NEW SOUTH WALES COURT OF APPEAL

CITATION:
Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council [2010] NSWCA 64
This decision has been amended. Please see the end of the judgment for a list of the amendments.

FILE NUMBER(S):
40113/09

HEARING DATE(S):
14 & 15 October 2009

JUDGMENT DATE:
1 April 2010

PARTIES:
Phoenix Commercial Enterprises Pty Limited (Appellant)
City of Canada Bay Council (Respondent)

JUDGMENT OF:
Spigelman CJ Campbell JA Handley AJA

LOWER COURT JURISDICTION:
Supreme Court - Equity Division

LOWER COURT FILE NUMBER(S):
1483/04

LOWER COURT JUDICIAL OFFICER:
White J

LOWER COURT DATE OF DECISION:
23 February 2009

LOWER COURT MEDIUM NEUTRAL CITATION:
Phoenix Commercial Enterprises v City of Canada Bay Council [2009] NSWSC 17

COUNSEL:
AP Cheshire (Appellant)
BA Coles QC; J Armfield (Respondent)

SOLICITORS:
Ferdinando Agresta (Appellant)
HWL Ebsworth (Respondent)

CATCHWORDS:
CONTRACTS – general contractual principles – construction and interpretation of contracts – meaning of ‘general advertising structure’ — construction involves ascertainment of meaning which the document would convey to a reasonable person with all relevant

background knowledge – evidence of negotiations and of parties intentions not admissible except to extent that they reveal facts that both parties knew and that were relevant to construction – CONTRACTS – general contractual principles – discharge, breach and defences to action for breach – INTERPRETATION – general rules of construction of instruments – admissibility of extrinsic evidence in relation to instruments – strong but rebuttable presumption that technical words or phrases are intended to be used according to their correct technical meaning – current approach involves ascertaining what the reasonable reader would take the words of a particular document, in its context, to mean – if extrinsic circumstances cannot be established by evidence, one can look to the circumstances that one can know without evidence from outside terms of document – EVIDENCE – admissibility and relevancy – whether additional evidence can be received on appeal pursuant to s75A(7) – what constitutes "special grounds" for the purpose of s75A(7) – Akins tests – tests for determining "special grounds" are not exhaustive and possess some flexibility – LANDLORD AND TENANT – form and contents of lease – commercial lease for advertising site – construction of terms – extent to which lease creates indefeasible rights – whether termination for breach valid – clauses of original lease admissible as evidence to aid understanding of current varied lease

LEGISLATION CITED:
Concord Planning Scheme Ordinance 55
Conveyancing Act 1919
Environmental Planning and Assessment Act 1979
Environmental Planning and Assessment Amendment Act 1997
Fair Trading Act 1987
Local Government Act 1919
Real Property Act 1900
Roads Act 1993
Subordinate Legislation Act 1989
Supreme Court Act 1970

CATEGORY:
Principal judgment

CASES CITED:
Agricultural and Rural Finance Pty Ltd v Gardiner [2008] HCA 57; (2008) 238 CLR 570
Akins v National Australia Bank (1994) 34 NSWLR 155
Aon Risk Services Australia Pty Ltd v Australian National University [2009] HCA 27; (2009) 239 CLR 175
Australian Electrical Electronics Foundry & Engineering Union (WA Branch) v Hamersley Iron Pty Ltd (1998) 19 WAR 145
Aztech Science Pty Ltd v Atlanta Aerospace (Woy Woy) Pty Ltd [2005] NSWCA 319; (2005) 55 ACSR 1
Bank of Credit and Commerce International SA v Ali [2001] UKHL 8; [2001] 2 WLR 735
Burns Philp Hardware Ltd v Howard Chia Pty Ltd (1987) 8 NSWLR 642
CDJ v VAJ [1998] HCA 67; (1998) 197 CLR 172
Chandra v Perpetual Trustees Victoria Ltd [2007] NSWSC 694
Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38; [2009] 3 WLR 267
Cholmondeley v Clinton (1820) 2 Jac & W 1; (1820) 37 ER 527
Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337
Ferris v Plaister (1994) 34 NSWLR 474

Franklins Pty Ltd v Metcash Trading Limited [2009] NSWCA 407
Gardiner v Agricultural and Rural Finance Pty Ltd [2007] NSWCA 235
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896
Karacominakis v Big Country Pty Ltd (2000) 10 BPR 18,235
Kimberley Securities Limited v Esber [2008] NSWCA 301
Lackovic v Insurance Commission (WA) [2006] WASCA 38; (2006) 31 WAR 460
Leach v Jay (1878) 9 ChD 42
Maggbury Pty Ltd v Hafele Australia Pty Ltd [2001] HCA 70; (2001) 210 CLR 181
McCann v Parons (1954) 93 CLR 418
McCann v Switzerland Insurance Australia Ltd [2000] HCA 65; (2000) 203 CLR 579
Mercantile Credit Ltd v Shell Co of Australia Ltd (1976) 136 CLR 326
Nowlan v Marson Transport Pty Ltd [2001] NSWCA 346; (2001) 53 NSWLR 116
Nyerlucz v Dei Rocini [1995] NSWCA 340
Pacific Carriers Ltd v BNP Paribas [2004] HCA 35; (2004) 218 CLR 451
Pennant Hills Golf Club Limited v Roads and Traffic Authority of NSW [1999] NSWCA 110
Perpetual Trustee Company Ltd v Westfield Management Limited [2006] NSWCA 337; (2007) 12 BPR 23,793
Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council (White J, Supreme Court of NSW, 25 March 2009, unreported)
Phoenix Commercial Enterprises v The City of Canada Bay Council [2009] NSWSC 17
Prenn v Simmonds [1971] 1 WLR 1381
Preston v Green (1944) 61 WN (NSW) 204
Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17
Proprietors SP 9968 v Proprietors SP 11173 [1979] 2 NSWLR 605
PT Ltd v Maradona Pty Ltd (1992) 25 NSWLR 643
Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd (1998) 1 VR 188
Re Bostock's Settlement; Norrish v Bostock [1921] 2 Ch 469
Reardon Smith Line Ltd v Hansen-Tangen [1976] 1 WLR 989
Royal Botanic Gardens and Domain Trust v South Sydney City Council [2002] HCA 5; (2002) 76 ALJR 436
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596
Small v Tomassetti [2001] NSWSC 1112
Smith v Butcher (1878) 10 ChD 113
Sydall v Castings Ltd [1967] 1 QB 302
TAMAS v Streimer (Court of Appeal, 10 July 1981, unreported)
Thomas v HP Mercantile Pty Ltd [2008] NSWCA 308
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165
Westfield Management Ltd v Perpetual Trustee Co Ltd [2007] HCA 45; (2007) 233 CLR 528
Wollongong Corporation v Cowan (1955) 93 CLR 435

TEXTS CITED:
Cross on Evidence, 8th Aust ed (2010)
Kim Lewison, The Interpretation of Contracts, 4th ed, (2007)
Peter Butt, Land Law, 6th ed (2010)

DECISION:
(1) Cross-appeal allowed.
(2) Set aside orders 1 and 9 in the court below.
(3) Appeal dismissed.

(4) Replace order 9 in the court below with an order:
"Except as otherwise provided by the preceding or earlier orders, I order the plaintiff pay the first defendant's costs of the proceedings:
(5) Direct the parties, within 14 days of the date of delivery of these reasons for judgment
(a) to provide to each judge hearing this appeal, agreed Short Minutes of the Order appropriate to be made in lieu of order 1 in the court below.
(b) in the event that agreement is not possible, to provide to each judge hearing this appeal their respective written submissions about the order that should be made in lieu of order 1 in the court below.
(6) Order the Appellant to pay costs of the Respondent of the appeal and of the cross-appeal.
(7) Reserve further consideration of the orders appropriate to give effect to these reasons for judgment.
(8) Dismiss with costs the Appellant's Notice of Motion to receive further evidence.
(9) Dismiss with costs the Appellant's application for leave to appeal from the trial judge's order refusing leave to amend the Statement of Claim.
(10) Respondent to pay costs of the Appellant of the Notice of Motion seeking to strike out the Cross-Appeal.

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40113/09
SC 1483/04

SPIGELMAN CJ
CAMPBELL JA
HANDLEY AJA

1 APRIL 2010

PHOENIX COMMERCIAL ENTERPRISES PTY LTD v CITY OF CANADA BAY COUNCIL

HEADNOTE

(This headnote does not form part of the Court's judgment)

FACTS:

In April 1996, the Council leased to the Appellant two areas of land, upon which the Appellant erected structures for the display of large advertisements. On 13 May 2003, the Council issued notices alleging that the Appellant had not paid an amount due under each lease and in June 2003, the Council served a Notice of Termination concerning each lease. The Council acted on the basis that it was entitled to keep the structures erected on the land and made them available to other organisation.

While it was undisputed that a provision in each lease required the Appellant to pay to the Council a lump sum of $450,000 rental by 1 February 2003, and that the amount had not been paid, the Appellant contended that it was not obliged to pay this amount because the Council had breached clause 15(d) of each lease. The breach was alleged to have arisen from the approval provided by the Council for the erection of three bus shelters in the Council's area, each of which had an advertising display panel on their sides. The Appellant argued that the bus shelters were each 'a general advertising structure' within the meaning of clause 15(d) and that when the Council approved the erection of the structures, it did so 'in it's capacity as consent authority' within the meaning of clause 15(d). This, according to the Appellant, gave rise to an obligation on the part of the Council to pay three separate amounts to the Appellant, in relation to the alleged three separate breaches, and interest under clause 15(e).

The Appellant contended that, as a result of the operation of an equitable or contractual right to set-off the various amounts owing between itself and the Council, as at 1 February 2003, the Appellant owed the Council a total of $72,900.56, the whole of which was interest. The Appellant then paid the Council $20,578.66 on 6 February 2003, thereby reducing the amount that it owed to $52,321.90.

The Appellant contended that:

(a) because no rental was owing and unpaid, the termination of the leases was invalid; and

(b) the service of the notice issued on 13 May 2003 was misleading and deceptive within the meaning of s42 of the ***Fair Trading Act*** **1987** because it was false to say that the Appellant had failed to make payments of rental.

