

### Interpretation of ambiguous clauses

Catherine Hamilton-Jewell reports on *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12

A recent decision of the High Court has provided clarity in relation to the way in which courts should interpret ambiguous clauses in contracts.

It was not disputed that the clause the subject of the proceeding was ambiguous. In those circumstances, the High Court construed the term by reference to the commercial purpose sought to be achieved by the terms of the agreement – that is, the ambiguous clause was to be construed in a manner consistent with the commercial objective of the agreement.

#### Facts

On 19 November 1988, Westmelton (Vic) Pty Limited (Westmelton) and Mr Peter Morris entered into a memorandum of agreement for a lease, whereby Mr Morris was to lease from Westmelton 12.5 hectares of part of a larger parcel of land near Melton, in Victoria. Westmelton was the registered proprietor of the estate in fee simple of the larger parcel of land. The lease was a 99 year ‘farm’ lease.<sup>1</sup>

Relevantly, at the time that the lease was entered into:

- Subdivision for sale of the larger parcel of land was prohibited by local planning restrictions, such that a sale from Westmelton to Mr Morris of the leased area was not possible;
- Westmelton was in receivership; and
- The memorandum of agreement for the lease was prepared by adapting the terms of a standard form memorandum of agreement for a farm lease. Handwritten and typewritten deletions and insertions were made on the standard form document by solicitors acting for the parties.

Clause 4 of the memorandum of agreement (with deletions from the standard form agreement shown as struck through) read as follows:<sup>2</sup>

4. AND also will pay all rates taxes and 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).~~

Clause 13 of the memorandum of agreement, which was an addition to the standard form agreement, read as follows:<sup>3</sup>

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 acknowledged to have been paid in full.

In 1993, Ecosse Property Holdings Pty Limited (Ecosse) purchased the land from Westmelton, subject to the lease, thereby becoming the lessor under the lease. In 2004, Gee Dee Nominees Pty Limited (Gee Dee) took a transfer of the lease from Mr Morris, thereby assuming the rights and obligations of the lessee under the lease.

In 2013, Ecosse commenced a proceeding against Gee Dee in the Supreme Court of Victoria seeking a declaration that the lease, on its proper construction, provided that Gee Dee, as lessee, was liable to pay all rates, taxes, assessments and outgoings whatsoever in respect of the land, including land tax.

Gee Dee counterclaimed in the proceeding for a declaration that the lease, on its proper construction, provided that the lessee was not liable to pay rates, taxes, assessments and outgoings levied on the lessor in respect of the land.

The central issue for determination was the proper construction of cl 4 of the lease.

#### Proceedings below

The primary judge (Croft J) made the declaration sought by Ecosse, namely that the lease obliged the lessee to pay all rates, taxes, assessments and outgoings whatsoever in respect of the land.

Gee Dee appealed to the Victorian Court of Appeal. The Court of Appeal (Santamaria and McLeish JJA, Kryou JA dissenting) allowed the appeal and preferred the lessee’s construction of the lease. Santamaria and McLeish JJA considered that the striking-through of the words ‘Landlord or’ in the printed text of cl 4 indicated that the parties had considered and rejected the possibility that the lessee should pay rates, taxes, assessments or outgoings levied on or otherwise payable by the lessor in respect of the land.<sup>4</sup> In dissent, Kryou JA (agreeing with the primary judge) treated cl 13 as indicating that the parties intended the lease to place the lessee in a position as close as possible to the position of owner and occupier of the leased land such that the tenant was liable to pay all rates, taxes and assessments in respect of the land the subject of the lease.<sup>5</sup>

By a grant of special leave, Ecosse appealed to the High Court.

#### The decision of the High Court

It was not in issue in the proceeding or on the appeal that cl 4 of the lease was ambiguous and that the competing constructions offered by Ecosse and Gee Dee were both open on the language of the clause. Nor was it in dispute that the clause was to be determined by reference to what a reasonable person in the position of the original parties would have understood by that

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language. It was also accepted that, given the ambiguity of cl 4, the High Court could have regard to the words struck out in the standard form document and which remained legible on the face of the document, as an aid to construction of the term.

By majority (Kiefel, Bell and Gordon JJ, Gageler J agreeing, Nettle J dissenting), the High Court held that Ecosse's construction of the lease was to be preferred and overturned the decision of the Court of Appeal (essentially reinstating the decision of the primary judge). Their Honours held that, on its proper construction, the lease obliged the lessee to pay all rates, taxes and assessments during the term of the lease. In arriving at this conclusion, emphasis was placed on the commercial purpose of the lease which was informed, in the majority's view, by cl 13 of the lease. The majority found that it was the intention of the parties to place the lessee in as close a position as possible to the conditions which would have existed following a sale of the land.

