IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B60 of 2015

BETWEEN

Moreton Bay Regional Council
Appellant

and

Mekpine Pty Ltd
Respondent

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APPELLANT'S SUBMISSIONS

Part I. Certification re Internet Publication

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

Part II. Issues

20 2. Whether under the *Land Title Act 1994* (Qld) ("**LTA**"), in the absence of any specific statutory provision to such effect, the registration of a plan of survey to create a new lot by the amalgamation of two existing lots, and/or the registration of existing interests in the two existing lots on the title of the new amalgamated lot, has the effect of varying a lease over just one of the existing allotments to include a leasehold interest over all of the new amalgamated lot?

3. Whether provisions of the *Retail Shop Leases Act 1994* (Qld) ("**RSLA**"), which include a definition in s.6 of "common areas" of a retail shopping centre, operate to:

30 (a) vary a retail shop lease to include areas defined by the RSLA as "common areas"; or

(b) otherwise create an interest in the "common areas" defined by the RSLA.

Part III. Judiciary Act 1903, s 78B

4. The appellant considers that notice is not required pursuant to s.78B of the *Judiciary Act 1903 (Cth)*.

40 **Part IV. Report of reasons for judgment**

5. The decision of the Court of Appeal ("**CA**") is reported at (2014) 206 LGERA 120. Its internet citation is [2014] QCA 317.

6. The decision of the Land Appeal Court ("**LAC**") is unreported and its internet citation is [2014] QLAC 5.

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7. The decision of the Land Court ("**LC**") is unreported and its internet citation is [2012] QLC 0046.

Part V. Relevant Facts

(a) Background

8. In March 1999 the respondent entered into a retail shop lease (the "**Mekpine Lease**") within the meaning of the RSLA in respect of Lot 6 on RP 809722 ("**Lot 6**"). At that time Lot 6 was the site of a retail shopping centre (the "**Retail Shopping Centre**") within the meaning of the RSLA.[1]

9. Under the Mekpine Lease:

   (a) the land the subject of the Mekpine Lease was identified as Lot 6;

   (b) Mekpine Pty Ltd had a right to occupy and use part of a building constructed on Lot 6; and

   (c) "common areas" for the Mekpine Lease were identified as being those parts of the building or Lot 6 not leased or licensed by the lessor.[2]

10. In about 2007 the Retail Shopping Centre expanded to include retail development on adjoining land identified as Lot 1 on RP 847798 ("**Old Lot 1**"). Lot 6 and Old Lot 1 were at that time amalgamated, by registration of a plan of survey and existing interests under the LTA , to create Lot 1 on SP 184746 ("**New Amalgamated Lot 1**").[3]

11. In November 2008 the applicant resumed part of New Amalgamated Lot 1 under the provisions of the *Acquisition of Land Act 1967* (**ALA**). The land that was resumed (the "**Resumed Land**") had previously formed part of Old Lot 1, and had never been part of Lot 6.[4]

12. The arrangements of the relevant parcels of land, and the events described above, are described by the Land Court at LC[5] and LC[6]. They can be seen diagrammatically by reference to the plan attached to the Mekpine Lease (showing Lot 6 and Old Lot 1), the plan of New Amalgamated Lot 1, the plan of resumption, and the aerial photographs.[5]

13. Mekpine Pty Ltd brought a claim for compensation under the ALA on the basis that, at the date of resumption, Mekpine Pty Ltd had an interest in the Resumed Land for the purposes of s. 12(5) of the ALA.[6]

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1 See CA[2].

2 See CA[2] and CA[3].

3 See CA[5].

4 See CA[6].

5 See Exhibits 1 and 3 in the Land Court.

6 See CA[7] and LC[10] and LC[11].

(b) Decisions of the courts below

14. On 10 September 2014 the Land Court of Queensland (Mr WA Isdale) held that, at the date of resumption, Mekpine Pty Ltd had an interest in the Resumed Land for the purposes of s. 12(5) of the ALA. That decision involved determination of two questions:

(a) Whether the amalgamation of Lot 6 with Old Lot 1 varied the Mekpine Lease to extend an interest over all of New Amalgamated Lot 1, including parts of New Amalgamated Lot 1 beyond the land previously within Lot 6. The Land Court answered this question in the negative (i.e. favourably to the present appellant).[7]

(b) Whether the provisions of the RSLA varied the Mekpine Lease, or otherwise operated, to include an interest in parts of New Amalgamated Lot 1 identified by the RSLA as "common areas" for the Retail Shopping Centre. The Land Court answered this question in the affirmative (i.e. favourably to the present respondent).[8]