Proceedings at trial

The trial judge accepted that the council had been acting "in its capacity as a consent authority" in approving the erection of the bus shelters and that each shelter counted as "a general advertising structure" within the meaning of clause 15(d). He held that the while the consent to erect the bus shelters amounted to three consents, breaching clause 15(d), the clause could only operate once and thus only one sum became due under it. It was found that no set-off was available and that the termination was justified on the grounds that there was an amount of rental owing since 1 February 2003 which remained unpaid. His Honour rejected the argument that the notices were misleading and deceptive. It was found that the Council was entitled to have the structures remain on the land following the termination.

After judgment was reserved, the Appellant made an application to amend its Statement of Claim and re-open its case by tendering further evidence. His Honour rejected the application to amend and reopen, primarily on the basis of futility. The final result was a judgment for the Council in the sum of $948,671.55.

Proceedings in this court

The Appellant has appealed against the judgment below.

The Council has cross-appealed against:

(1) the judge's finding that it had breached clause 15(d); and

(2) the judge denying it an order for all its costs

The Appellant:

(1) Seeks leave to appeal against the judge's refusal to permit amendment of the Statement of Claim;

(2) Has filed a Notice of Motion that this Court receive additional evidence on the appeal; and

HELD (per Spigelman CJ, Campbell JA and Handley AJA):

(1) **Application to receive additional evidence**

a. Where an appeal is from a judgement after a trial or hearing on the merits, the Court shall not receive further evidence except on special grounds: s7A(7) ***Supreme Court Act***

b. Section 75A(8) does not confer a completely untrammelled discretion on the court to receive further evidence whenever it can identify "special grounds": [11] per Spigelman CJ and [136] per Campbell JA

c. While the *Akins* tests are usually applicable, the tests are not exhaustive and possess some flexibility. The application of the section ought always be governed by the overriding purpose of reconciling the demands of justice with the policy in the public interest of bringing suits to an end: [6]-[11], [22] per Spigelman CJ and [134]-[136] per Campbell JA

d. The evidence sought to be admitted is not evidence of surrounding circumstances, but rather, is evidence of the parties' subjective intentions. Evidence of negotiations and of the parties' intentions is not admissible, except to the extent that it might show some fact that both parties knew and that was relevant to construction: [30] per Spigelman CJ and [139] per Campbell JA (***Codelfa Construction Pty Ltd v State Rail Authority (NSW)*** (1982) 149 CLR 337 applied)

e. That the evidence is inadmissible has the effect that, regardless of whether the ***Akins*** tests are met, and regardless of whether there is a discretionary reason for receiving the evidence notwithstanding that it does not comply with the ***Akins*** tests, it cannot be received in this Court: [31] per Spigelman CJ and [140] per Campbell JA and

f. The rules concerning civil litigation include the achievement of a just but timely and cost-effective resolution of a dispute and this ought to be applied to the exercise of discretion under s75A(7): [39]–[40] per Spigelman CJ

g. Even if the evidence was admissible, the application to admit the evidence would have been rejected in the exercise of the Court's discretion: [41] per Spigelman CJ

h. The Notice of Motion that the court receive additional evidence on the appeal is dismissed with costs: [82] and [141] per Campbell JA (Handley AJA agreeing at [250])

(2) Are the bus shelters "general advertising structures" for the purposes of clause 15(d)?

Construction of a written agreement

a. The ordinary principles of contract law apply to leases: [150] per Campbell JA

b. A written agreement should be interpreted by ascertaining the meaning that the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to parties in the situation in which they were at the time of the contract. This requires consideration of the text of the document, the surrounding circumstances known to the parties and the purpose and object of the transaction: [148], [149] and [153] per Campbell JA

c. The background knowledge that is able to be used as an aid to construction must be background knowledge that is accessible to all the people who it is reasonably foreseeable might, in the future, need to construe the document: [151] and [154] per Campbell JA

d. If surrounding circumstances cannot be established by evidence, one is not thrown back to relying upon the "natural and ordinary meaning" of the words. One can look to the circumstances that one can know without evidence from outside the terms of the document itself: [158] and [166] per Campbell JA

A right in contract or property?

a. If an indefeasible right is granted in terms not fully understandable as a matter of general knowledge, it may be necessary to resort to extrinsic evidence (limited to that which is, in theory, available to everyone) to understand the meaning of the words that identify the legal right to which indefeasibility attaches: [157] per Campbell JA

b. Though the grant of an easement is the creation of a legal property right and can be unilaterally granted, a lease is a consensual document, and confers both contractual and property rights. Some principles for construction of a registered easement can be applied in construction of a registered lease: [159]–[160] per Campbell JA

c. The covenant in clause 15(d) does not create any interest in the land and creates a contractual right only. Clause 15(d) does not touch and concern the land and does not delimit or qualify a registered interest. This means that it is not the type of interest to which indefeasibility attaches and therefore indefeasibility cannot be a basis for disallowing extrinsic evidence as an aid to construction in this matter: [161] per Campbell JA

Technical or ordinary meaning of words and phrases

a. There is a strong but rebuttable presumption that when technical words or phrases are made use of, the party intended to use them according to their correct technical meaning: [167]–[170] per Campbell JA

b. A presumption concerning construction must be understood in accordance with the approach to construction now established by the High Court, which involves ascertaining what the reasonable reader would take the words of a particular document, in its context, to mean. This context can include the setting of social practices and institutions within which the contract will operate. So understood, the presumption about technical words being used in accordance with their technical meanings is consistent with the present approach to construction: [171]–[174] per Campbell JA

Construction of "General Advertising Structure"

a. "General Advertising Structure" is a phrase which a reasonable reader would, absent counterveiling reasons, understand as having its technical meaning: [179] per Campbell JA

b. The expression "general advertising structure" in clause 15(d) should be construed as having the meaning given to it by the relevant planning instrument, namely the Concord Planning Ordinance 1969. In accordance with that construction, the bus shelters were "general advertising structures": [182] and [185] per Campbell JA (Handley AJA agreeing at [247])

(3) Was the Council acting "in its capacity as Consent Authority"?

a. While the composite expression "consent authority" is not a matter of ordinary English, it is an expression that has a specific technical legal meaning, applicable in the precise field of discourse with which clause 15(d) deals: [196] per Campbell JA

b. The clauses of the original lease are admissible as part of the background circumstances known to both parties to which reference can be made for the purpose

of interpreting clause 15(d) and determining whether the council was acting "in its capacity as Consent Authority": [42] and [48] per Spigelman CJ

c. The Council was not acting in *"its capacity as a consent authority"* when it approved the erection of the bus shelters. This means that clause 15(d) was not triggered: [80] per Campbell JA (Handley AJA agreeing at [247])

(4) One payment or multiple payments?

a. If an even triggering clause 15(d) occurs, one must calculate the percentage of the full term that is remaining. Pursuant to clause 15(d), the Council must pay that percentage of 25% of the rental: [207] per Campbell JA

b. A powerful aid to construction is the principle that a contract should be construed so as to result in a sensible commercial meaning: [211] per Campbell JA (***McCann v Switzerland Insurance Australia Ltd*** [2000] HCA 65 applied)

c. The clauses of the original lease are admissible as part of the background circumstances known to both parties to which reference can be made for the purpose of interpreting clause 15(d) and determining the question of one or multiple payments: [42] and [47] per Spigelman CJ

d. Clause 15(d) can be exercised only once and as such there is no need to consider the effect of 15(d) in the event that multiple breaches were proved: [81] per Campbell JA and [251] per Handley AJA

(5) Live remaining issues

a. The application to amend the Statement of Claim and re-open is rejected: [82] and [225] per Campbell JA

b. The order for general costs in the court below is altered by giving the Council all those costs: [82] and [228] per Campbell JA

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IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40113/09
SC 1483/04

SPIGELMAN CJ
CAMPBELL JA
HANDLEY AJA

1 APRIL 2010

PHOENIX COMMERCIAL ENTERPRISES PTY LTD v CITY OF CANADA BAY COUNCIL

Judgment

1 **SPIGELMAN CJ**: I have had the advantage of reading the judgment of Campbell JA in draft. Subject to the following observations, I agree with his Honour's reasons. I agree with the orders his Honour proposes.

2 It is convenient to set out again the clause in the lease which falls to be construed on the issues in this appeal. This clause was added by Deed of Variation:

> "15(d) Should the Lessor in its capacity as consent authority approve the erection of a general advertising structure on other land within the Lessor's Local Government Area or control then within one (1) month of such approval the Lessor will pay the Lessee an amount equivalent to 25% of the Rental corresponding to the amount of time remaining within the Term."

3 Two issues of contractual interpretation have arisen in the present case. The first is whether the words "general advertising structure" and "in its capacity as consent authority" are used in a technical sense or in their natural and ordinary meaning. The second, quite distinct, issue is whether or not the reference to the payment of an amount equivalent to 25 percent of the Rental is to be made upon one only, or upon each, occasion on which the erection of a general advertising structure is 'approved' by the Council "in its capacity as consent authority".

4 Each of these issues may be affected by the further evidence which the appellant seeks to adduce in this Court. Each may also be affected by having regard to the predecessor of cl 15(d) in cl 18 of the original lease, which Campbell JA sets out but does not deploy in his analysis.

5 I set out cl 18 again:

> "18 ADDITIONAL LEASE FEE
>
> In addition to the Lease Fee payable hereunder, the Lessee expressly covenants with the Lessor, during the term of the lease, to pay to the Lessor by way of additional rental an amount equivalent to 25% of the Lease Fee, such additional rental being payable on the same day as stipulated herein for the payment of the Lease Fee. Payment of the additional Lease Fee hereunder shall be subject to the rights and obligations of the parties pursuant to Clause 15 hereof as if the additional Lease Fee formed part of the Lease Fee PROVIDED HOWEVER that should at any time during the term of the Lease, the Lessor in its capacity as consent authority, approve the erection of an advertising structure on other land within the Lessor's Local Government Area THEN during the period of such approval the additional Lease Fee hereunder shall abate and the obligation of the Lessee to pay such additional Lease Fee shall only be revived by the termination of such consent, either by effluxion of time, cancellation, surrender or other reason."

