

Purposive construction

Ecosse Property Holdings v Gee Dee Nominees

[13.110] *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12; (2017) 261 CLR 544 – Appeal from the Supreme Court of Victoria.

[FACTS: Westmelton (Vic) Pty Ltd leased farmland to Morris for a term of 99 years. The land was part of a larger parcel which, under local planning laws, could not be subdivided. Because the land could not be sold to Morris, the parties instead entered into a 99-year lease. Rent for the entire term was paid on signing and was equivalent to the market value of the land. The lease was based on a printed standard form “farm lease” with deletions and typewritten additions. Ecosse later purchased the freehold from Westmelton (and became the lessor) and Gee Dee took an assignment of the lease from Morris (and became the lessee). A dispute arose as to whether cl 4 of the lease required the lessee to pay all “rates taxes assessments and outgoings” imposed in respect of the land or only those imposed on the lessee itself. Ecosse sought a declaration that the lessee was required to pay all such outgoings and was succeeded at first instance. The Court of Appeal by majority allowed an appeal. Ecosse appealed to the High Court. The main terms of the lease were as follows:

1. THE term of the tenancy hereby created shall be from the First day of November 1988
2. 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.

3. 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.
4. 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.
5. 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.
6. 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.
7. 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.
8. 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.

9. 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.
10. 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.
11. 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.]

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

[7] The appellant's argument focuses on cl 13, which is said to identify the genesis and aim of the transaction between the original lessor and lessee (*Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 350 per Mason J). Adopting what was said by Kyrou JA, who dissented in the Court of Appeal (*Gee Dee Nominees Pty Ltd v*

Ecosse Property Holdings Pty Ltd (2016) V ConvR (54-879), it is said that it was clearly the intention of the parties to recreate, as far as possible, in a lease, the conditions which would have obtained following a sale. On that approach, the position of the lessee under the lease would have more closely resembled that of a purchaser, upon whom liability for rates, taxes and other outgoings would fall.

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

[9] It was not disputed in the Court of Appeal that cl 4, as settled by the parties, is ambiguous (at [92]) and argument in this Court proceeded upon that acceptance. And it was not disputed that in the circumstances it is open to the court to take account of the words crossed out of the standard form as an aid to the proper construction of the clause (*Postle v Sengstock* [1994] 2 Qd R 290, 298 per McPherson JA; *Esso Australia Ltd v Australian Petroleum Agents' & Distributors' Association* [1999] 3 VR 642, 647-648 [19] per Hayne J; *A Goninan & Co Ltd v Direct Engineering Services Pty Ltd* [No 2] (2008) 15 ANZ Insurance Cases (61-779, 76,946 [38]-[40]; and see Lewison and Hughes, *The Interpretation of Contracts in Australia* (2012) at 65-66; *Timber Shipping Co SA v London & Overseas Freighters Ltd* [1972] AC 1, 15-16 per Lord Reid; *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd* [1975] 2 Lloyd's Rep 197, 209). The deletions do not evidence a prior intent, which could have changed, but rather they identify a matter which, on the face of the

document, was rejected by both parties (*Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 352-353 per Mason J).

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

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

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

[13] The last-mentioned submission directs attention to the concluding words of the clause, “in respect of the said premises”. The appellant observes that on the respondent’s construction, these words are redundant: if the lessee’s liability is confined to the payment of those imposts that are “payable by the tenant” they will necessarily be imposts “in respect of the said premises”. The appellant’s argument points to the retention of this phrase as a recognised means of conveying that the lessee’s liability to pay land tax assessed on the whole of the lessor’s landholdings is confined to the demised land (*Tooth & Co Ltd v Newcastle Developments Ltd* (1966) 116 CLR 167, 170-171; *Centrepoint Custodians Pty Ltd v Lidgerwood Investments Pty Ltd* [1990] VR 411; *112 Acland Street Pty Ltd v Australia and New Zealand Banking Group Ltd* (2002) 4 VR 372, 376 [13] per Ormiston and Phillips JJA; *Halsbury’s Laws of England*, 5th ed, vol 62, par 424). On the appellant’s construction, the words “payable by the tenant in respect of the said premises” reiterate the lessee’s obligation, tying it to the leased premises. It is a construction which the appellant submits rendered the reference to the landlord and the mechanism for apportionment in parentheses in the standard form unnecessary and confusing.

