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35 Ibid.

36 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 461–2 [22] (*'Pacific Carriers'*); *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179 [40] (*'Toll'*); *Leon Mancini & Sons Pty Ltd v Tallowate Pty Ltd* [2014] VSCA 306 [56].

37 *Pacific Carriers* (2004) 218 CLR 451, 461–2 [22]; *Toll* (2004) 219 CLR 165, 179 [40]; *Woodside Energy Ltd v Electricity Generation Corporation* (2014) 251 CLR 640, 656–7 [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 89 ALJR 990, 998 [46].

1. The land in question was not at the time that the lease was entered into able to be sold by way of freehold.

2. The original landlord received, as the payment of rent, the sum of $70,000 at the commencement of the lease, which was more or less equivalent to the market freehold value of the leased land.

90 Further, the appellant submitted that, as at the date of the lease:

1. General rates were levied upon the occupier of land, namely the tenant.[38] The tenant was, however, entitled to recover from the landlord for any rates paid.[39]

2. It was possible for water rates to be levied on an occupier of land.[40]

3. A tenant was deemed for land tax purposes to be the owner of the fee simple and could be made liable to pay land tax.[41]

91 It will be necessary to return to these arguments. It should be noted, however, that the above matters were not raised before the trial judge and no findings were made as to whether a reasonable person in the position of the parties would be taken to know about these potential liabilities. There was no evidence that these matters were known to the parties or (if it matters) that there ever have been any rates, taxes or assessments levied on the tenant in respect of the leased land.

92 The law as to whether, and in what circumstances, the deletion of parts of a standard form contract may be referred to as an aid in the construction of that contract was not in issue at the trial. As appears below, at least where ambiguity appears from the relevant part of the contract, resort to deleted words or clauses which are legible on the face of the document is permissible as an aid to construing the ambiguous language. Both the trial and the appeal proceeded upon this basis.

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38 *Local Government Act 1958* s 267(b).

39 Ibid s 342.

40 *Melbourne and Metropolitan Board of Works Act 1958* s 98.

41 *Land Tax Act 1958* s 42(1).

However, it is important to keep in mind that it is not the deleted words, but those forming the contract agreed between the parties, which are being construed. The deleted words are nothing more than an aid in that process of construction, to the extent (if any) to which they might assist. Resort to deleted words does not transform the process of construction so as to require the deletions and the contractual words to be understood together as one harmonious whole. If the words deleted do not assist in resolving the ambiguity in question, then they must, like other extrinsic aids to construction, be put to one side.

93 The traditional approach of the common law was that deleted words, whether visible in the final contract or not, were not to be considered in interpreting the contract. The agreement itself was sharply distinguished from the negotiations which preceded it, and visible deletions from the contractual text amounted to no more than inadmissible evidence of pre-contractual negotiations.[42] This approach sits comfortably with the objective theory of contract, by which the meaning of the contract is determined by interpreting its words, rather than by reference to the subjective intentions of the parties. At the same time, however, matters external to the contract may still be relevant to interpretation without departing from the objective approach.[43] Moreover, the law as to deleted words has been characterised by what Diplock J described as a 'pleasant diversity of authority' on the subject.[44] In some cases words which had been struck through have been taken into account, without elaboration, in construing the contract.[45] Further, it has been suggested that a distinction is to be drawn between words struck from a printed form (to which

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42 *Inglis v John Buttery & Co* (1878) 3 App Cas 552, 558, 569 (Lord Hatherley), 571 (Lord O'Hagan), 577 (Lord Blackburn); *MA Sassoon & Sons Ltd v International Banking Corporation* [1927] AC 711, 721; *The King v New Queensland Copper Co Ltd* (1917) 23 CLR 495, 500–1; *Building and Engineering Constructions (Aust) Ltd v Property Securities No 1 Pty Ltd* [1960] VR 673, 681; *Mobil Oil Australia Ltd v Kosta* (1969) 14 FLR 343, 348–9; *Harrod v Palyaris Construction Pty Ltd* (1973) 8 SASR 54, 58–9.