Further Evidence

6 As Campbell JA indicates it is logical to first address the application to adduce further evidence going to the issue of the proper interpretation of cl 15(d) of the leases on the basis that "special grounds" have been established within the meaning of s 75A(8) of the *Supreme Court Act* 1970. Campbell JA sets out the relevant passage from the judgment of Clarke JA in *Akins v National Australia Bank* (1994) 34 NSWLR 155 at 160 where his Honour identifies "three conditions" required to "be met … in general … before fresh evidence can be admitted".

7 Inevitably, the application of a statutory formulation expressed in general terms such as "special grounds" will lead to a body of case law identifying matters which satisfy the statutory description and those which do not. Such case law may lead to the formulation of principles of general application. Justice Clarke's observations in *Akins* identified certain principles from which his Honour derived "three conditions" to "be met".

8 As Heydon JA pointed out in *Nowlan v Marson Transport Pty Ltd* [2001] NSWCA 346; (2001) 53 NSWLR 116 at [14], the tests to which Clarke JA referred in *Akins* were derived from High Court cases such as *McCann v Parsons* (1954) 93 CLR 418 and *Wollongong Corporation v Cowan* (1955) 93 CLR 435 on the powers of a Court to order a new trial where certain principles had been identified. Heydon JA went on to quote a passage from *McCann v Parsons* at 430-431 where the joint judgment of the High Court referred to the grounds upon which a new trial would be granted as grounds which "have always possessed some flexibility and have been governed by the overriding purpose of reconciling the demands of justice with the policy in the public interest of bringing suits to a final end".

9 In *Nowlan* supra at [14], Heydon JA (with whom Mason P and Young CJ in Eq agreed) referred to the three "conditions" in the passage from *Akins* as "tests", but noted that these were "not exhaustive". No doubt this was a reference to Clarke JA's statement that the requirement that the three conditions be met was qualified by the words "in general".

10 Clarke JA's reference to "in general" expresses an understanding that, even if one or other of the "conditions" is not met in a particular case, nevertheless "special grounds" may be capable of being shown, by reason of the fact that other considerations overwhelm the failure of one or other of the "conditions" in the particular circumstances. Furthermore, that Clarke JA was not intending to identify essential conditions is, in my opinion, affirmed by the introductory words of the relevant passage which are: " … it is not possible to formulate a test which should be applied in every case to determine whether or not special grounds exist …" (*Akins* supra at 160).

11 Such an approach does not convert s 75A(8) into an unfettered discretion. Rather, decisions such as *Akins* identify principles which have been developed in the case law to guide the formulation of the judgment for which s 75A(8) provides.

12 I am reinforced in this analysis by a judgment of Clarke JA delivered about one year after the judgment in *Akins* in which his Honour, together with Mahoney AP (Meagher JA dissenting), admitted further evidence and restated the relevant principles. His Honour did so without reference to the earlier judgment in *Akins*. The latter case is *Nyerlucz v Dei Rocini* which was an unreported judgment of the New South Wales Court of Appeal of 8 September 1995. In an electronic age, where there is no longer any such thing as an unreported judgment, the New South Wales Case Law system is back-capturing such judgments and the case is now given the medium neutral citation *Nyerlucz v Dei Rocini* [1995] NSWCA 340 and is available on line in a series which has been given the ironic, if not self-contradictory, appellation "Unreported Judgments" or "URJ".

13 In *Nyerlucz* supra at 6, Clarke JA set out the relevant case law and repeated the observation he had made in *Akins* to the effect that "it is not possible to formulate a test which should be applied in every case to determine whether or not special grounds exist" in the terms "there is no precise formula which needs to be satisfied in order to establish special grounds" (at 5). His Honour went on to refer at 5-6 to the "three tests" derived from Jordan CJ in *Preston v Green* (1944) 61 WN (NSW) 204. The test is an equivalent, but somewhat differently expressed, threefold "test" in which the Chief Justice identified the "questions to be considered in determining whether a new trial should be directed on the ground of discovery of fresh evidence", namely, (at 204):

> "(1) Is the new evidence prima facie likely to be believed?
>
> (2) If believed, would it be likely to be a determining or at least a very important factor in the result of the trial?
>
> (3) Is it evidence that might have been produced at the hearing if the applicant had been reasonably diligent?"

14 Both Mahoney AP and Clarke JA accepted that each of the first two "tests" were satisfied with respect to the evidence sought to be adduced in the Court of Appeal. The issue, therefore, turned on the third matter identified in *Preston v Green*, being the first of the "conditions" identified in *Akins*, ie, could the evidence have been produced if the applicant had been reasonably diligent?

15 The evidence sought to be adduced on appeal in *Nyerlucz* was evidence from a next-door neighbour which was to the effect that the plaintiff who had been injured in a motor vehicle accident was not as seriously injured as he had successfully established at first instance.

16 Mahoney AP pointed out that such evidence from a neighbour could have been obtained "with reasonable diligence for use at the trial" but added at 3:

> " … this aspect to the matter is not to be determined merely by that fact. In the particular circumstances of this case, that does not determine the matter against the defendant."

17 His Honour analysed the weight and significance of the neighbour's evidence and added at 4:

> "However, in the end, the matters relevant to the exercise of the discretion given by section 75A cannot be divided into inflexible categories. Circumstances are various. In the present case, the evidence now provided goes, in my opinion, against the overall thrust of the evidence presented at the trial; the picture it presents is different in substance from that presented by the plaintiff at the trial. There are, in my opinion, special grounds warranting the reception of it upon the appeal."

18 Clarke JA agreed with Mahoney JA that the evidence of the neighbour could have been produced if "reasonable diligence" had been exercised by the appellant and, accordingly, test 3 had not been made out.

19 Clarke JA then added at 6:

> "That conclusion is not, in my opinion, fatal to the appellant's claim. The strict inquiry upon which the Court has embarked is not whether the three tests have been satisfied but whether, in the circumstances of the present case, special grounds exist. Although I would agree that it would only be in rare cases that the Court would find that special grounds existed in the absence of the satisfaction of the three tests the Court is obliged to exercise its powers under the Statute and is not constrained by section 75A(8) to find against the appellant because of its failure to satisfy the third test."

20 His Honour went on to say that there were "special grounds" in the case because, although the "reasonable diligence" test had not been satisfied, there was an explanation for the failure to lead the evidence at trial "which is both sensible and reasonable" and the evidence sought to be adduced was to the effect that the respondent "was deliberately feigning injury" and the evidence "would, or could, have had a dramatic effect if given at the trial" (at 7).

21 His Honour concluded at 7:

> "In the circumstance that there is a reasonable explanation for the failure to lead the evidence coupled with the strong tendency of the evidence to establish that the respondent manufactured, and presented, a false case I consider that the interests of justice require a conclusion that 'special grounds' have been made out and that the application be granted."

22 The approach taken in *Nyerlucz* is consistent with earlier authority on the application of s 75A(8) and I do not believe that it was the intention of the Court in *Akins* to determine that the three matters identified as "conditions" were each determinative, nor that they represented an exhaustive statement of the considerations to be taken into account when formulating the specific judgment for which the statute calls, ie the determination that there were "special grounds" which justified the admission of further evidence.

23 In *TAMAS v Streimer* (Court of Appeal, 10 July 1981, unreported) Moffitt P, with whom Reynolds and Glass JJA agreed, referred to *Cowan* and the extract from *McCann v Parsons* that I have quoted at [8] above and added at 6-7:

> "There is much to support the view that in making provision for evidence to be admitted before the Court of Appeal S.75A(8) was framed in terms which would avoid confining to some particular inflexible practice what ought to be a wide discretion. Cowan is no more than a statement of what common sense in the law says as to how in practice, in the exercise of a discretion to set aside a judgment and order a new trial, the interests of justice to an individual, who has already had his case tried but claims to have discovered some fresh evidence, should be reconciled with the public interest in relation to the finality of litigation. In so far as Section 75A(8) in terms can operate to facilitate the taking of a step which may lead to the order of a new trial on the basis of fresh evidence, it is clear that the considerations of justice inherent in the requirement that there be 'special grounds' will be of the same quality as the consideration of justice inherent in the exercise of the discretion to order a new trial. … What the demands of justice are in either situation may vary from case to case and may be stated differently at different times by different judges, but the ultimate question in the end will be the same, namely to do what is just in the light of all relevant circumstances which will require consideration to be had of the extent to which the policy of the law relating to finality will be interfered with by the course required to be taken."

24 Common law case law with respect to a discrete, although cognate, subject matter must be treated with some care when applying a statutory formulation such as that contained in s 75A(8). The ultimate issue is whether there are "special grounds". Case law will identify the facts, matters and considerations relevant to the determination of what constitutes sufficiently "special" grounds for purposes of exercising the statutory power.

25 Such considerations led the High Court in *CDJ v VAJ* [1998] HCA 67; (1998) 197 CLR 172 to distinguish the common law case law on the basis that in its application "the court applies principles, bordering on fixed rules", whereas with respect to the statutory provision there under consideration, applicable to the Full Court or Court of Appeal, the discretion referred to involved the weighing of factors (at [104]). The case law with respect to the Federal Court is relevantly distinguishable because as the High Court noted at [107], the statutory formulation did not identify a requirement that the Court find there to be "special grounds" for exercising the relevant power. A similar conclusion was reached by the Court of Appeal of the Supreme Court of Western Australia in *Lackovic v Insurance Commission (WA)* [2006] WASCA 38; (2006) 31 WAR 460 at [6] and [109].

26 In Western Australia the relevant rule of court also required "special grounds" for the admission of further evidence on appeal after trial or hearing. In *Lackovic*, the Court (for the same reasons that this Court in *Nowlan* followed the reasoning in *Akins*) applied its own earlier Full Court judgment in *Australian Electrical Electronics Foundry & Engineering Union (WA Branch) v Hamersley Iron Pty Ltd* (1998) 19 WAR 145.

27 The case law in New South Wales with respect to s 75A(8) is not as confined as that of Western Australia. *Akins* should not, particularly in view of the observations in *Nyerlucz*, be understood to require that each of the three "conditions" be satisfied. (See also *Thomas v HP Mercantile Pty Ltd* [2008] NSWCA 308 esp at [87]-[90]; *Aztech Science Pty Ltd v Atlanta Aerospace (Woy Woy) Pty Ltd* [2005] NSWCA 319; (2005) 55 ACSR 1 at [99]-[108].) It is the duty of the Court to apply the statutory formulation whilst acknowledging that the case law has identified the facts and matters that

are often required to be taken into account in formulating the judgment for which the statute expressly provides.