Noting that the outcome of the appeal was not going to turn on any 'contested question of contractual or interpretive principle'<sup>6</sup>, the High Court confirmed the well-established principles of contractual interpretation which are to be deployed in construing a commercial contract. Namely:

- The terms of a commercial contract are to be understood objectively by what a reasonable business person would have understood the contract to mean, rather than by reference to the subjectively stated intention of the parties.<sup>7</sup>
- This requires the reasonable business person to be placed in the position of the parties.<sup>8</sup>
- It is from this perspective that the court considers the circumstances surrounding the contract, and the commercial purpose and object to be achieved by it.<sup>9</sup>
- It was permissible for the purposes of construing ambiguous language in an agreement, to have recourse to words and clauses deleted from a standard form agreement, but which remain legible on the face of the document.<sup>10</sup>

The majority, applying the joint judgment in *Electricity Generation Corporation v Woodside Energy Limited* (2014) 251 CLR 640, held that the High Court was entitled to approach the task of construction of the clause on the basis that 'the parties intended to produce a commercial result, one which makes commercial sense' and that this required the construction to be placed upon cl 4 to 'be consistent with the commercial object of the agreement'.<sup>11</sup>

Gageler J noted that in construing the 'clumsily tailored variation of an ill-fitting off-the-shelf precedent'<sup>12</sup>, the choice between the competing constructions came down to deciding what was 'more reasonable considered as a matter of 'commercial efficacy

or common sense'<sup>13</sup>. Although in dissent, Nettle J agreed that a 'commercial contract is to be construed objectively according to business common sense'.<sup>14</sup>

In considering the commercial objective of the parties, the majority were drawn to cl 13 which stated that the parties had intended to enter into a sale and purchase agreement. It not being possible to convey a freehold estate in the property the subject of the lease, a leasehold for 99 years for a fixed sum (which was to be the sale price) was conferred. The majority considered that the 99-year lease was as close an approximation to the desired outcome that could be arranged.<sup>15</sup>

The majority concluded from cl 13 that the intention of the parties was to place the lessee in the position it would have been in, had the land been sold. With that in mind, the majority were of the view that it made no sense for the lessor to remain liable for payments of rates, taxes and other outgoings over the term of the lease.<sup>16</sup> For this reason, the construction of cl 4 of the lease put forward by the lessor was to be preferred.

In dissent, Nettle J was not satisfied that cl 13 evidenced an intention to, as far as possible, replicate a possible conveyance of the land. Rather, in his Honour's view the natural and ordinary meaning of the clause was that, although it was the parties' intention to enter into a sale and purchase agreement in relation to the land, when that was not possible, the parties resolved to enter into a 99-year lease. Nettle J was not satisfied that the parties intended to effect a transaction equivalent to the sale and purchase.

Agreeing with the majority of the Court of Appeal, Nettle J was of the view that the phrase 'payable by the tenant' in cl 4 limited the kinds of rates and taxes to which the clause applied, namely those for which the lessee was liable *qua* tenant.<sup>17</sup>

Finally, Nettle J concluded:<sup>18</sup>

Poor drafting may justify a court in being more ready to depart from the natural and ordinary meaning of the terms of a contract, and no doubt, the poorer the drafting, the less willing a court should be to be 'driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention'. But poor drafting provides 'no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language they have used interpreted in the light of the relevant factual situation in which the contract was made'.

...

The court is not authorised under the guise of construction to make a new contract for the parties at odds with the contract to which they have agreed.

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### Endnotes

- 1 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, at [31].
- 2 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, at [35].
- 3 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, at [35].
- 4 *Gee Dee Nominees Pty Limited v Ecosse Property Holdings Pty Limited* [2016] V ConvR ¶54-879 at 65,289 [5], 65,308 [121]-[125].
- 5 *Gee Dee Nominees Pty Limited v Ecosse Property Holdings Pty Limited* [2016] V ConvR ¶54-879 at 65,293 [33], 65,294-65,295 [40]-[42].
- 6 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Gageler J at [45].
- 7 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Kiefel, Bell and Gordon JJ at [16], Gageler at [45], Nettle at [73].
- 8 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Kiefel, Bell and Gordon JJ at [16].
- 9 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Kiefel, Bell and Gordon JJ at [16].
- 10 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Nettle J at [73].
- 11 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Kiefel, Bell and Gordon JJ at [17].
- 12 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Gageler J at [51].
- 13 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Gageler J at [52].
- 14 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Nettle J at [77].
- 15 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Kiefel, Bell and Gordon JJ at [18].
- 16 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Kiefel, Bell and Gordon JJ at [26].
- 17 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Nettle J at [90].
- 18 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Nettle J at [98], footnotes and references omitted.