43 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 89 ALJR 990, 998 [50].

44 *Louis Dreyfus & Cie v Parnaso Cia Naviera SA* [1959] 1 QB 498, 513.

45 *Caffin v Aldridge* [1895] 2 QB 648, 650; *TJ Watkins Ltd v Cairns Meat Export Co Pty Ltd* [1963] Qd R 21, 27. See also *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129.

regard could be had) and words struck from an agreement prepared by the parties.[46]

94 The preparedness of the courts to have regard, at least to some extent, to parts of a contract which have been struck out but which remain legible, for the purpose of construing the operative language of the instrument, is explicable as a departure from the general rule prohibiting recourse to pre-contractual negotiations. Words struck from the actual instrument may justifiably be seen as still forming part of that instrument, albeit not intended to have operative effect. Importantly, any third party dealing with the contracting parties, such as an assignee or security holder, is in as good a position as the court in having regard to the struck out words. In these ways, little violence, if any, is done to the objective theory by taking those words into account in interpreting the contract.

95 None the less, it is clear that the existing authorities do not allow immediate resort to be had, when construing a contract, to words struck out in a contract. The position was reviewed by Ormiston J in *Centrepoint Custodians Pty Ltd v Lidgerwood Investments Pty Ltd*:[47]

> Many of the cases deal with the deletion of words or clauses from a standard or common form, such as a charter party, letter of credit or building contract. Perhaps the preponderance of authority favours the view that the court should not take those deleted clauses into account in interpreting a contract: see, eg, *Scrutton on Charter Parties* (19th ed), p 21 and compare the many cases in footnotes 47 and 48, but excluding *Stanton v Richardson* (1874) LR 9 CP 390 and *Glynn v Margetson* [1892] 1 QB 337; [1893] AC 351: see the useful note by ER Hardy-Ivamy in (1959) 22 MLR 333, at p 336. An earlier version of the passage in *Scrutton* (16th ed) has been cited with approval or qualified approval in a number of cases: see, eg, *Louis Dreyfus & Cie v Parnaso Cia Naviera SA* [1959] 1 QB 498, at p 513; *Building and Engineering Constructions (Aust) Ltd v Property Securities No 1 Pty Ltd* [1960] VR 673, at p 681 and *Mobil Oil Australia Ltd v Kosta* (1969) 14 FLR 343, at p 348, cited in *Harrod v Palyaris Construction Pty Ltd* (1973) 8 SASR 54, at p 58. However, as pointed out by Pape J in the *Building and Engineering Constructions Case*, at p 681, the passage in the 16th edition of *Scrutton on Charter Parties* reflected in part the benevolent view of Scrutton LJ in looking at words and clauses stuck out, and even in that edition it was doubted whether the view there expressed was good law. The 19th edition accepts that the weight of authority is now against looking at deletions. Expressions on high authority consistent with

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46 *Timber Shipping Co SA v London & Overseas Freighters Ltd* [1972] AC 1, 15–16.

47 [1990] VR 411, 421–2.