28 In his reasons, Campbell JA finds that each of the first and second conditions in *Akins* are not met. His Honour's analysis indicates that the determinative consideration is that the material sought to be relied upon is not admissible, on the basis that it is merely evidence of the subjective intentions of the parties. The basic principle which his Honour applies is that expressed by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 352 and subsequent authority.

29 As has frequently been noted, it is by no means always apparent where to draw the line between an impermissible use and a permissible use of extrinsic material of this character. (See *Kimberley Securities Limited v Esber* [2008] NSWCA 301 at [5]; *Franklins Pty Ltd v Metcash Trading Limited* [2009] NSWCA 407 at [24].)

30 There is no doubt that the letter of 28 January 1998 and the generally confirmatory, evidence of Mr Stephen Nixon in his affidavit, upon which reliance is sought to be placed, are an attempt to express the subjective intentions of the parties. This is apparent from the introductory words of the letter which states that it is written "to confirm the mutual understanding and intent on the lease terms and conditions" and concludes with an expression of hope that what it contains "accurately reflects the mutual intentions". The letter is, to use Lord Hoffman's redolent phrase, "drenched in subjectivity". (*Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 3 WLR 267 at [38].)

31 Accordingly, I agree with Campbell JA's conclusion. The same result would be reached if, contrary to the above analysis, the letter and affidavit were admissible on some basis.

The Factual Background

32 The principal element of possible unfairness or injustice upon which the appellant seeks to rely with respect to its failure to put forward the evidence at trial, is the fact that it was not represented by a solicitor during the trial and that counsel for the appellant had been briefed only two days before the trial commenced on 7 April 2008. Preparation for the trial had, for some unspecified time, been undertaken by a director of the appellant who was not legally qualified. This is clearly only part of the story.

33 The appellant, as plaintiff below, was legally represented for a considerable period including during the formulation of the pleadings, the preparation of the tender bundle and the filing of affidavits. The letter which the appellant seeks to tender was written by the director who had the conduct of the proceedings during the period that the appellant was not represented by solicitors. It was contained in the tender bundle. The letter was addressed to a particular officer of the Council. These were the two persons who had the conduct of the negotiations for variation of the lease. The affidavit upon which the

appellant now seeks to rely was sworn by that same former officer of the Council. It was an affidavit prepared for and filed on behalf of the appellant some four years before the trial.

34 Given the issues in the trial it would, in my opinion, be clear to a layman that this evidence was of significance. It would be equally clear to a lawyer that the admissibility of this evidence was at best dubious, if not clearly impermissible. I am not convinced that the limited time counsel for the appellant had to prepare for the case was the reason for the failure to adduce this evidence below. No evidence to that effect was given. The Court was asked to infer it. It is at least equally likely that a forensic decision was taken not to rely on such evidence. Not only was its admissibility dubious, its self-serving character was such as to arouse suspicion.

35 Furthermore, there were a number of opportunities available to the appellant to raise additional issues after the hearing had been completed. Counsel for the appellant filed a document entitled "Additional Matters" on 10 April 2008 and another document entitled "Plaintiff's further additional matters" on 22 April 2008. Indeed, prior to his Honour delivering judgment the appellant proceeded, in February 2009, by way of notice of motion together with supporting affidavit, to seek to amend the statement of claim in respects not relevant to the present issue, but indicating that further detailed consideration had been given to the plaintiff's case.

36 It is clear in these circumstances that the appellant had a number of opportunities over an extended period of time to reconsider its case and to raise the issues now sought to be agitated in this Court by way of further evidence.

37 In submissions to this Court the respondent raised what it described as "serious doubts about the authenticity of the letter". It went on to submit that:

> " … the provenance of the letter would have been a matter of significant controversy should Phoenix have attempted to tender it. In anticipation of the tender of the letter at the vacated August 2005 trial, Canada Bay prepared evidence in reply which was not ultimately read. It was not needed given the form of the claim at trial and the fact that the letter was not tendered. That evidence would need to be revisited and possibly augmented".

38 The detail underlying this submission is not before the Court. The issues proposed to be agitated with respect to authenticity and such other evidence in reply would not be appropriate to be adduced in this Court. It would require the Court, in my opinion, to remit the whole or some part of the proceedings for further trial. These proceedings have already been delayed for a much longer period than is desirable.

39 As the High Court noted in *Aon Risk Services Australia Pty Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175 in a joint judgment of Gummow, Hayne, Crennan, Kiefel and Bell JJ at [93]:

> "[93] … The rules concerning civil litigation no longer are to be considered as directed only to the resolution of the dispute between the parties to a proceeding. The achievement of a just but timely and cost-effective resolution of a dispute has an effect upon the court and upon other litigants."

40 This perspective is equally applicable to the exercise of the discretion to admit further evidence pursuant to s 75A(7) and (8). It is quite clear, on the basis of the respondent's submissions in this Court, that the tender of the evidence would give rise to further delay and increased costs. There is a public interest in finality of litigation as well as a private interest.

41 In all of these circumstances, even if I had been of the view that the evidence was admissible, I would have rejected the application to adduce the further evidence in the exercise of the Court's discretion.

The Original Lease

42 The clause to be interpreted in the present proceedings is contained in a variation of the original lease. The original lease is before the Court and no argument has been, nor in my opinion could be, advanced that it was not admissible as part of the background circumstances known to both parties, to which reference can properly be made for purposes of interpretation of the clause inserted by the Deed of Variation. Clause 15(d) replaced cl 18 of the original lease which I have set out at [5] above.

43 Campbell JA does not refer to this clause for the purposes of resolving the issues of interpretation that arise. In my opinion it is permissible to do so. There are limits to which a clause such as this can be put in circumstances where the lease, particularly with respect to the obligation to pay rent, had undergone as substantial a change as occurred in the variation in the present case. Nevertheless, in my opinion, reference to the pre-existing cl 18 is of some assistance to reinforce the conclusion to which Campbell JA comes with respect to the issues of interpretation on other grounds, grounds with which I am in agreement.

44 In his judgment White J referred to cl 18 and added:

> "[19] This clause was deleted in the deed of variation. It is clear that under clause 18 the additional fee of 25 percent would abate whether the lessor in its capacity as consent authority approved of the erection of one advertising structure or more than one, and whether it gave one or more such approvals. The clause also provided for the revival of the obligation to pay the additional lease fee if the consent to the erection of an advertising structure on other land within the local government area expired, or was terminated or surrendered."

45 White J went on to refer to cl 18 with respect to the issue of whether or not cl 15(d) obliged the Council to make one payment or multiple payments. His Honour said:

> "[78] It is correct that clause 18 of the original lease … provided for the abatement of the additional lease fee of 25 percent whether the Council in its capacity as consent authority approved the erection of one or more advertising structures on other land within the local government area. There was only one additional lease fee and it was to abate during the

> period of approval for the erection of another advertising structure, whether there was one or more than one such approval current at any particular time. However, that clause was deleted in the deeds of variation and the wording was changed. On any view, the amendments improved the position of the lessee. Instead of the lessee being required to pay an additional 25 percent lease fee which would abate if the Council approved the erection of an advertising structure on other land, clause 15(d) required the Council to pay 25 percent of the rent if, as consent authority, it approved the erection of a general advertising structure on other land within the municipality. Interest was to be payable on that amount pursuant to clause 15(e). Money was payable under clause 15(d) on the giving of an approval, irrespective of the period for which the approval remained current. Given that these were substantive changes in favour of the lessee, and given the rewriting of the clause, it cannot be assumed that clause 15(d) was intended to operate in the same way as clause 18 of the original lease. On the other hand, the changes do not necessarily imply that a different operation was intended."

46 I appreciate the force of his Honour's reasons. However, in my opinion the terms of cl 18 are of some utility with respect to each of the issues of interpretation that fall to be decided in the present case.

47 On the issue of one or multiple payments the significance of cl 18 of the original deed for the purposes of interpretation of cl 15(d) of the varied lease is the precise figure of "25 percent". It seems to me to be overwhelmingly probable that this constituted a transposition from one clause to the other of what was, notwithstanding differences in structure, the substance of the commercial disincentive to the Council from approving an additional advertising structure. Whilst there were differences in the nature of the computation involved, by reason of the complete transformation of the mode of payment of rent, nevertheless, the persistence of the "25 percent" figure indicates the mutual intention that, if the Council approved the erection of a competing advertising structure, then it would lose 25 percentage points of what it would otherwise expect to receive, as and from that time. This appears to me to significantly reinforce the proposition that cl 15(d) was intended to operate only once.

48 Furthermore, the continuation of the substance of the original cl 18 is of assistance for determining the interpretation of the words "general advertising structure" and "in its capacity as consent authority". Campbell JA's analysis approaches these matters separately because they did arise in that way in argument. Nevertheless, in my opinion, they are interconnected. In this respect there is a synergy between the two issues. Insofar as the terminology of "general advertising structure" was a technical legal term adopted from a planning instrument it makes it more likely that the reference to "consent authority" is also a reference to that term as used in planning instruments. The reverse proposition is also true.

49 I note that there is only one word of difference between cl 18 of the original lease and cl 15(d) of the varied lease. That is the inclusion of the word "general" before the words "advertising structure". To repeat, cl 15(d) relevantly provides:

> 15(d) Should the lessor in its capacity as consent authority approve the erection of a *general* advertising structure ..."

50 Campbell JA has concluded that the term "general advertising structure" employed words in the sense that they were used in the Concord Planning Scheme Ordinance together with the definition contained in Ordinance 55, being of general application throughout the State. Ordinance 55 was subsequently amended and then repealed after the Concord Planning Scheme Ordinance came into existence.

51 As at the date of the Concord Ordinance, being 22 August 1969, Ordinance 55 contained the definition which was picked up and applied to the Concord Ordinance. As and from 30 March 1973 the Ordinance did not contain a definition of general advertising structure, but instead included a definition of "advertising structure" which was defined to mean "a structure used or to be used *principally* for the display of an advertisement" (emphasis added). That, I should note, is also the definition found in s 4 of the *Environmental Planning and Assessment Act* 1979, as amended by the *Environmental Planning and Assessment Amendment Act* 1997, commencing on 1 July 1998. That is also the precise words used in the original cl 18.

