IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B60 of 2015

BETWEEN

Moreton Bay Regional Council
Appellant

and

ANNOTATED

Mekpine Pty Ltd
Respondent

APPELLANT'S REPLY

1. These submissions are in a form suitable for publication on the internet.

The Amalgamation

2. **Re: Paragraphs 5 to 8 of the Respondent's Submissions ("RS").** The appellant acknowledges that, relevantly, the Mekpine Lease defined the "Common Areas" by reference to the "Land", but notes that the "Land" was expressly identified under the Mekpine Lease as "Lot 6".

3. The appellant accepts that the Mekpine Lease anticipated that there could be dealings with, or alterations to, the "Common Areas", but there is nothing in the Mekpine Lease that evidences any intent on the part of the parties to the lease that the "Land" within which those "Common Areas" were to be found would be altered under the lease. The Mekpine Lease itself makes no reference to amalgamation of land and cl. 16.4, while permitting subdivision of the Land, requires that such subdivision shall occur "*without interference with the Lessee's other rights under* [the Mekpine Lease]"[1].

4. Further, cl. 15(b) of the Mekpine Lease (following cl. 15(a) quoted by the respondent) provides that Mekpine Lease "*does not give the Lessee by implication or otherwise any rights to the Common Areas or what is done or not done within them other than as specifically provided in* [the Mekpine Lease]"[2].

5. Nothing about Mekpine's contractual rights to use the Common Areas under the Mekpine Lease, or the Landlord's entitlement to limit or vary those rights, suggests that the parties to the lease intended that the spatial extent of the Land under the Mekpine Lease (from which the Common Areas were to be derived) could be extended by amalgamation of the identified "Land" with other land (or by any other means), without some agreement of the parties to effect such an amendment to the Mekpine Lease. There was no such agreement between the parties and the amalgamation itself (including the registration of the survey plan for New Amalgamated Lot 1) did not effect such an amendment.

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1 AB 130. In this regard, the reference to amalgamation in cl. 25(k) of the Mekpine Lease (cited by Morrison JA at CA [134] and [137] at AB 474) is only a reference to consequential matters arising from "*any right under this Lease ...to relocate the Lessee or subdivide, or amalgamate or otherwise deal with the Premises or the Land*" (emphasis added) and no right to amalgamate is conferred by the Mekpine Lease (see AB 135).

2 AB 131.

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Filed on behalf of: The Appellant
Prepared by: Moreton Bay Regional Council
220 Gympie Road
STRATHPINE QLD 4500
Tel: (07) 3840 6661
Ref: Richard Duhig

6. **Re: RS 9 to 14, 25(a), 26, 27(b), 28, 32, 34 and 35.** The appellant accepts that the issue between the parties in this proceeding (in all courts) is whether, at the date of the resumption, Mekpine had an interest in the Resumed Land for the purposes of s. 12(5) of the ALA. That was the issue raised for determination in the Land Court[3].

7. The only basis alleged for the existence of such an interest was the Mekpine Lease, with Mekpine contending that, as a result of the Amalgamation, the description of the "Land" in the Mekpine Lease became a reference to New Amalgamated Lot 1, rather than Lot 6.

8. It is correct to observe that all courts below noted that the Mekpine Lease expressly identified the "Land" for that lease as Lot 6. However, that observation does not result in a characterisation of the decisions of those courts as decisions involving only the construction of the Mekpine Lease. The Land Court expressly rejected the contention that the lodgement of the survey plan for New Amalgamated Lot 1 "*in effect amended the* [Mekpine Lease]"[4]. This was a rejection of Mekpine's argument before that court.

9. In the Land Appeal Court Mekpine raised s.182 of the LGA as further support for its contention that "*by virtue of, or in consequence of, the registration of the survey plan, the "Land" described in Item 2 of the lease instrument became a reference to* [New Amalgamated Lot 1]"[5]. Mekpine's argument as to the effect of the Amalgamation upon the Mekpine Lease (by virtue of s.182 or otherwise) was rejected by the Land Appeal Court[6].

10. In the Court of Appeal all members of the court considered Mekpine's contention that the Amalgamation, and the registration of the survey plan for New Amalgamated Lot 1, had an effect upon the operation of the Mekpine Lease by altering the "Land" expressly identified in the instrument of lease[7].

11. References by the majority of the Court of Appeal to the intention of the parties to the Mekpine Lease[8] do not transform the decision of the majority into a decision only about the construction of the Mekpine Lease.

12. The respondent submits that the decision of the Court of Appeal involved only the construction of the Mekpine Lease "*in the circumstances following the* [Amalgamation][9]" or "*in light of the* [Amalgamation]"[10]. The respondent contends that the significance of the Amalgamation for the decision of the majority of the Court of Appeal is only that "*it created a different factual context in which the terms of the lease had to be construed*"[11].

