



## HIGH COURT OF AUSTRALIA

29 March 2017

### ECOSSE PROPERTY HOLDINGS PTY LTD v GEE DEE NOMINEES PTY LTD

[2017] HCA 12

Today the High Court, by majority, allowed an appeal from a decision of the Court of Appeal of the Supreme Court of Victoria. The High Court held that a clause in an unusual lease obliged the lessee to pay all rates, taxes, assessments and outgoings in respect of the leased land, and not merely those imposts levied on the lessee in its capacity as tenant.

The original lessor and lessee recorded their agreement in a standard form printed farm lease to which they made amendments. Due to planning restrictions affecting subdivision, the owner of the land the subject of the lease could not sell it to the lessee. Clause 13 provided that:

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.

As amended, cl 4 imposed an obligation on the lessee in these terms:

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)~~.

In 2013, the lessor commenced proceedings in the Supreme Court of Victoria seeking a declaration that the lease requires the lessee to pay all rates, taxes, assessments and outgoings in respect of the land. The primary judge made the declaration sought. The Court of Appeal, by majority, allowed an appeal by the lessee and set aside the orders of the primary judge.

By grant of special leave, the lessor appealed to the High Court. The lessor argued that cl 4 obliged the lessee to pay all rates, taxes, assessments and outgoings in respect of the land. The lessee argued that cl 4 obliged it to pay only those imposts that are levied on the lessee in its capacity as tenant, leaving the lessor to pay those imposts that may be levied on it as owner of the land. It was not in issue on the appeal that cl 4 is ambiguous and that, in the circumstances, the Court could have regard to words struck out in the standard form document, and which remained legible on the face of the document, as an aid to construction.

Allowing the appeal, the majority in the High Court held that the lessor's construction of cl 4 is to be preferred. The Court approached the question of the proper construction of cl 4 on the basis that the parties were to be understood as having intended to produce a result consistent with the commercial object of the agreement. The majority said that the parties' intended to recreate, as far as possible, in a lease, the conditions which would have existed following a sale. The majority held that it made 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. The orders of the Court of Appeal were set aside, with the effect that the declaration of the primary judge was reinstated.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*