> that view contained in *A & J Inglis v John Buttery and Co* (1878) 3 App Cas 552, at p 569; *Ambatielos v Anton Jurgens Margarine Works* [1923] AC 175, at p 185 and in particular in Viscount Sumner's judgment on behalf of the Judicial Committee in *MA Sassoon & Sons Ltd v International Banking Corporation* [1927] AC 711, at p 721 were relied upon by Blackburn J, when sitting in the Supreme Court of the Northern Territory, so as to conclude that he should construe an agreement, in the absence of extrinsic evidence, without resort to any words struck out: *Mobil Oil Australia Ltd v Kosta*, at pp 348–9. The same view was accepted by Jacobs J in *Harrod v Palyaris Construction*, at pp 58–9. On the other hand, courts in recent years have looked, from time to time, at deleted clauses, although few of the dicta contain any analysis of authority: see, eg, *Louis Dreyfus & Cie v Parnaso Cia Naviera SA*, at pp 512–13, per Diplock J; *TJ Watkins Ltd v Cairns Meat Export Co Pty Ltd* [1963] Qd R 21, at p 27; *London & Overseas Freighters Ltd v Timber Shipping Co SA* [1972] AC 1, at pp 15–16, per Lord Reid and *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd* [1975] 2 Lloyd's Rep 197, at p 209, per Lord Cross: cf *Odgers on Deeds and Other Instruments* (4th ed), pp 64–5 and *Chitty on Contracts* (25th ed), para 782.
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> A distinction drawn in the authorities appears to have been given some significance. On the one hand there is no case of which I am aware in which a court has looked for the purpose of interpretation to a draft contract or term which has been rejected in the course of negotiations, although in several cases, some of which have been cited above, a court has been prepared to look at a clause or words which have appeared on, but which have been struck out of, a standard form contract. This distinction has been justified by saying that evidence of negotiations is always irrelevant to the process of construction, but that a deliberate and mutually agreed deletion of a standard form term may throw light on the parties' intentions in cases of ambiguity: cf *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, at pp 140–1 and *London & Overseas Freighters Ltd v Timber Shipping Co SA* [1972] AC 1, at pp 15–16.

96 It was not necessary for Ormiston J to decide the question, but subsequent Australian appellate authority allows recourse to words or clauses deleted from a standard or common form agreement for the purpose of construing ambiguous language in the agreement.[48] Part of the justification for doing so lies in the potential exception to the rule against admissibility of pre-contractual negotiations identified by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*:[49]

> There may perhaps be one situation in which evidence of the actual intention of the parties should be allowed to prevail over their presumed intention. If it transpires that the parties have refused to include in the contract a provision

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48 *Postle v Sengstock* [1994] 2 Qd R 290, 298; *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187 [137]; *260 Oxford Street Pty Ltd v Premetis* [2006] NSWCA 96 ('*260 Oxford*') [99]–[100], [127], [132]–[134]; *A Goninan & Co Ltd v Direct Engineering Services Pty Ltd [No 2]* [2008] WASCA 112 [37]–[40].

49 (1982) 149 CLR 337, 352–3 ('*Codelfa*').

> which would give effect to the presumed intention of persons in their position it may be proper to receive evidence of that refusal. After all, the court is interpreting the contract which the parties have made and in that exercise the court takes into account what reasonable men in that situation would have intended to convey by the words chosen. But is it right to carry that exercise to the point of placing on the words of the contract a meaning which the parties have united in rejecting? It is possible that evidence of mutual intention, if amounting to concurrence, is receivable so as to negative an inference sought to be drawn from surrounding circumstances.

97 Consistently with this approach, there is, as Ormiston J expressed it, a 'robust common sense'[50] in looking at terms which the parties have agreed to strike out. But it is plain that the authorities regard struck out language as secondary, even if not strictly extrinsic, material. As such, it is used as an aid to construction without forming part of the language being construed. So, the possible exception permitting evidence of actual intention, to which Mason J alluded in the passage above, operates only to rebut reliance on evidence of surrounding circumstances where admissible as an aid to construction.

98 The most recent Australian authority appears to be the decision of the Western Australian Court of Appeal in *A Goninan & Co Ltd v Direct Engineering Services Pty Ltd [No 2]*.[51] It was there held that deleted words or clauses in a standard or common form agreement may at least be referred to as an aid to construing ambiguous words or an ambiguous clause in the concluded agreement. That approach is consistent with a number of both older and more recent cases, including *Louis Dreyfus & Cie v Parnaso Cia Naviera SA*,[52] *Timber Shipping Co SA v London & Overseas Freighters Ltd*,[53] *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd*,[54] *Punjab National Bank v de Boinville*,[55] *Postle v Sengstock*,[56] *Sanko Steamship Co Ltd v Sumitomo Australia Ltd*

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50 *Centrepoint Custodians Pty Ltd v Lidgerwood Investments Pty Ltd* [1990] VR 411, 422.