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3 See paragraph 6 of the Facts and Circumstances and paragraph 1 of the Orders or Other Relief in the General Application at AB 30.
4 See LA [26] at AB 368.
5 See LAC [50] at AB 398.
6 See LAC [53], [56] and [57] at AB 399-400.
7 See Margaret McMurdo P at CA [18], [21] and [22] (at AB 451-452), Holmes JA at CA [53] and [54] (at AB 460-461) and Morrison JA at CA [131] (at AB 473).
8 See Margaret McMurdo P at CA [19] (at AB 451) and Morrison JA at CA [140] (at AB 474).
9 See RS at paragraphs 21 and 22.
10 See RS at paragraph 23.
11 See RS at paragraph 28.

13. However, the decision of the majority, at its heart, involved acceptance of the contention that a description of "land" in a lease by reference to a lot number (as here, with the reference to Lot 6 in the Mekpine Lease) means that that "land" will be altered by an amalgamation of the original lot with other land (with the new "land" being the new lot created by registration of the survey plan for the amalgamated parcel). The majority erred in holding that the Amalgamation had that effect. Holmes JA was correct in holding that the Amalgamation, and the registration of the survey plan for New Amalgamated Lot 1, did nothing to alter, vest or create the Mekpine Lease[12].

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14. **Re: RS 17 to 20, 25(b), 31, 32 and 33.** The precise characterisation of Mekpine's interest in "Common Areas" is not in issue in this case[13]. The matter has proceeded on the basis that Mekpine will have the relevant interest in the Resumed Land if, at the date of resumption, the "Common Areas" for the Mekpine Lease included the Resumed Land.

15. Assuming that Mekpine's rights to use the "Common Areas" were "contractual rights", the area over which such rights could be exercised depends on the geographical ambit of the lease.[14]

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16. **Summary regarding the Amalgamation.** The respondent's submissions regarding the Amalgamation:
    (a) raise the irrelevant consideration of the precise characterisation of Mekpine's interest in the "Common Areas";
    (b) incorrectly characterise the decision of the majority of the Court of Appeal as one involving only construction of the Mekpine Lease, when the majority clearly determined that the Amalgamation had an effect upon the Mekpine Lease so as to alter the meaning of the "Land" expressly identified in the lease instrument itself; and
30 (c) leave entirely unexplained how the Amalgamation, or the registration of the survey plan for New Amalgamated Lot 1, had the effect of altering the "Land" identified in the Mekpine Lease (a registered instrument).

The RSLA

17. **Re: RS 42.** With regard to the respondent's submissions in RS 42 regarding the proper construction of the RSLA:
    (a) The matters referred to in RS 42(a) and (d) *may* be correct as indicating that the Act was, to put it shortly, to benefit those with inferior bargaining power[15]. It

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[12] See CA [53] and [54] at AB 460-461.

[13] This case does not involve consideration of the sorts of issues concerning the nature of the relevant interest that were raised in *Sorrento Medical Services Pty Ltd v Chief Executive, Department of Main Roads* (2007) 2 Qd R 373 ([2007] HCA Trans 374, 31 August 2007).

[14] The reference in RS 31 to the difference between "*premises leased*" and the "Common Areas" and the observation of Holmes JA to the identification of "*premises leased*" by reference to the sketch plan" misunderstands the significance of Her Honour's observation. As complete reading of the passage in the reasons of Holmes JA makes clear, Holmes JA was merely noting that the spatial extent of the property (the "Land", the "Building" and the "Premises") under the Mekpine Lease remained the same after the registration of the survey plan with the Mekpine Lease as encumbrance on the title to New Amalgamated Lot 1.

[15] It is unlikely that major tenants such as Coles or David Jones would be regarded as having "inferior bargaining power".

does not explain, however, why the majority's conclusion should be arrived at. The existence of such a legislative intent says nothing about the operation of definitions beyond the Act itself. The "intended wide application" of the RSLA is achieved by the imposition of the suggested mandatory protections and minimum standards.

(b) In relation to RS 42(b), the dictionary in s. 6 *does* define "common areas" for the purposes of the Act. It takes one to s. 6. The respondent's argument gives no operation to the word "definitions" in the heading "Extended *definitions*" and no operation to the heading "Meaning of *common areas* in s. 6[16].

10 (c) The points made in RS 42(c), and in particular in fn (52) suggest that s. 6 is no more than a definition for the purposes of the Act. It is used as part of the definition of "retail shopping centre", and it is *that* definition which, when used in other parts of the RSLA, has operative effect.