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

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

[15] As each of the judges below rightly acknowledged, each of the constructions proposed by the parties is plausible. The determination of the proper construction is not advanced by observing that on the appellant’s case the phrase “payable by the tenant” is redundant or that on the respondent’s case the phrase “in respect of the said premises” is redundant. The amendments to the standard form of lease were poorly crafted. The only

explanation for the deletion of the lessee's covenant to the lessor (in relation to all succeeding covenants) in cl 2 and for the retention of cl 3, which in light of the deletion of cl 2 is redundant, is inadvertence. In the circumstances it hardly assists the determination of the proper construction of cl 4 to observe that the effect for which the appellant contends might have been achieved economically by simply deleting the words "excepting land tax".

[16] It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract (*Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656 [35] and the cases at fn 58). In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it (*Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656-657 [35] and the cases at fn 60).

[17] Clause 4 is to be construed by reference to the commercial purpose sought to be achieved by the terms of the lease. It follows, as was pointed out in the joint judgment in *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656-657 [35], that the court is entitled to approach the task of construction of the clause on the basis that the parties intended to produce a commercial result, one which makes commercial sense. It goes without saying that this requires that the construction placed upon cl 4 be consistent with the commercial object of the agreement.

[18] Consideration of that object invites attention to cl 13. Clause 13 identifies the term of the lease and the amount of the total rental for that term and contains an acknowledgement that it has been paid in full. These statements form part of the operative terms of the lease. What is said at the commencement of cl 13 stands in a different position. It

is an explanation of why the parties entered into a lease rather than a sale and purchase, which had been intended. Although expressed in the past tense it may be understood to convey that the circumstances leading to the lease remained unchanged at the time of its execution. Clause 13 explains that in circumstances in which the parties were unable to convey a freehold estate in the land, they had chosen instead to convey a leasehold estate for almost a century for a fixed sum. It is readily to be inferred that this was as close an approximation to their desired outcome as they thought they could arrange.

[19] Even without cl 13, the surrounding facts and circumstances which a reasonable businessperson in the position of the parties may be taken to have known would have pointed to that conclusion. Clause 13 itself does not explain how the parties' desire for a sale and purchase was thwarted, but it is a fact that it was the impossibility of subdivision of the land the subject of the lease. The length of the term, prepayment of a sum equivalent to the market value of the land, and the removal of the covenants restricting the lessee's user of and capacity to deal with the land (Clause 5, the lessee's covenant to keep the premises in good repair; cl 11, to use the land as a farm in a proper and husband like manner; and cl 13 in its original form, to cultivate the land; see also the addition of cl 16, the lessee's right to repair, rebuild or replace any dwellings or other improvements whether for personal, commercial purposes or otherwise; and cl 15, the lessee's right to assign, transfer, sub-let or grant licences without the consent of the lessor) and the lessor's rights of inspection (Clause 8) and termination for breach and re-entry (Clause 10, deletion of the words "or sooner determination"; see also the addition of cl 14), support the conclusion that the parties' intention was, as Kyrou JA stated it (at [29], [66]), to recreate, as far as possible, in a lease, the conditions which would have existed following a sale. The addition of the words "whatever purpose is allowable by law" to the chapeau also supports that conclusion. Clause 13 puts that conclusion beyond doubt.

...

[25] Notwithstanding that the consideration was the market value of the land, the lease does not provide an option to renew or to purchase for a nominal sum at the end of the term. The significance of this omission is suggested to favour the conclusion that the parties bargained for the lessor to bear the expense of any imposts levied on it as owner taking into account the value to the lessor of the reversion. An alternative view is the omission was inadvertent; neither the parties nor their advisers turning their minds to how matters might stand in 2087. Kyrou JA was drawn to that explanation (at [71]). So are we. A surrounding circumstance of which the reasonable businessperson would be aware is that the lessor company was in receivership. It must be accounted highly unlikely that a receiver would agree to burden the lessor company with uncertain financial obligations over the term of a ninety-nine year lease.

[26] The Court of Appeal majority's conclusion failed to give effect to the clear statement of the parties' objective in entering the agreement. It makes no commercial sense, having regard to that objective, for the lessor to remain liable for the payment of rates, taxes and other outgoings over the term of the lease. That is especially so where the lessor has taken as consideration for the lease the land value, with no provision for future adjustments. The lessor would have been exposed to uncertainties including the effect that any change of (lawful) land use by the lessee might have had on the amount of any rates, taxes and other outgoings.