15. The appellant appealed to the Land Appeal Court of Queensland. That Court (Peter Lyons J, Mrs CAC MacDonald and Mr PA Smith) allowed the appeal, answering both questions in the negative. In determining the appeal in this way, the Land Appeal Court held that:

(a) after the amalgamation (to create New Amalgamated Lot 1) the extent of the respondent's interest under the Mekpine Lease continued to be determined in accordance with the lease and was limited to land formerly contained within Lot 6 (notwithstanding that that lease had come to be registered on the title to New Amalgamated Lot 1)[9]; and

(b) the definition of "common areas" in the RSLA was a definition for the purposes of the RSLA and had no substantive effect and the RSLA did not amend the Mekpine Lease and did not otherwise create an interest in the land identified as "common areas" of the Retail Shopping Centre outside former Lot 6[10].

16. Mekpine Pty Ltd appealed to the Court of Appeal of Queensland (Margaret McMurdo P, Holmes and Morrison JJA). By majority (Margaret McMurdo P and Morrison JA, Holmes JA dissenting), the Court of Appeal allowed the appeal, holding that:

(a) registration of the plan of survey to create New Amalgamated Lot 1 and/or the registration of existing interests in Lot 6 on the title of the New Amalgamated Lot 1 varied the Mekpine Lease to include all of New Amalgamated Lot 1[11], and, in any event;

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7 See LC[23] to LC[26].

8 See LC[27] to LC[35].

9 See LAC [52] to LAC[57].

10 See LAC[62] to LAC[68].

11 See CA[17] to CA[22] (per Margaret McMurdo P) and CA[124] to CA[125] (per Morrison JA).

(b) provisions of the RSLA operated to:

(i) vary the respondent's lease to include areas defined by the RSLA as "common areas"; or

(ii) otherwise create an interest in the "common areas" defined by the RSLA.[12]

17. Holmes JA found that neither the amalgamation[13] nor the provisions of the RSLA[14] created any interest in land, within the meaning of s. 12(5) of the ALA, beyond the existing interests in land within the former boundaries of Lot 6.

PART VI. Argument

(a) The Amalgamation

18. The majority of the Court of Appeal erred in concluding that, as a result of the amalgamation, the respondent's leasehold interest under the Mekpine Lease was extended:

(a) to include all of New Amalgamated Lot 1; and

(b) relevantly, to include the Resumed Land that had previously formed part of Old Lot 1, but had never been part of Lot 6.[15]

19. In reaching this conclusion, Margaret McMurdo P and Morrison JA:

(a) failed to give effect to the difference between the registration of an interest on the title of land and the nature and identification of the *extent* of that interest, to be determined by reference to the lease document so registered on the title;[16]

(b) failed to identify the Mekpine Lease as a relevant instrument for the purposes of s. 182 of the LTA[17];

(c) wrongly concluded that a description of land in a lease document by reference to a lot number will mean that that description will automatically vary each time that a lot number changes (for instance, by amalgamation)[18]; and

(d) with regard to the reasoning of Morrison JA, confused the issues of consent to the registration of a survey plan (even if such consent was identifiable) and consent to amendment of a lease[19].

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[12] See CA[36] to CA[40] (per Margaret McMurdo P) and CA[156] to CA[162] (per Morrison JA).

[13] See CA[53] to CA[55].

[14] See CA[56] to CA[59].

[15] See particularly Margaret McMurdo P at CA[21] and CA[40] (first sentence) and Morrison JA at CA[131] and CA[140].

[16] See particularly CA[17] to CA[22] and CA[132] to CA[140].

[17] See particularly CA[18] and CA[101].

[18] See particularly CA[21] and CA[131].

20. The LTA is the Queensland version of the Torrens title system, modernised of course.

21. It provides for the freehold land register in s. 22. In the register are to be recorded the particulars set out in s. 28. They include particulars of every interest registered in the register (s. 28(1)(a)) and particulars of all instruments registered and where they were lodged and registered (s. 28(1)(e)).

22. The title vested on registration is indefeasible: ss. 37 and 38.

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23. The LTA also recognises that leases may be registered over part of a lot and that the part of the lot so leased may be identified by a drawing. See s. 65(1) (opening words), s. 65(1)(b), s. 65(2)(a) and s. 65(3).

24. Part 9 of the LTA, commencing with s.173, deals in Division 1 with "Registration of Instruments" and in Division 2 with "Consequences of The Registration".