51 [2008] WASCA 112 [37]–[40].

52 [1959] 1 QB 498, 513.

53 [1972] AC 1, 15–16.

54 [1975] 2 Lloyd's Rep 197, 209 ('*Mottram*').

55 [1992] 1 WLR 1138, 1147–9 ('*Punjab Bank*').

56 [1994] 2 Qd R 290, 298.

(No 2);[57] *Burger King Corporation v Hungry Jack's Pty Ltd*,[58] and *260 Oxford Street Pty Ltd v Premetis*.[59] It is the approach which should be applied in the present case.

Construction of cl 4

99 The first question, on this analysis, is whether cl 4 is ambiguous, paying no regard to the deleted words. The parties accepted that cl 4 is relevantly ambiguous. For the reasons shortly set out below, in my view they were correct to do so.

100 Clause 4, omitting the deleted words, provided as follows:

> 4. AND 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.

101 Read in conjunction with the preceding clauses, it is plain that cl 4 imposes an obligation on the lessee. On the appellant's construction, that obligation is confined to rates, etc which are payable by the tenant in respect of the premises. On the respondent's construction, the lessee's obligation extends to 'all' rates, etc. The latter construction treats the words 'which during the said term shall be payable by the tenant' as, in effect, restating the obligation in different words.

102 Clause 4 is the only term of the lease to use the word 'tenant'. Elsewhere, the appellant's predecessor (Mr Morris) is described (and defined) as 'the Lessee'. This is explicable, at least on the basis that the reference to 'the tenant' in cl 4 is part of a description of the kind of rates, etc which are payable under that provision. It is perhaps a more awkward use of language if the respondent's construction is correct. If the last part of cl 4 is merely emphasising the obligation of the 'Lessee' to pay all rates, etc, it is not clear why the word 'tenant', rather than 'Lessee' should be used.

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57 (1995) 63 FCR 227, 256–8 ('*Sanko*').

58 [2001] NSWCA 187 [137].

59 [2006] NSWCA 96 [99]–[100], [127], [132]–[134].

103 However, in my view this consideration is not sufficient to deny cl 4 an ambiguous character. It can be read as imposing on the lessee an obligation to pay all rates, etc, just as it can be read as confining that obligation to those which are payable by the tenant. Similarly, other features of the lease, including the statement of purpose in cl 13, cannot be said to be so clear as to deny any ambiguity in the meaning of cl 4. Its words are susceptible of more than one meaning.[60] It is therefore necessary to turn to the deleted words.

104 In that regard, the following submissions were made.

105 The appellant submitted firstly that the natural and ordinary meaning of cl 4 was that rates, etc of the kind specified which were payable by the tenant, in respect of the leased premises, were required to be paid by the lessee. Contrary to the reasoning of the trial judge, this did not mean that the words 'payable by' were treated as meaning 'levied on'. The words 'payable by' envisage only some obligation external to the lease (in distinction to the words 'AND also will pay' which create the obligation within the lease). Further, the judge was wrong to conclude, in any event, that the only rates and taxes which the parties could have had in contemplation were those levied on the landlord. The appellant submitted that municipal rates and land tax could each have been levied on a tenant when the lease was executed.

106 Secondly, the appellant contended that the critical deletion from the printed form of farm lease was the striking out of the words 'Landlord or', which was consistent only with the appellant's interpretation. Deletion of the expression 'excepting land tax' showed only that the clause was capable of extending to land tax. The striking out of the provision for apportionment was consistent with making one party responsible for the payments to the exclusion of the other. Once the tenant was responsible for paying accounts payable by the tenant, but not by the landlord, no occasion for apportionment could arise.

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60 *Codelfa* (1982) 149 CLR 337, 350.