52 I note, in passing, that if the definition had been applicable, and I agree with Campbell JA that it is not, then the bus shelters would not have answered the description of an "advertising structure" as so defined. I am not suggesting that anyone had the bus shelters in mind. It is merely that in cognate instruments both terms had distinct definitions. Accordingly, there was clearly some scope for confusion if the words "advertising structure" from the original cl 18 had been retained.

53 The two leases were executed on 9 April 1996. On 30 January 1995 and 17 November 1995 the Council gave notice of approval of the development application with respect to, respectively, the Young Street and Victoria Avenue locations. In each case the notice included the following:

> "Pursuant to section 92 of the Act, notice is hereby given of the determination by the consent authority of the Development Application …
>
> …
>
> Consent is given for the erection and use of a general advertising structure …"

54 Although these approvals preceded the entry into the original lease agreement, it appears likely that someone noticed that the subject matter for which the Council could give, and had given, an approval under the Concord Planning Ordinance was not identical with the terminology of cl 18. Accordingly, the word "general" was introduced for the very purpose of bringing the restraint effected by a 25 percent reduction in rent into alignment with what the Council was authorised to approve "in its capacity as a consent authority".

55 In my opinion, this alteration reinforces the conclusion that Campbell JA has reached with respect to the meaning of both "general advertising structure" and "in its capacity as a consent authority".

56 CAMPBELL JA:

PART A – THE PROCEEDINGS IN OUTLINE

57 In April 1996, the Council of Concord leased to the Appellant two areas of land, each of which was adjacent to a motorway. That Council had previously granted development consent for the erection of a large advertising sign on each of those sites. The Appellant thereafter erected on each site a structure that could display large advertisements.

58 The Respondent came into existence after those leases were executed. It is the successor to both the rights and the liabilities of the Council of Concord. I will refer to both councils as "**the Council**".

59 On 13 May 2003, the Council issued notices that alleged that the Appellant had not paid an amount of money due under each lease, and that the Council required the Appellant to comply with its obligations within 21 days. On 25 June 2003, solicitors for the Council served a Notice of Termination on the Appellant concerning each lease. Thereafter the Council acted on the basis that it was entitled to keep the advertising structures that were erected on the land, and made them available for other commercial organisations to use, for a fee.

60 The Appellant brought proceedings in the Supreme Court of NSW against the Council in which it contested the validity of the termination, claimed that it was entitled to remove the advertising structures from the land, and claimed that the Council owed it money pursuant to clauses 15(d) and 15(e) of the leases.

61 The Council filed a cross-claim seeking (so far as is now relevant), judgment for a sum of money it claimed was outstanding pursuant to the leases, a declaration that its termination of the leases was valid, and a declaration that the Council owned the structures on the land.

62 Clause 15(d) of each lease provided that *"should the Lessor in its capacity as consent authority approve the erection of a general advertising structure on other land within the Lessor's Local Government Area or Control"* then the Lessor would pay a particular sum of money to the Lessee within one month of such approval. Under clause 15(e) of each lease any unpaid monies owing by the Lessor to the Lessee accrued interest at the rate of 10% per annum.

The Appellant's Argument in Outline

63 Mr A P Cheshire presented the Appellant's argument in this Court. His submissions here (as, apparently, in the court below – ***Phoenix Commercial Enterprises v The City of Canada Bay Council*** [2009] NSWSC 17 at [111]) were perceptive, clear and economical.

64 It was undisputed that a provision in each lease required the Appellant to pay to the Council a lump sum of $450,000 rental by 1 February 2003, and that neither amount had been paid. The Appellant's contention at trial, and in this Court, was that it was not obliged to pay anything like that amount of money, because the Council had breached clause 15(d) of each lease. The breach was alleged to have occurred on 22 February 2000, when the Council gave approval for three bus shelters, each of which had an advertising display panel at the side, to be erected on the footpath at three different bus stops within the Council's area. The Appellant contended that the bus shelters were each *"a general advertising structure"* within the meaning of clause 15(d), and that when the Council approved of the erection of the structures it did so *"in its capacity as consent authority"* within the meaning of clause 15(d). The Appellant contended that clause 15(d) applied on each occasion that an approval of the type referred to in clause 15(d) was given, and thus that the Council had come under an obligation to pay three separate amounts pursuant to clause 15(d). Because the Council had not paid the Appellant anything to satisfy these obligations that had arisen under clause 15(d), the Appellant contended that it had been entitled to interest, in accordance with clause 15(e), on the amounts the Council was obliged to pay by clause 15(d), and that that interest ran from one month after 22 February 2000.

65 According to the Appellant, if one added together the three amounts to which it was entitled pursuant to clause 15(d), and the interest to which it was entitled under clause 15(e), by the time 1 February 2003 arrived the total amount that the Council owed to the Appellant was greater than $450,000 per lease.

66 However, by 1 February 2003 the Appellant owed the Council more than $450,000 per lease. The structure of the leases had been (at least since the Deeds of Variation were entered on 1 February 1998) that a lump sum of rental was payable (and was in fact paid) on entry of the Deeds of Variation, and no more rental was payable for the next five years. A further $450,000 of rental was payable by 1 February 2003, which accrued interest from 1 February 1998 at a variable rate (identified as 2% above an ascertainable bank bills interest rate). The Appellant was not obliged to pay that interest until 1 February 2003. As things eventuated, the rate of interest payable by the Appellant on the $450,000 was less than the rate of any interest payable by the Council under clause 15(e). The Appellant contended that, by 1 February 2003, the net difference between the amount of rental plus interest that had accrued due from it to the Council, and the amount of payments due under clause 15(d) and interest that the Council owed to it, resulted in the total amount of $72,900.56, being owed by the Appellant to the Council.

67 At this stage of the Appellant's argument it becomes important that (as the Appellant sees things) the total amount that the Council owed to the Appellant by 1 February 2003 was greater than $450,000 per lease. The Appellant contended that it had a right to set off the various amounts that the Council owed to it against the amounts it owed to the Council. That right of set-off was alleged to be a contractual right of set-off that was conferred by the terms of the leases, or alternatively, an equitable right of set-off. The set-off took place at the time that the Council's obligation to make each payment under clause

15(d) arose. The correct way, according to the Appellant, of giving effect to that right of set-off is by applying the amount that the Council owed to the Appellant first to rental, and then to interest. Thus, each amount to be set off operated as a pre-payment of part of the $450,000 that was payable on 1 February 2003. The effect of part of the $450,000 being notionally paid early was that a lesser amount thenceforth accrued interest at the variable rate. The result of so doing would be that, as at 1 February 2003, the Appellant owed the Council a total amount of $72,900.56, the whole of which was interest. The Appellant paid the Council $20,578.66 on 6 February 2003, thereby reducing the amount it owed to $52,321.90.

68 The Appellant contended that there were two different types of legal effect that resulted.

69 The first was that, because no rental was owing and unpaid, the termination of the leases (which had been effected on the basis that the Appellant had breached its obligations to pay rent) was invalid. The second was that the service of the notice of 13 May 2003 was misleading and deceptive conduct within the meaning of section 42 ***Fair Trading Act* 1987**, because it was false to say that the Appellant had failed to make payments of rental. The Appellant contended that, in issuing the notices, the Council was acting in trade or commerce. It also contended that it had suffered significant damage in consequence of the service of the notices.

The Judgments Below

70 The principal judgment below was delivered on 23 February 2009: ***Phoenix Commercial Enterprises v The City of Canada Bay Council*** [2009] NSWSC 17. In it, the trial judge accepted that the Council had been acting *"in its capacity as a consent authority"* when it approved the erection of the bus shelters, and that each bus shelter counted as *"a general advertising structure"* within the meaning of clause 15(d). Thus he held that the Council had breached clause 15(d). He accepted that the consent of 22 February 2000 was in substance three consents. However, he held that clause 15(d) could operate only once, and thus only one sum became due to the Appellant from the Council pursuant to clause 15(d). It was that one sum that then accrued interest under clause 15(e).

71 His Honour held that neither contractual set-off, nor equitable set-off, was available between the various amounts owed by the Appellant, and the various amounts owed by the Council.

72 A consequence of his Honour's reasoning on this point was that an amount of rental had been owing since 1 February 2003, and remained unpaid. For that reason he held that the termination was justified.

73 His Honour held that the Council was acting *"in trade or commerce"* within the meaning of the ***Fair Trading Act***, but rejected the argument that the notices were misleading and deceptive. Essentially, this was because, in accordance with the judge's findings, there was an amount of rental owing and unpaid when the notices were served. Further, his Honour held that the Appellant had not established

that it had suffered any damage in consequence of the service of the notice of 13 May 2003. He held that the Council was entitled to have the structures remain on the land after the termination of the lease. That conclusion followed from the validity of the termination and the effect of clause 10(b) of the lease, which entitled the Council to keep the structures on the land if the lease was terminated before it was due to end by effluxion of time.

74 After judgment was reserved, and after the parties had been notified of a date when judgment was to be delivered, the Appellant made an application to amend its Statement of Claim and re-open its case by tendering further documentary evidence. The judge delayed delivering judgment, and gave his reasons concerning the applications in the course of his principal judgment. His Honour rejected the application to amend and re-open, on grounds including that, in the light of other findings he had made, it would be futile to do so.

75 After the reasons for judgment were delivered, the parties agreed on figures for the amounts owed one to the other consistently with his Honour's reasons. The amount that the Council owed to the Appellant pursuant to clause 15(d) and (e) was of the order of $677,000. In entering a judgment in the proceedings, the judge set that amount off against the amount owed by the Appellant to the Respondent, resulting in a judgment for the Council against the Appellant in the sum of $948,671.55. He dismissed the Appellant's claims for relief; declared both leases had been validly terminated; declared that the advertising structures on the land became the property of the Council on termination of the leases; otherwise dismissed the cross-claim; and dismissed the motion for leave to amend and re-open. In a supplementary judgment (***Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council***, White J, Supreme Court of NSW, 25 March 2009, unreported and no medium neutral citation) the judge ordered (subject to other specific costs orders that had been made) the Appellant to pay three-quarters of the Council's costs of the proceedings.