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

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

[52] The competing constructions of cl 4 being open on its language, and the textual indications in favour of each being at best equivocal and at worst conjectural, the choice between them comes down to deciding which is more reasonable considered as a matter of “commercial efficacy or common sense” (*Gollin & Co Ltd v Karenlee Nominees Pty Ltd* (1983) 153 CLR 455, 464).

[Gageler J referred to various factors (including the length of the lease, the lack of any restriction on the lessee as to the use of the land or its ability to transfer or sublet, the fact that the lease resulted from an intended sale to Mr Morris and that its purpose was to replicate a sale, that if the land had been sold the lessor would obviously have had no responsibility for outgoing, that Westmelton had been under the control of a receiver at the time of the sale and would therefore have been unlikely to accept ongoing financial burdens) and concluded as follows.]

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

[In a dissenting judgment, NETTLE J agreed with the majority judges in the Court of Appeal below that cl 13 evidenced a past rather than a present intention to sell and purchase the land and did not evidence an intention to replicate a sale and purchase. Moreover, other

clauses (cll 6, 7, 10 and 12) were consistent with a landlord and tenant relationship. As a matter of language, the natural and ordinary effect of the deletion of the words “excepting land tax” in cl 4 was to “reverse the exclusion” and subject the lessee to such land tax as was levied on the lessee, and the natural and ordinary effect of deleting the words “Landlord or” was to limit the lessee’s liability to those rates and taxes for which the tenant becomes liable during the term. His honour concluded as follows.]

[98] Poor drafting may justify a court in being more ready to depart from the natural and ordinary meaning of the terms of a contract (*Arnold v Britton* [2015] AC 1619, 1628 [18] per Lord Neuberger of Abbotsbury PSC, with whom Lord Sumption and Lord Hughes JJSC agreed, Lord Hodge JSC agreeing at 1637 [66]), 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” (*Mitsui Construction Co Ltd v Attorney General of Hong Kong* (1986) 33 BLR 1 at 14, cited with approval in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299, 306 [13] per Mance LJ). 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” (*Mitsui Construction* (1986) 33 BLR 1, 14. See also *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, 2910 [26] per Lord Clarke of Stone-cum-Ebony JSC, with whom Lord Phillips of Worth Matravers PSC, Lord Mance, Lord Kerr of Tonaghmore and Lord Wilson JJSC agreed; [2012] 1 All ER 1137, 1147-1148). Where there is ambiguity which permits of two alternative and semantically not improbable interpretations, construction in accordance with what it may be supposed would be the approach of honest and reasonable businesspersons may assist in choosing one such alternative over the other. But where, as here, the language and surrounding circumstances of a commercial contract present a choice

between, on the one hand, a plain, ordinary and commercially not irrational meaning of a clause and, on the other, a meaning which is significantly removed from the natural and ordinary meaning of the terms of the clause, which ill-accords with other provisions of the agreement, and which in the end produces an outcome that is more commercially acceptable from one of the parties' point of view only, the precept runs out of application. Unless the Anglo-Australian objective theory of contract is now to be cast aside, the commercial approach to construction (*Cohen & Co v Ockerby & Co Ltd* (1917) 24 CLR 288, 300 per Isaacs J; *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429, 437 per Barwick CJ. Cf *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 770-771 per Lord Steyn; *Society of Lloyd's v Robinson* [1999] 1 WLR 756, 763 per Lord Steyn (the other Law Lords agreeing at 758, 767-768) is not a licence to alter the meaning of a term that is "clear and fairly susceptible of one meaning only" to achieve a result that the court may think to be reasonable (*Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 851 per Lord Diplock. See also *Arnold v Britton* [2015] AC 1619, 1628 [18] per Lord Neuberger PSC, with whom Lord Sumption and Lord Hughes JJSC agreed, Lord Hodge JSC agreeing at 1637 [66]). 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 (*Johnson v American Home Assurance Co* (1998) 192 CLR 266, 272 [19] per Kirby J; *Charter Reinsurance* [1997] AC 313, 388 per Lord Mustill, Lords Goff, Griffiths and Browne-Wilkinson agreeing at 381). Where, as here, all things considered, the words of a clause are fairly susceptible of only one meaning, they must be given that effect.

Appeal allowed.