107 Finally, the appellant submitted that commercial common sense supported its construction. The landlord retained the reversion interest in the land, which was a valuable asset. It could not be assumed, and there was no evidence, that the burden of rates, taxes, assessments or outgoings that might be imposed on the landlord over the term of the lease transformed that asset into a liability so that the arrangement made no commercial sense. The stated intention of the parties to execute a freehold transfer (cl 13) had not been able to be achieved and the language of the lease should not be strained to reach such an outcome.

108 The respondent placed considerable reliance on cl 13. It contended that it was the 'prism' through which the lease needed to be understood and construed. It would be fundamentally absurd for the landlord under a lease transaction tantamount to a sale of the freehold to pay rates and taxes for 99 years while the intended purchaser enjoyed the property. On its proper construction, cl 4 required the lessee to pay all rates, etc whatsoever and the words 'which during the said term shall be payable by the tenant' served to emphasise the lessee's obligation.

109 The respondent accepted that general rates, water rates and land tax could 'theoretically' be levied on a tenant in occupation of land in limited circumstances, but submitted that there was no evidence that this had occurred in the present case or that such levies were contemplated by the parties.

110 Finally, the respondent contended that the removal of the provision for apportionment was equivocal. Under the respondent's construction, the whole of the rates, etc in respect of the land were to be paid by the tenant, so there was no need for the landlord to share any expenses of that kind for the duration of the lease.

111 It is apparent from the operative terms of the executed agreement that its terms are unusual in a lease. Much of the argument on the appeal concerned the character of the underlying transaction, by which it was sought to explain the unusual features of the lease and to construe cl 4. As noted, the respondent emphasised cl 13 and submitted that the lease should be regarded as the parties' attempt, within the

confines of a lease, to replicate as closely as possible a conveyance of freehold title. The appellant contended that it was the operative terms of the whole lease, and not just cl 13, which defined its character and effect.

112 It is plain that the parties had, before entering into the lease, intended to enter into a freehold sale. This is expressly stated in cl 13. It readily explains why the rental for the whole term of the lease was paid in a single instalment at its commencement. It also explains why the lessor has no right to terminate the lease for breach and no 'power of right of re-entry' (cl 14). Similarly, the stated intention is consistent with the lessee's entitlement to assign, transfer or sub-let without the lessor's consent (cl 15) and its right to repair, replace and build dwellings and outhouses on the land, including for commercial purposes (cl 16).

113 On the other hand, the lease contains provisions which are not explicable as effecting the parties' intention to achieve a transaction approximating a freehold sale. The lessee is obliged to keep the land free from vermin and noxious weeds (cl 6) and not to damage timber or trees except for fencing and domestic purposes (cl 7). As one would expect in a lease, the lessee is required to deliver up possession of the land in good repair and condition at the end of the term (cl 10). The lessee is further required not to commit any nuisance on the land or do anything that might prejudice or increase the cost of any insurance of the land (cl 12). Finally, the last proviso envisages the lessor having the right to sue the lessee for unpaid municipal rates.

114 Some of these provisions are explicable on the basis that the leased land comprised only a portion of a much larger area of land owned by the lessor. But they all serve as reminders that, notwithstanding the intention mentioned in cl 13, the instrument is a lease. It would be wrong in the circumstances to assume that the parties intended, so far as possible, to replicate a transfer of the freehold title, and to construe the lease on that basis. In that regard, the following further points may be noted.

115 First, cl 13 itself refers to the intention of the parties to execute a sale and

purchase of the land in the past tense. Further, cl 13 only explains the term of the lease and the advance payment of rental by reference to that intention. It falls well short of stating that the parties intend to replicate, so far as possible, a sale and purchase.

116 Secondly, as the appellant submitted, the lease contained no option to purchase at its conclusion. Similarly, it contained no right of renewal. Nor did it provide any rights in the lessor in respect of improvements or other fixtures at the conclusion of the lease. All these matters could have been expected to have been addressed in a lease seeking to achieve, in effect, a sale and purchase under another name. The absence of these kinds of provisions meant that the obligation of the lessee to deliver up the land at the end of the lease had real substance.