The Proceedings in this Court

76 The Appellant has appealed against the judgment below. The Council has cross-appealed against the judge's finding that it had breached clause 15(d), and against the judge denying it an order for all its costs. The Appellant also seeks leave to appeal against the judge's refusal to permit amendment of the Statement of Claim, and has filed a Notice of Motion that this Court receive additional evidence on the appeal. All those applications have been heard together.

77 The Appellant also filed a Notice of Motion seeking to strike out the Notice of Cross-Appeal. However, at the hearing that Notice of Motion was not proceeded with.

Issues Arising

78 The issues argued on the hearing in this Court are:

(1) Were the bus shelters *"general advertising structures"* within the meaning of clause 15(d)?

(2) Was the Council acting *"in its capacity as consent authority"* when it approved erection of the bus shelters?

(3) On the correct construction of clause 15(d),

(a) can the clause operate to cause more than one sum of money to become payable by the Council?

(b) if it can operate to cause more than one sum of money to become payable by the Council, how are those several sums of money calculated?

(c) is there a contractual right of set-off of any amount due under clause 15(d) against rental?

(d) is there an equitable set-off of any amount due under clause 15(d) against rental?

(4) Was the Notice of Termination valid?

(5) Was the notice of 13 May 2003 misleading and deceptive?

(6) If yes to (5), did any damages arise from the misleading and deceptive notice?

(7) Who currently holds the title to the advertising structures?

(8) Should the trial judge have allowed the Appellant to amend its Statement of Claim and re-open?

(9) Should this Court should receive the additional evidence on the appeal?

(10) Whether the judge was appellably wrong in his conclusion about the costs of the proceedings?

79 Though the Council filed a cross-appeal against the judge's decision that it was acting in trade and commerce in issuing the notices, it did not press that aspect of the cross-appeal.

Outcome

80 The conclusions that I have reached are that the bus shelters were *"general advertising structures"* within the meaning of clause 15(d), but the Council was not acting in *"its capacity as a consent authority"* when it approved their erection. Thus clause 15(d) was never triggered.

81 For the Appellant to be able to obtain any greater measure of success than the judge accorded it, it would need to establish that the judge was wrong in holding that clause 15(d) could operate only once. I have concluded that the judge was correct in holding that it can operate only once. Thus, it is not necessary to consider the other matters upon which the Appellant would need to succeed to obtain a more favourable result than it obtained below.

82 I would reject the application to amend the Statement of Claim and re-open, and would also reject the application to receive additional evidence on the appeal. In consequence of the cross-appeal succeeding, I would alter the order for general costs in the court below by giving the Council all those costs.

PART B – FACTUAL MATTERS

83 There were no disputed questions of fact in the court below – the evidence comprised documents, and some affidavit evidence that was not cross-examined on.

The Sites and Advertising Structures

84 One of the sites in question is at Young Street, Concord, at a place where Parramatta Road, Concord Road and the M4 converge. Another is at the western end of Victoria Avenue, Concord West, and is adjacent to Homebush Bay Drive. The judge found that there are two advertising panels at each of the Victoria Avenue and the Young Street sites. They stand on towers over 16m tall, and the advertising signs themselves are of the order of 15m x 4.7m.

85 A development consent for the Victoria Avenue site had issued on 17 November 1995 to permit the erection of a general advertising structure, while a development consent had issued on 30 January 1995 to permit the erection and use of a general advertising structure at the Young Street site. At the time the leases were entered in April 1996 there were no advertising structures on the sites.

Relevant Terms of the Leases

86 The leases governing each of the sites are in identical terms. The terms of the leases that are relevant to the dispute in the present case came to be arrived at by a two-stage process. A lease of each site was entered between the Appellant and the Council on 9 April 1996 and registered under the ***Real Property Act* 1900** ("**RPA**"). A Variation of Lease concerning each site was executed on 18 February 1998, and also registered under the ***Real Property Act***.

The Leases of 9 April 1996

87 Each lease contained the following provisions:

> "1. In this Lease unless the contrary intention appears:
>
> "Advertising Display Structure" means all the improvements erected on the Land.
>
> "Lease Fee" means the payment to be made one (1) month from the date that advertising is displayed on the Advertising Display Structure and thereafter on the same day of each an[d] every month of the term.
>
> …
>
> "Term of Lease" means the period of five years computed from the date that advertising is first displayed on the Advertising Display Structure."

88 The judge found that the term of the Victoria Avenue lease began on 16 February 1997, while the term of the Young Street lease began on 24 April 1997.

89 Each lease made provision for a Lease Fee of $100,000 to be payable during the first year of the term, payable by equal monthly instalments in arrears. There was provision for that fee to be varied annually by an indexation formula dependent on the Consumer Price Index. The Lessee had a call option for a further term of five years, and the Lessor had a put option for a further term of five years. The leases provided:

> "7. COMPLIANCE WITH CONDITIONS OF DEVELOPMENT AND BUILDING APPROVALS
>
> The Lessee shall at all times comply in all respects with the conditions of development and building approval in respect of any advertising display structure and the conditions of Development and Building Approval shall be deemed to be incorporated and form part of the conditions of this lease. Default in compliance with any of the conditions shall constitute a breach of an essential term of this Lease.
>
> 8. USE OF DEMISED PREMISES
>
> The Lessee shall not use or permit to be used the demised premises or any part thereof for any purpose other than an advertising display structure."

90 In clause 10(a) the Lessee covenanted that at the end of the term it would remove all structures on the land:

> "…other than advertising structures erected by the Lessee in good and substantial repair and condition in all respects. The Lessee shall (unless otherwise mutually agreed by the Lessor and the Lessee) remove any advertising structures erected by it upon the Land …"

91 Clause 10(b) provided that on determination before expiration of the term the Lessee would yield up the premises with everything built on them.

92 Clause 18 provided:

> "ADDITIONAL LEASE FEE
>
> In addition to the Lease Fee payable hereunder, the Lessee expressly covenants with the Lessor, during the term of the lease, to pay to the Lessor by way of additional rental an amount equivalent to 25% of the Lease Fee, such additional rental being payable on the same day as stipulated herein for the payment of the Lease Fee. Payment of the additional Lease Fee hereunder shall be subject to the rights and obligations of the parties pursuant to Clause 15 hereof as if the additional Lease Fee formed part of the Lease Fee PROVIDED HOWEVER that should at any time during the term of the Lease, the Lessor in its capacity as consent authority, approve the erection of an advertising structure on other land within the Lessor's Local Government Area THEN during the period of such approval the additional Lease Fee hereunder shall abate and the obligation of the Lessee to pay such additional Lease Fee shall only be revived by the termination of such consent, either by effluxion of time, cancellation, surrender or other reason."

93 There are some other clauses, that I mention only because they include the expression *"Advertising Display Structure"*.

94 Under clause 15(a), if the Lease Fee was unpaid for more than a month:

> "… the Lessee's interest in any agreement made between the Lessee and any other party to display advertisements on the Advertising Display Structure shall revert to and vest in the Lessor until such time as the Lessor has received all the Lease Fee outstanding. …"

95 Clause 15(d) provided that if legislation or governmental action

> "… or other cause outside the control of the Lessor or the Lessee it shall become impossible for the Lessee to effectively exhibit illuminated advertisements on the said Advertising Display Structure or if at any time during the term or any extension thereof the Lessee is called upon by reason of any legislation, regulation or by-law or act or requirement of a constituted authority as aforesaid to remove advertisements from the Advertising Display Structure and is prevented from affixing advertisements to the Advertising Display Structure then and in every case the Lease Fee shall not commence or if commenced shall cease to be payable during such time as such impediment shall continue or in the event of such impediment being permanent this Lease shall forthwith be determined. …"

96 Clause 15(e) provided:

> "That should any property or structure be erected so as to wholly or partly obliterate, obscure or interfere with any advertisement on the Advertising Display Structure then and in every case the Lessee shall be at liberty to determine this Lease …"

97 Clause 19 provided:

"WELCOMING SIGNAGE ON ADVERTISING DISPLAY STRUCTURE

The Lessee shall in any Advertising Display Structure erected upon the Land incorporate as part of the structure signage in such form as may be reasonably required by the Lessor so as to identify the Local Government Area as being that of the Lessor and incorporating a reference to the 2000 Olympic Games."

The Variations of Lease

98 When the ***RPA*** forms of Variation of Lease were executed on 18 February 1998, each incorporated the provisions of a Deed of Variation that had been made on 1 February 1998. Relevant amendments made by clause 1 of the Deed of Variation included:

> "(ii) Wherever the term "Lease Fee" occurs in the Lease it is replaced by the word "Rental".
>
> (iii) Clause 1 is amended by deleting the words and definition of "Lease Fee" and replacing with the following clause:
>
> ""Rental" means the amount stipulated in the schedule hereto to be paid one (1) month from the date that advertising is displayed on the Advertising Display Structure and thereafter by equal monthly instalments. For the remaining Term from the date of execution of this Deed of Variation as prepayment of Rental the sum of nine hundred thousand dollars ($900,000) of which the sum of four hundred and fifty thousand dollars ($450,000) is to be paid on execution of this Deed of Variation".

99 The *"schedule hereto"* referred to in that definition of *"Rental"* is the schedule to the original lease. The effect is that Rental was to be payable in accordance with the original lease up to 1 February 1998 (or perhaps at the rate of $100,000 per annum by equal monthly instalments without indexation, as the schedule to the lease stated only the rent during the first year of the lease). A lump sum of $900,000, was also payable of which $450,000 was payable forthwith, for the remainder of the Term from 1 February 1998. Clause 1 of the Deeds of Variation continued:

> …
>
> (vii) Clause 1 is amended by deleting the words and definition of "Term of Lease" and replacing with the following clause:
>
> ""Term" means the period commencing from the date of this Lease and terminating on the First day of January 2008."
>
> (viii) Clause 1 is amended by including after the definition of "Term of Lease" the following:
>
> "1.2 INTERPRETATION
>
> (a) words importing persons shall include a corporation and vice versa;

(b) words importing any gender shall include all other genders as the case may require;

(c) references to statutes, ordinances or regulations shall include any statutes, ordinances or regulations amending, consolidating or replacing the same and all subordinate or other legislation from time to time relating thereto or in connection therewith;

(d) any covenant, term, condition or provision of this Lease to be performed or any warranty, guarantee or indemnity given by two or more persons shall bind those persons jointly and each of them severally;

(e) the headings contained herein are for convenience only and shall not affect interpretation;

(f) a reference to any party or to any person, corporation or association shall be a reference to them as so constituted from time to time and shall include their executors, administrators, successors and permitted assigns."

