ECOSSE PROPERTY HOLDINGS PTY LTD v GEE DEE NOMINEES PTY LTD (M143/2016)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2016] VSCA 23

Date of judgment: 4 March 2016

Date special leave granted: 7 October 2016

This appeal concerns the construction of a lease, dated 19 November 1988, which was made between Westmelton (Vic) Pty Ltd, as landlord, and Peter Morris, as tenant, whereby the subject land was leased for a term of 99 years commencing on 1 November 1988 ("the Lease"). The respondent ("Gee Dee Nominees") is currently the tenant under the Lease. The leasehold reversion was, in about 1993, sold by Westmelton to the appellant ("Ecosse"), which is now entitled to the reversion immediately expectant on expiry of the Lease.

The contracting parties expressed an intention, in clause 13 of the lease, that the lessor wished to sell and the lessee wished to purchase the leased land for a consideration of $70,000 but they were precluded from doing so because of planning restrictions. The contracting parties therefore sought to achieve as nearly as they practicably could, what they could not achieve directly by a sale transaction by making amendments to a standard form instrument of lease. Clause 4 of the Lease was revised as follows:

> 4. [The Lessee] 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~~).

A dispute arose between Ecosse and Gee Dee Nominees with respect to the payment of rates, taxes, assessments and outgoings, and Ecosse issued proceedings in the Supreme Court of Victoria. Croft J 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. As such, cl 4 should not be construed as imposing an obligation on the landlord 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.

Gee Dee Nominees' appeal to the Court of Appeal (Santamaria and McLeish JJA, Kyrou JA dissenting) was successful. The Court agreed that cl 4 was ambiguous and two interpretations were open. The first, advanced by Gee Dee Nominees, was that it required the lessee to pay all rates, taxes, assessments and outgoings payable by the tenant in respect of the premises. The second construction, advanced by Ecosse, treated the words '*by the tenant*' as words of emphasis which served to reinforce the meaning of the clause. That meaning was that all rates, taxes, assessments and outgoings should be paid by the tenant.

The majority considered that if cl 4 was read alone, the former meaning was the more natural reading. Ecosse's construction attributed a clumsy operation to the words which, in both constructions, were critical: '*by the tenant*'. The striking out of the words '*Landlord or'* in cl 4 clearly operated 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 was cut down by this change. It was difficult to see any other basis for omitting the words. Ecosse 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. If it was intended to make it clear that the tenant, and not the landlord, was to be liable, the more likely scenario was 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. The omission of the words '*Landlord or*' was therefore a strong indication that the parties considered, and rejected, the possibility that the lessee should pay rates, taxes, assessments and outgoings payable by the landlord.

Kyrou JA (dissenting) found that when the Lease was read as a whole and regard was had to its purpose as disclosed in cl 13, and the surrounding circumstances that were known to the original contracting parties at the time the Lease was executed, Ecosse's preferred construction of cl 4 was much more persuasive than that of Gee Dee Nominees.
The grounds of appeal include:

- The Court of Appeal erred in law in holding that the lease of land dated 19 November 1988 on its proper construction provides that the lessee is not liable to pay to the lessor rates, taxes, assessments and outgoings which during the term of the lease are levied on or otherwise payable by the lessor in respect of the leased land.