117 It follows that the changes that were made to the standard form lease are properly to be regarded as reflecting the parties' intention to enter into a 99 year lease with rental paid in advance. It should not, however, be assumed that the changes were made for the further purpose of seeking to approximate, so far as possible, a sale and purchase of the land. The considerations set out above show that the parties did not seek to achieve that end.

118 When one turns to cl 4, in that context, two interpretations are open. The first, advanced by the appellant, is that it requires the lessee to pay all rates, taxes, assessments and outgoings payable by the tenant in respect of the premises. Such a construction is not merely tautologous. It creates an obligation, enforceable by the lessor, to meet obligations owed in respect of the land to third parties. Such an obligation enables the lessor to hold the lessee to account for failure to satisfy liabilities to third parties which could lead to those parties obtaining rights against the land. As the Court of Appeal explained in *112 Acland Street Pty Ltd v Australia and New Zealand Banking Group Ltd*:[61]

> [F]requently particular taxes and rates fell naturally, by the words of the

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61 (2002) 4 VR 372, 380 [22].

> statute imposing them, on the party, more often than not the tenant, whom the parties intended to bear them, without the need for an explicit covenant to that effect. Sometimes the covenant has been expanded so as to ensure that in fact the party so liable under the statute paid the relevant impost in order to make sure that, by reason of default, liability did not ultimately fall, by virtue of a charge or otherwise, on the other party, usually the landlord, who wished to receive the rent free of any potential liabilities for such rates, taxes and the like. Often the language chosen was apposite to occupation or use, either in its express terms or by virtue of the legislation applicable at the time. What is relatively clear, however, is that, if the parties wished to ensure that the tenant did bear all such rates, taxes, etc, they could, and not infrequently did, say so.

119 The second construction, advanced by the respondent, treats the words 'by the tenant' as words of emphasis which serve to reinforce the meaning of the clause. That meaning is that all rates, taxes, assessments and outgoings whatsoever which during the said term shall be payable in respect of the premises shall be paid by the lessee or tenant.

120 In my opinion, if cl 4 is read alone, the former meaning is the more natural reading. The respondent's construction attributes a clumsy operation to the words which, in both constructions, are critical: 'by the tenant'. It must be acknowledged that the lease contains many unwieldy and anomalous provisions. Notably, cl 3 provides for the payment of rent and the proviso for re-entry. Seemingly this serves only to make clear that the obligations in cls 4–12 rest on the lessee. This circuitous approach to drafting would sit comfortably with either reading of cl 4. That matter aside, however, the more natural reading is that the lessee is obliged to pay the rates, etc payable by the tenant.

121 When regard is had to the words struck from the lease, the appellant's construction in my view remains the preferable one.

122 In cl 4 itself, the deletion of the words 'excepting land tax' shows only that the lessee may potentially be liable under the clause to pay land tax. It does not follow from acceptance of that proposition that the parties intended that the lessee be liable for all rates, etc payable by the lessor. Moreover, it is far from clear that land tax would have been payable solely by the lessor in any event (as mentioned further

below).

123 The parties were correct to submit that the omission of the parenthetical words regarding apportionment was equivocal as between the competing constructions.

124 On the other hand, the striking out of the words 'Landlord or' clearly operates to reduce the ambit of the clause as originally drafted. The extensive and all-embracing liability of the lessee in the original version of the clause is cut down by this change. It is difficult to see any other basis for omitting the words. The respondent submitted that, on its construction, the words 'Landlord or' needed to be omitted to make it clear that the tenant, and not the landlord, was to pay the amounts in question. But it was already plain that cl 4 only imposed an obligation on the tenant (or 'Lessee'). In my opinion, if it was intended to make it clear that the tenant, and not the landlord, was to be liable, the more likely scenario is that the entire phrase 'by the Landlord or tenant' would have been deleted. Clarity would, in other words, have been achieved by adopting simpler language and avoiding awkward repetition.