25. In relation to Division 1 it may be noted that s. 175 had the effect that the Mekpine Lease formed part of the Register when it was lodged. It did not disappear after
20 registration of the amalgamation of the two freehold titles. Further, s. 179 provided that particulars of the registered lease were conclusive evidence as to its terms. It is difficult, with respect, to see how it could "expand" simply by reason of the amalgamation of Lot 6 with Old Lot 1.

26. The answer given by the majority in the Court of Appeal, however, appears to have been 'by the operation of s. 182 of the LTA'[20].

27. Section 182 of the LTA is in the following terms:

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> "*182 Effect of registration on interest*
> *On registration of an instrument that is expressed to transfer or create an interest in a lot, the interest –*
> *(a) is transferred or created in accordance with the instrument; and*
> *(b) is registered; and*
> *(c) vests in the person identified in the instrument as the person entitled to the interest.*"

28. It is submitted that Holmes JA was correct in her views[21] to the effect that the operation of s. 182 in the present case was to create New Amalgamated Lot 1. It did
40 not create or vest the Mekpine Lease. As Holmes JA said:

> "*The premises leased continued to be identified by the sketch plan which formed part of the registered lease instrument; in other words by reference to what had been Lot 6.*"[22]

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[19] See particularly CA[131].

[20] See CA[18] and CA[21] (per Margaret McMurdo P) and CA[100] and CA[101] (per Morrison JA).

[21] See CA[44], CA[45] and CA[54].

[22] See CA[54].

29. The reasoning of the majority means that the LTA has a curious operation in relation to leases. The LTA provides specifically in s. 65 that a lease may be registered over part of a lot. Yet the majority decision holds that, where a lease applies in respect of the whole of a lot, it cannot survive as a lease over part of a new lot when the original lot is amalgamated with another lot, notwithstanding that the lease remains registered and there has been no variation in its terms.

30. The registration of the plan of survey for New Amalgamated Lot 1 did not alter the status of the Mekpine Lease as a registered instrument for the purposes of section 182 of the LTA. Accordingly, as Holmes JA observed[23], the nature and extent of Mekpine's interest under the Mekpine Lease continued to be defined by the relevant registered instrument which created that leasehold interest.

31. It is submitted that Holmes JA was correct in her view that, given the absence of some agreement to vary or amend a lease, there is nothing in the LTA, or general principles, to suggest that registration of a lease on the title to an amalgamated lot has the effect of varying or amending the lease itself. Holmes JA correctly observed that it would be extraordinary if registration of a survey plan had the effect of unilaterally and retrospectively altering the terms of an agreement between parties[24].

32. Such an approach would be inconsistent with the provisions of the LTA noted above[25] and, as Holmes JA observed, inconsistent with the requirement of s. 67 of the LTA that any instrument amending a registered lease "*must not ... increase or decrease the area leased*"[26].

33. The reasons of the Land Court[27] and the Land Appeal Court[28] were to the same effect as those of Holmes JA and, it is submitted, give the better view of the operation of the provisions of the LTA.

34. The reasons of the majority of the Court of Appeal do not, with respect, provide any actual explanation as to why the registration of the plan of survey for the New Amalgamated Lot 1 varied the Mekpine Lease.

35. The heart of the reasoning of the President is at CA[18]-[21]. As to CA[18]:

    (a) It may be accepted that in one sense Lot 6 "ceased to exist" with registration of the amalgamation. But it only ceased to exist *as such*, i.e. as a separate lot. It does not follow that its terms ceased to be those applying to the position as between lessor and lessee.

    (b) The notation of the Lease on the new title was as "EXISTING LEASE ALLOCATION". Surely the term "EXISTING" was to be given some effect.

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[23] See CA[54].

[24] See CA[53].

[25] See paragraphs 23 and 24 above.

[26] See CA[52].

[27] See LC[26].

[28] See LAC[53] to LAC[57].

(c) If it be assumed:

(i) that "instrument" in s. 182 refers to the plan of survey; and

(ii) that the registration of that plan with the lease noted on it as "EXISTING LEASE ALLOCATION" transferred or created a leasehold interest in the lessee;

it is not at all evident why the conclusion arrived at in the last sentence of CA[18] followed from those assumptions.

36. As to CA[19], it may be accepted that – as the third sentence of CA[19] suggests – in entering into the lease the parties intended to give the land its then suggested description. It is very difficult to see, however, that it follows in any very relevant sense that if the land were amalgamated the parties intended that the *extent* of the lease would be determined by reference to the description of the new amalgamated lot.