(d) In relation to RS 42(e), it may be that some of the provisions of Part 6 of the RSLA do impose duties on and give entitlements to lessors and lessees. But it is *those provisions* which do so, not the definition sections.

(e) In relation to RS 42(f) and (g), there is no provision of the lease which purported to exclude a relevant provision of the RSLA. The assumption referred to in RS 42(g), last sentence, represents the orthodox view.

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18. **Re: RS 41, 42(g) and 43**. The submissions in RS 41 assume an inconsistency for the purposes of s.20 arising from the difference between the definitions of "Common Areas" in the Mekpine Lease and in s.6. However, no inconsistency is identified. Nor is it shown how the provisions of the Mekpine Lease, relying on the definition in the lease of "Common Areas" cannot operate alongside the provisions of the RSLA, relying upon a different definition of "Common Areas".

19. The existence of two different definitions, one for the Mekpine Lease, and one for the RSLA, does not, of itself, create any inconsistency within the meaning of s.20 of the
30 RSLA.

20. Further, the RS do not explain why, in the event of any such inconsistency, s.20 of the RSLA operates to entirely replace the definition of "Common Areas" in the Mekpine Lease with the definition of "Common Areas" in s.6 of the RSLA. Section 20 provides that, in that event, the provision of the RSLA prevails "*to the extent of the inconsistency*".

21. The submissions of the respondent in RS 42(g) and 43 of the RS, relying upon conclusions reached by the majority of the Court of Appeal:

40 (a) really do no more than recognise (as the majority did) that there is a difference between the two definitions of "Common Areas"[17]; and

(b) wrongly assume that the RSLA definition of "Common Areas" itself has substantive operation;

(c) wrongly assume that RSLA itself confers rights to use "Common Areas" when, in fact, such rights only arise from the terms of the Mekpine Lease (relying upon the definition of "Common Areas" in that lease) and, in the absence of some right in the RSLA to use the "Common Areas", there can be no inconsistency between the RSLA and the Mekpine Lease.

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[16] Both can be taken into account in interpreting the Act: *Acts Interpretation Act 1954*, ss. 14(1) and (14(2)(a).

[17] See Margaret McMurdo P at CA [34] (at AB 456) and Morrison JA at CA [147] (at AB 476).

22. As to the observation in RS 43 that Morrison JA identified inconsistency between the RSLA and the Mekpine Lease, by undertaking a comparison of potential rights in respect of "Common Areas" using the different definition of those areas, it is submitted that Morrison JA erred in undertaking that exercise. That comparison by Morrison JA[18] involved four steps:
    (a) first, an examination of rights and obligations under the Mekpine Lease *using the definition of "Common Areas" in the Mekpine Lease*;
    (b) secondly, an examination of rights and obligations under the Mekpine Lease *using the definition of "Common Areas" in the RSLA*;
    (c) thirdly, a comparison of those rights and obligations to identify any differences between them; and
    (d) fourthly, a conclusion that identified differences constitute inconsistency, which means that the definition of "Common Areas" in the RSLA prevails over the definition of "Common Areas" in the Mekpine Lease.

23. However, that process is circular and illogical, as it assumes that the definition in the RSLA has substantive effect in order to give rise to an "inconsistency", which, by virtue of s.20 of the RSLA, gives the RSLA definition substantive effect in the Mekpine Lease.

24. No inconsistency arises if the definition of "Common Areas" in the Mekpine Lease is used to interpret the extent of rights and obligations under the Mekpine Lease, while the definition of "Common Areas" in the RSLA is used simply as a definition provision for the purposes of the RSLA. The two definitions can operate for the purposes of the provisions of the instruments in which they are found.

25. Finally, it is noted that s.19 and/or s.20 of the RSLA do not operate to amend the Mekpine Lease by substituting the definition of "Common Areas" in s.6 of the RSLA for the existing definition of "Common Areas" in the lease itself. They only operate to strike down any part of the lease that purports to exclude, or is inconsistent with, a provision of the RSLA.

26. While s.18 would operate to amend the Mekpine Lease, that amendment is only an amendment to include a duty or entitlement conferred by the RSLA, not a re-writing of the Mekpine Lease to insert new definitions that may alter other duties or entitlements agreed between the parties under the Mekpine Lease.

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Andrew N. S. Skoien

D. F. Jackson QC
Per: Andrew N. S. Skoien
T: (02) 9151 2009
F: (02) 9223 1850
jacksonqc@newchambers.com.au

Andrew N. S. Skoien

A. N. S. Skoien

T: (07) 3220 0650
F: (07) 3012 7811
skoien@chambers33.com.au

[18] See CA [148] to [151] and [156] (at AB 476-478).