100 The clause conferring the put and call option was deleted, no doubt because the term of the lease was extended. The clause providing for annual reviews of the Lease Fee was also deleted.

101 It seems that by that time the advertising sign had actually been constructed on the Victoria Avenue site, and encroached on some adjacent land. The deed relating to the Victoria Avenue site included a new clause 6, that included:

"(f) In the event that the RTA or such other party require that the encroachment by the Advertising Display Structure be extinguished then the Lessor will allow the Lessee to remove those parts of the Advertising Display Structure which are encroaching and fix the removed sections to the other ends of the Advertising Display Structure. The Lessor will upon such an occurrence give to the Lessee a Licence over Lot 2 DP 218758 for the right to encroach over Lot 2 DP 218758.

(g) The Lessor will not object to and will allow and continue to allow any encroachment by the Advertising Display Structure over any Council lands and other lands including as noted within Clause 6(f)."

102 These provisions were not echoed in the Deed of Variation relating to the Young Street site. Instead, its clause 6 contained:

(f) The Lessor will not object to and will allow and continue to allow any encroachment by the Advertising Display Structure over any Council lands and other adjacent lands."

103 The former clause 7 was deleted, and replaced with a clause beginning:

"(a) The Lessee shall comply and continue to comply in all respects with the conditions of Development and Building Approval in respect of any Advertising Display Structure and the conditions of the Development and Building Approval shall be deemed to be

incorporated and form part of the conditions of this Lease. Default in compliance with this paragraph shall constitute a breach of an essential term of this Lease.

(b) The Lessee and Lessor hereby acknowledge that the landscaping is a condition of the development and building approval still outstanding in respect of the Advertising Display Structure. …"

104 The whole of the previous clause 15 was deleted, and replaced with a clause reading:

"15 Default Termination Etc.

The Lessor and Lessee COVENANT AND AGREE that:

(a) The Lessor will not prohibit or restrict the Lessee or its Sub-Lessee from effectively exhibiting illuminated advertisements on the Advertising Display Structure whilst the Rental is paid in accordance with the requirements of the Lease.

(b) If for any reason the Lessor prohibits or restricts in any way the Lessee or its Sub-Lessee from effectively exhibiting illuminated advertisements on the Advertising Display Structure then the Lessor will pay to the Lessee, within one (1) month of any notification of such prohibition or restriction, the proportional amount of the Rental corresponding to the amount of time remaining within the Term. The Lessor shall remain liable in damages to the Lessee for any consequent losses sustained by the Lessee in the event that the Lessor prohibits or restricts in any way the Lessee or its Sub-Lessee from effectively exhibiting illuminated advertisements on the Advertising Display Structure.

(c) Should any property or structure be erected so as to wholly or partly obliterate, obscure or interfere with any advertisements on the Advertising Display Structure then and in every case the Lessee shall be at liberty to terminate this Lease. The Lessor will, within one (1) month of such termination pay to the Lessee the proportional amount of the Rental corresponding to the amount of time remaining within the Term.

(d) Should the Lessor in its capacity as consent authority approve the erection of a general advertising structure on other land within the Lessor's Local Government Area or control then within one (1) month of such approval the Lessor will pay to the Lessee an amount equivalent to 25% of the Rental corresponding to the amount of time remaining within the Term.

(e) Without prejudice to the rights powers and remedies under this Lease the Lessor will pay to the Lessee interest at the rate of ten percentum (10%) per annum on all monies due but unpaid for fourteen (14) days by the Lessor to the Lessee on any account whatsoever pursuant to this Lease. Such interest to be computed from the due date for the payment of the monies in respect of which the interest is chargeable until payment of such monies in full and to be recoverable in like manner as overpaid Rental.

(f) That if by reason of any legislation, regulation or by-law or any act or requirement of a constituted authority or through the effect of voluntary industry agreement between advertisers and the Government, including without limiting the generality of the foregoing any town planning authority or other cause all outside the control of the Lessor or the Lessee it shall become impossible for the Lessee to effectively exhibit illuminated advertisements on the Advertising Display Structure or if at any time during the Term or any extension thereof the Lessee is called upon by reason of any

legislation, regulation or by-law or act or requirement of a constituted authority as aforesaid other than by the Lessor to remove advertisements from the Advertising Display Structure and is permanently prevented from affixing advertisements to the Advertising Display Structure then this Lease shall forthwith be terminated. The Lessor will, within one (1) month of such termination pay to the Lessee the proportional amount of the Rental corresponding to the amount of time remaining within the Term computed from the date that it shall become impossible for the Lessee to effectively exhibit illuminated advertisements on the Advertising Display Structure. In the event that such impediment is not permanent this Lease shall be extended by a period equal to the period during which the Lessee has been prevented from exhibiting advertisements due to such impediment. For the purposes of this Clause, permanent shall mean an impediment extending for an unbroken period of twelve (12) calendar months.

(g) That part of the Rental remaining outstanding after execution of this Deed of Variation, namely $450,000, will accrue interest from the date of execution at the rate of two percentum above the 90 day AFMA Bank Bills Interest Rate. The Lessee will pay to the Lessor the outstanding Rental, including interest, within five years from the date of execution of this Deed of Variation. The Lessee hereby acknowledges that the Term of the loan with ING Mercantile Mutual Bank is for a Term less than 5 years. The Lessee further acknowledges that the Lessee will not alter the Term of the loan with ING Mercantile Mutual Bank without the approval of the Lessor. The repayment of the loan to ING Mercantile Mutual Bank shall be repaid in full prior to any obligation on the part of the Lessee to pay to the Lessor any outstanding Rental however failure to pay the outstanding Rental within five years of the date of this Deed of Variation will constitute a breach of an essential term of this Lease."

105 Clause 18 was deleted.

The Appellant's Development and Building Consents

Terms of the Original Development Consent

106 On 30 January 1995 the Council sent a Notice of Determination of a Development Application concerning the Young Street site. Its heading made clear that "*the Act*" referred to in it was the ***Environmental Planning & Assessment Act* 1979** ("**EPA Act**"). It included the following:

"Pursuant to Section 92 of the Act, notice is hereby given of the determination by the consent authority of the Development Application No. 148/94.

…

The conditions of consent are set out as follows:-

1. **Consent**: Consent is given for the erection and use of a general advertising structure for the display of two (2) signs.

…

3. **Location**: The advertising structure and all ancillary equipment shall be located wholly within the land in Zone No.6(a) shown hatched on the plan marked 'Concord Local Environmental Plan No.18' deposited in the office of the Council of Concord.

4. **Size of signs**: The advertising structure shall comply with the following requirements for pole or pylon signs as prescribed in Ordinance 55 to the ***Local Government Act*, 1919**:

(a) The advertising area of each sign shall not exceed 44.6sm.

(b) The maximum height above ground level of the structure at any point shall not exceed 15.2m.

…

11. **Advertisements and Signs**: All advertisements will require Licensing pursuant to Ordinance 55 of the Local Government Act, 1919.

The reasons for the imposition of the conditions are as follows:-

These conditions have been required in the public interest to protect the amenity of the neighbourhood, to ensure compliance with the provisions of the Concord Planning Scheme and in accordance with the aims and objectives of the ***Environmental Planning & Assessment Act,* 1979**.

…

Notes: …

(3) Section 97 of the Act confers on an applicant who is dissatisfied with the determination of a consent authority a right of appeal to the Land & Environment Court exercisable within twelve (12) months after receipt of this notice."

Terms of the Modified Development Consent

107 On 23 January 1997, the Council gave notification of a modification of that consent. Its heading made clear that a reference in the notice to *"the Act"* was to the ***EPA Act***. The notification included:

"The Development Consent is Modified by deletion of Condition No.1 and 4 and insertion of the following:–

"**1.** **Consent**: Consent is given for the erection and use of a general advertising structure for the display of two (2) signs as amended in accordance with the plans submitted by Phoenix Commercial Enterprises Pty Ltd and numbered Drawing No.1R, 2R and 3R received by Council on 17th January, 1997, except where varied by the following modifications …

Section 97 of the Act confers on an applicant who is dissatisfied with the determination of a consent authority, a right of appeal to the Land & Environment Court exercisable within twelve (12) months after receipt of this notice."

108 By January 1997, Ordinance 55 to the ***Local Government Act* 1919** had been repealed (on 1 September 1995), so the size restrictions under Ordinance 55 that had been imposed under the original Development Consent were no longer ones that Ordinance 55 required. The modified consent permitted signs that were much larger than the original consent had permitted. A report to the Council dated 13 August 1996 concerning that application for modification stated, as part of the background:

> "In 1994 Council adopted a Policy prohibiting any new general advertising signs (billboards) except for three locations. The subject site is one of the permitted locations."

109 The report noted the repeal of Ordinance 55, and that *"[t]he proposed modification would increase the area of each sign by in excess of 50%, to 67.5m^2, but there would be no increase in height."*

The Victoria Avenue Development Consents

110 The Council granted a Development Consent permitting advertising signage at the Victoria Avenue site on 17 November 1995. It is not in materially different terms to the original Development Consent for the Young Street site. It also was modified, on Phoenix's application, on 27 August 1996 to permit a larger sign. The terms of that modification are not materially different to the terms of the modification of the consent concerning the Young Street site.

The Building Consents

111 The building consents do not appear to bear upon construction of the leases.

The Council's Contract Concerning Bus Shelters

112 On 5 October 1993, the Council entered an agreement with Australian Posters Pty Limited under which the latter company agreed to supply and install at its sole expense twenty *"Advertising Shelters"*. The contract defined an *"Advertising Shelter"* as a shelter constructed in accordance with particular plans and specifications annexed to the contract. It had a solid rear wall, to which a bench seat was attached, and from which a roof was cantilevered. At one end of the shelter, furthest away from the oncoming traffic, was a frame that functioned as a wall. It contained a *"light box"* 1.19 m long and 1.185 m wide. An advertisement could be placed on either side of this light box, so that one advertisement faced people coming from one direction, and the other faced people coming from the other direction. The Council was to receive a percentage of the advertising revenue received. The agreement was for a term of 15 years.