125 The omission of the words 'Landlord or' is therefore a strong indication that the parties considered, and rejected, the possibility that the lessee should pay rates, etc payable by the landlord. The striking out of words which would clearly produce a particular result is a strong basis for construing the contract so as not to produce that result.[62] This is also the kind of use of pre-contractual negotiations to which Mason J adverted in the passage in *Codelfa* set out above, namely to rebut a specific contrary construction.

126 The remainder of the changes to the standard form document in my view take the matter no further. As already discussed, they can be seen to be directed to the twin circumstances mentioned in cl 13, namely the lengthy term of the lease and the advance payment of the rental in full. Further, all of the changes, including those to cl 4, operate so as to alleviate obligations of the lessee, compared with the obligations

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62 See, eg, *Mottram* [1975] 2 Lloyd's Rep 197, 209; *Punjab Bank* [1992] 1 WLR 1138, 1148–9; *Sanko* (1995) 63 FCR 227, 262; *260 Oxford* [2006] NSWCA 96 [100].

under the standard form lease. The only exception, potentially, is the inclusion of liability for land tax under cl 4. But, as indicated, this is consistent with the parties having decided that cl 4 should be confined to any liabilities of the tenant.

127 It is true that, so construed, cl 4 imposes an obligation on the lessee which places it in a more favourable position than it would have enjoyed had it purchased the land. The lessor is potentially liable for rates, taxes, assessments and outgoings which it would not have had to meet had the land been sold. But I do not consider that this consideration can carry great weight in the process of construction. As already noted, the parties agreed on a lease, not a sale. In many respects, the lessee is subject to obligations which would not have existed under a sale. Above all, the lessee is required to return the land at the end of the term. In those circumstances, there is no warrant for presuming that the parties intended cl 4 to operate so as to approximate the position under a sale and purchase.

128 Reference has been made above to the arguments raised by the appellant as to the incidence of general and water rates and land tax on landlords and tenants. The respondent contended that, in the absence of evidence that the parties contemplated that these charges may be levied on the lessee, it could not be assumed that they had considered the matter. In my view, the fact that the parties were legally represented means that they can be taken to have known of the possible application of relevant legislation imposing charges in respect of the land. But in the context of a 99 year lease that assumption may be of little significance. The incidence of statutory charges is notoriously liable to change over time. In the circumstances, there is little for the Court usefully to proceed upon aside from the respondent's proper acceptance that general rates, water rates and land tax could theoretically be levied on a tenant of land when the lease was executed.

129 In these circumstances, it is not necessary to examine more closely the legislation governing specific statutory imposts at the time of execution of the lease. Both parties accepted that a tenant might be liable for rates and land tax. Neither

submitted that a landlord could not be liable. It can be assumed that the parties enjoyed, through their lawyers, a similar state of knowledge. But this does not ultimately advance the matter. All that can be said is that they did not retain the form of cl 4 which would have required these amounts unequivocally to have been paid by the lessee.

130 For the above reasons, I would uphold grounds 1 to 4 and allow the appeal.

131 Although it is unnecessary to decide, in my view there is no substance in ground 5. The judge referred in his reasons to conduct of the appellant in 2004, to which the respondent had pointed in its submissions.[63] The judge held that the significance of the conduct was not developed in argument, and held that it was 'consistent with but not decisive as to the position advocated' by the respondent.[64] In those circumstances, there is no basis for contending that the judge relied on the conduct as an aid to interpreting cl 4.

Conclusion

132 It follows that the appeal should be allowed and the orders made by the trial judge should be set aside. It is appropriate to make a declaration in their place, as sought in the appellant's counterclaim, to the effect that its construction of cl 4 is correct.

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63 Reasons [34].

64 Ibid.