37. As to CA[20] it is suggested by Margaret McMurdo P that a clear purpose of the registration of the survey plan for New Amalgamated Lot 1 was the protection of Mekpine's leasehold interest in the New Amalgamated Lot 1[29]. That may be so, but that observation fails to recognise that the leasehold interest that was so protected was the leasehold interest conferred by the terms of the Mekpine Lease itself – a registered instrument for the purposes of section 182 of the LTA, under which the leasehold interest in Lot 6 (part of New Amalgamated Lot 1) vested in Mekpine.

38. As to CA[21], it is not all apparent why the conclusion there set out should be drawn. There seems simply, again with respect, a leap in reasoning.

39. The reasoning of Morrison JA at CA[81] – CA[113] is similar to that of the President. It is summarised at CA[131]. The first three sentences of CA[131] are accepted. Assuming also that the fourth and fifth sentences are accepted, the remainder of the reasoning in the paragraph does not follow and, with respect, should not be followed.

40. In short, the appellant submits that, following the amalgamation, Mekpine's leasehold interest continued to be identified by reference to the terms of the registered lease, which identified the spatial extent of that leasehold interest by reference to land that had previously been Lot 6. The decision of the majority of the Court of Appeal to the contrary was erroneous.

(b) The RSLA

41. The second issue concerns the use by the majority of the definition of "common areas" in s.6 of the RSLA. The majority erred, it is submitted by:

(a) giving the definition a substantive effect;

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[29] See CA[20].

(b) treating it as amending the Mekpine Lease by substituting its definition of "common areas" for the definition of that term in the Mekpine Lease.

42. Section 6 is in Part 3 ("Interpretation") of the RSLA commencing at s. 5. Part 3 has three Divisions, all dealing with interpretation of the Act.

43. Divisions 1 and 2 of Part 3 relate respectively to "Standard Definitions" and "Extended Definitions". The Dictionary to which s.5 refers is found following s. 135. The "Standard Definitions" in it vary in length but, generally speaking, do not seem to be as long as the "Extended Definitions" in ss. 6, 7, 8 and 9. Perhaps, as Holmes JA said at CA[57], the reference to *Extended* Definitions is simply to their length.

44. What seems clear, whether the definitions be "Standard Definitions" or "Extended Definitions" is that they are definitions. That is apparent from s. 5 which says that the "dictionary *defines* particular *words* used in this Act" and the Dictionary definition of "common areas" simply refers back to s. 6. Section 6 also commences with the words "Meaning of".

45. Section 6 describes what are the common areas of a retail shopping centre. They must be areas in or adjacent to the centre and be used, or intended to be used, by the public or in common by the lessees in the circumstances set out in s. 6(1)(b). But, even though s. 6(1) might otherwise be satisfied in respect of an area, s. 6(3) will exclude leased areas.

46. The definition of "common areas" is used in the RSLA in two places only:

(a) in paragraph (f) of the definition of "retail shop lease" in the Dictionary; and

(b) in the definition of "retail shopping centre" in s. 8.

47. In s. 8(1) the reference to "common areas" is in ss. 8(1)(c)(ii)(B) and 8(1)(c)(ii)(C). The references do no more than form part of the criteria for determining when a cluster of buildings constitutes a "retail shopping centre".

48. Section 6 is, and remains through the RSLA, a definition section. The approach ordinarily to be taken to provisions which are definitions has been stated by the Court in *Gibb v. Commissioner of Taxation* (1966) 118 CLR 628 at 635, quoted at CA[36].

49. The reasons of the President for departing from that approach and giving the definition a substantive role appear at CA[37]. There it will be seen that she thought that there was a "clear, contrary legislative intent" and that the legislative intent was that the s. 6 definition of "common areas" was to be treated as incorporated into leases.

50. It is submitted with respect that none of the reasons for that conclusion should be accepted. Dealing with them in the order in which they appear in CA[37]:

(a) *"the scheme of the Act"*. This appears to be merely introductory.

(b) *"The inclusion of the definition of 'common areas' in the Extended Definitions rather than the Standard definitions and the Dictionary"*. There are difficulties

with this view. The definition of s. 6 *is* "picked up" in the Dictionary. It is also quite unclear why the status of a definition as such is downgraded because it is in the definitions described as Extended Definitions rather than as Standard Definitions. They remain *definitions*.

(c) "*The object of the Act and how it is to be achieved*". The object of the Act is set out in s. 3. How it is to be achieved is in s.4. It is, with respect, difficult to see how "efficiency and equity" in respect of matters in s. 3 is affected one way or the other by the adoption of the approach taken by the majority. Nor do the matters referred to in s. 4 touch upon it. In particular the reference in s. 4(a) to "mandatory minimum standards for retail shop leases" seem a reference to Part 6, commencing with s.24.

(d) "*the intended wide application of the Act*". In support of that proposition footnote 67 refers to ss. 12 and 13(1). But all that those provisions say is that:

(i) by s. 12 the Act applies to all retail shop leases which are of premises in Queensland; and

(ii) by s. 13(1) the Act applies to all such leases whether entered into or renewed before or after the day on which the substantive provisions of the act came into operation.

(e) "*the implication of the act's provisions in all retail shop leases*". Footnote 68 indicates that this is a reference to s. 18. But s. 18 does not have that function. Rather it is concerned with a duty which is imposed or an entitlement conferred under the Act. Neither s. 6 nor s. 8 imposes such a duty or confers such an entitlement.

(f) "*the prohibition on contracting out of the Act*". Section 19 says that a provision of a retail shop lease is void if it purports to exclude the application of a provision of the Act that applies to the lease. No part of the lease in this case purports to say that s. 6 or s. 8, incorporating the definition of s.6, does not apply.

(g) "*the Act prevails in the event of an inconsistency with a lease*". It is perfectly true that s. 20 provides that if a provision of the Act is inconsistent with a provision of the lease, the provision of the lease is void to the extent of any inconsistency. But what is the inconsistency? For the purpose of determining whether a shopping centre falls within the s. 8 definition of a "retail shopping centre" or the Dictionary definition of a "retail shop lease", s. 6 applies.

51. The essential reasoning of Morrison JA is at CA[158] – CA[161]. It is accepted that s. 6 is a "provision" of the RSLA. The view that the definition in s. 6 has a substantive operation beyond that found in its use in s. 8 should not be accepted.

52. In relation to CA[159] it is accepted that common areas may be relevant to determination of outgoings (CA[159]). CA[160], however, adds nothing to CA[159]. The proportion payable by a lessee is not based on common area.

53. Again CA[161] may be accepted. Where, however, is there any inconsistency? And why does the obligation make *contributions* in respect of an area different from the common areas in the lease mean that the definition of "common areas" in the Act is substituted for that in the lease.

54. Further if one accepts that the various rights and entitlements identified by Morrison JA (noted also by Margaret McMurdo P) in fact relate to "common areas" defined in s. 6, it is by no means apparent how those rights or entitlements, dealing with expenditure of monies:

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(a) create an inconsistency which requires the wholesale substitution of the definition of common areas in the Mekpine Lease; and

(b) create any interest in land for the purposes of section 12(3) of the ALA in respect of land within those additional "common areas" identified by the RSLA.

55. Again if provisions of the RSLA have substantive effect in respect of "areas" that include "common areas" defined in s. 6, there is no identified inconsistency between
20 those substantive provisions and the provisions of the Mekpine Lease.

56. In any event, even if there is some inconsistency, the effect of s. 20 of the RSLA is simply to provide that those substantive provisions of the RSLA (not the definition of "common areas" that may be used by those provisions) prevails to the extent of any such inconsistency.

57. Further, the reasoning of the majority of the Court of Appeal does not identify how any use made of the definition of "common areas" by those substantive provisions creates any interest in land comprising those "common areas". The substantive
30 provisions identified by Morrison JA (noted also by Margaret McMurdo P) do not confer any interest in land[30].

58. Holmes JA was correct in her conclusions that the definition of "common areas" in the RSLA does not have substantive effect and that it does not amend, or prevail over, the definition of "common areas" in Mekpine Lease by reason of s.18, s.19 or s.20 of the RSLA[31].

59. The decision of the majority of the Court of Appeal in relation to the operation of the definitions of "common areas" in s. 6 of the RSLA was erroneous.

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PART VII. Relevant Provisions

60. See the List of Authorities filed with these Submissions, pursuant to Practice Direction No. 1 of 2013, and attached hereto as an Annexure.

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[30] This was the view of the Land Appeal Court (see LAC[64]).

[31] See CA[56],CA[57] and CA[59].

PART VIII. Orders sought

61. The appellant seeks the orders set out in the Notice of Appeal.

PART IX. Estimate

62. The appellant's estimate is that 1.5 hours will be required for the presentation of its oral argument.

Dated: 4 November 2015

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