113 In 1994, twelve bus shelters were constructed pursuant to this agreement, and in January 1995, a further five were constructed. Another three were installed in July 1997. Thus, all 20 Advertising Shelters that were provided for under the agreement of 5 October 1993 were constructed by July 1997.

By that time Australian Posters Pty Limited had been taken over by Adshel Street Furniture Pty Ltd ("**Adshel**").

114 On 22 February 2000, the Council received a report from its Manager, Technical and Transport Services. It explained that Adshel were prepared to supply an additional ten advertising shelters, at a reduced revenue share. Four different options were available, three of which were variations upon the financial terms upon which Adshel's offer of ten shelters might be accepted. The Manager's recommendations included:

> "1. Council accept (Option B), the offer of 10 additional advertising shelters under the current contract terms, all other contract terms remaining unchanged…"

115 The Council resolved, on 22 February 2000, that that recommendation be accepted, subject to *"one of the new advertising bus shelters being placed at the bus stop near the corner of Majors Bay Road and Gallipoli Street, Concord"*, and another qualification not presently relevant.

116 The Further Amended Statement of Claim pleaded that:

> "On 22 February 2000, the Council of Concord approved the erection of three general advertising structures in the Concord Municipality …"

117 It particularised these as being:

> "(a) an illuminated advertising display case in a bus shelter on the footway on the corner of Majors Bay Road and Gallipoli Street ("1st approval");
>
> (b) an illuminated advertising display case in a bus shelter on the footway outside 142 Concord Road ("2nd approval");
>
> (c) an illuminated advertising display case in a bus shelter on the footway outside 48-54 Majors Bay Road ("3rd approval")."

Events Leading to the Notice of Termination

118 On 23 January 2003, the Council's solicitor wrote two letters to the Appellant, one relating to each site. Each letter said:

> "I advise that under the Terms of the Deed of Variation the second instalment of rental in the sum of $450,000.00, together with interest, is due for payment on the 1st of February 2003, that is five years after entering into the Variation of Lease on the 1st of February 1998. I am instructed that interest payable pursuant to Clause 15(g) amounts to $167,359.72. The total indebtedness of the Company as at the 1st of February 2003 is therefore $617,359.72."

The letter included instructions relating to the payment of that amount.

119 On 6 February 2003, the Appellant wrote to the General Manager of the Council, requesting a variation of the lease (though not saying precisely what variation was requested), and enclosing a cheque for $20,578.66, said to be one month's rental payment.

120 On 20 February 2003, the Appellant wrote a longer letter to the General Manager of the Council, containing a proposal that it acquire freehold title to the land, or alternatively be given a 21-year lease, on the basis of monthly rental payments. The letter explained the Appellant's concerns as including:

> "1. Shortly after commencement of the Lease, general advertising commenced to appear on a number of structures:
>
> (a) On what appears to be railway land in Railway Street a large advertising structure displays general advertising. Whilst a small unused structure was in existence at the commencement of the leases a recent inspection, Sunday 9th February 2003, confirmed that the structure was modified and new lighting installed. In addition, general advertising commenced to be displayed.
>
> (b) On the corner of Concord Road & Parramatta Road, general advertising is displayed on a roof structure. Again, whilst the structure was in existence at the commencement of the leases, a recent inspection, Sunday 9th February 2003, confirmed that the structure was recently modified. In addition, prior to the display of general advertising on the Young Street structure, the roof structure was a building identification sign identifying the building and the name of the business. Subsequent to the display of general advertising on the Young Street structure, the building identification sign changed from identifying the building and the name of the business to displaying general advertising.
>
> 2. Council is required to approve the erection of structures, modifications to structures and in particular to general advertising prior to their erection. I am concerned that Council may have either formally approved the matters noted in item 1(a) and 1(b) or provided approval by allowing the matters to occur. Either way they are of concern, impact on the leases and need to be addressed."

121 While this letter complained about other advertising structures in the Council's area, it did not complain about the bus shelters. The judge inferred, at [54], that the Appellant was not aware of the Council's resolution of 22 February 2000 until some time after 17 August 2005.

122 Solicitors for the Council wrote two letters to the Appellant on 28 February 2003, one letter relating to each of the sites, but the text of which was substantially identical. They stated that the proposals in the letter of 20 February 2003 were unacceptable, and continued:

> "The total indebtedness of Phoenix Commercial Enterprises Pty Limited as at 1 February 2003 was $617,359.72 representing the sum of $450,000.00 plus interest in the sum, of $167,359.72.
>
> If payment in the sum of $617,359.72 is not received within seven (7) days from the date herein we are instructed to take immediate action forthwith in accordance with the terms of the lease, without further notice to you."

123 On 14 May 2003, solicitors for the Council wrote to the Appellant enclosing a document dated 13 May 2003. As it is the document that is alleged to be misleading and deceptive I should set it out in full:

"NOTICE OF BREACH OF COVENANT

TO: PHOENIX COMMERCIAL ENTERPRISES PTY LIMITED
PKF Level 20
1 York Street, Sydney NSW 2000
(Tenant)

The Tenant is the lessee of lot 5 in deposited plan 778667 located adjacent to Victoria Avenue at Concord West and the lessee of lot 27 in deposited plan 719909 located parallel to Young Street at Concord (together, Premises).

By leases of the Premises dated 9 April, 1996 from Concord Council (now known as the City of Canada Bay Council (Council)) to the Tenant (Leases) and the variations of Leases dated 18 February, 1998 (Variations), the Tenant covenanted to pay Rental as defined in the Variations to the Council within a period of five years from the date of execution of the Variations.

The Tenant has failed to make the payments.

Take notice that the Council requires the Tenant to comply with its obligations under the Leases and the Variations by paying the Rental and all other amounts owing under the Leases and the Variations within 21 days of the date of this notice.

Dated this 13th day of May, 2003

Executed by the City of Canada Bay Council

[signature]

GENERAL MANAGER"

124 On 25 June 2003, the solicitors for the Council sent to the Appellant a Notice of Termination that had been executed on 16 June 2003. After reciting that the Appellant was the Lessee of the two sites it continued:

"By leases of the Premises dated 9 April, 1996 from Concord Council (now known as the City of Canada Bay Council (Council)) to the Tenant (Leases) and the variations of Leases dated 18 February, 1998 (Variations), the Tenant covenanted to pay Rental as defined in the Variations to the Council within a period of five years from the date of execution of the Variations.

The Tenant has failed to make the payments of Rental.

Take notice that the Council terminates the Leases effective immediately."

PART C – THE APPLICATION TO RECEIVE ADDITIONAL EVIDENCE

125 The Appellant seeks to have this Court receive additional evidence, and to rely upon that additional evidence as an aid to construction of some disputed words in the lease documentation. Logically I should decide whether the evidence is admissible before embarking on that task of construction.

126 One part of the evidence in question is a letter that Mr Ferdinando Agresta, a director of the Appellant who was closely involved in both the negotiation of the leases in question and the litigation in the court below, wrote to Mr Stephen Nixon on 28 January 1998, together with the fact that Mr Nixon did not reply to that letter. Mr Nixon had been the officer of the Council engaged in negotiation of the terms of each relevant lease and Variation of Lease.

127 Mr Agresta's letter of 28 January 1998 to Mr Nixon was written in the process of negotiating the variation to the lease. The letter said it was written, *"to confirm the mutual understanding and intent on the lease terms and conditions"*. The other relevant part of the letter said:

> "… We deleted clause 18 and incorporated the intent of exclusivity in the default provisions. The intent of exclusivity remained as, during the term of the leases, Council will not approve or allow, within the Municipality other than by our company, the erection of any advertising irrespective of size other than advertising relating to the premises on which the advertising is located. Should Council approve or allow, within the Municipality other than by our company, the erection of any advertising irrespective of size other than advertising relating to the premises on which the advertising is located then Council will be in default of the exclusivity provision. On such an occurrence and for each and every location advertising is displayed then Councill will be liable to Phoenix for an amount equivalent to 25% of the amount paid or to be paid by Phoenix to Council from the date of the approval till the expiration date of the leases. Where Council has not issued an approval but allowed advertising to be displayed, the date from which indebtedness commences is the date that advertising first appears on the structure."

128 The letter concluded, *"We trust that the above accurately reflects the mutual intentions. Should there be a difference please advise."*

129 The other part of the evidence in question is a single paragraph from an affidavit that Mr Stephen Nixon swore on 3 September 2004 in the proceedings. That paragraph deposed to Mr Nixon receiving Mr Agresta's letter to him dated 28 January 1998. It continued:

> "I agreed with the content of that letter. However, I was aware that the first defendant's solicitor had a different interpretation of clauses 10(b) and (c). The first defendant did not respond to the 28 January 1998 letter from Phoenix in order not to alert Phoenix to the different interpretation of clauses 10(b) and (c) of the leases."

130 Clauses 10(b) and (c) related to the consequences of a determination of the lease before expiration of the term.

131 In support of the application to have the additional evidence admitted, Mr Agresta has sworn an affidavit dated 30 June 2009. In it he gives evidence that the Appellant had no lawyer acting for it in

the proceedings below for a significant time before the hearing occurred. Mr Cheshire appeared at the hearing in the court below for the Appellant, but first received instructions after close of business on Friday, 4 April 2008, to appear at a hearing commencing on Monday, 7 April 2008. There was a significant volume of documentary material (some 2,100 pages). Mr Agresta had no legal training and thus was unable, in the available time, to direct Mr Cheshire's attention to matters that were of particular relevance.

132 As Mr Cheshire's submissions seeking to have this evidence received on the appeal recognise, section 75A(7) ***Supreme Court Act* 1970** empowers this Court to receive further evidence on an appeal, but section 75A(8) provides:

> "Notwithstanding subsection (7), where the appeal is from a judgment after a trial or hearing on the merits, the Court shall not receive further evidence except on special grounds."

133 There is an exception in section 75A(9) whereby section 75A(8) does not apply to evidence concerning matters occurring after the trial or hearing, but it is not contended that section 75A(9) applies in the present case.

134 As Clarke JA (with whom Sheller JA agreed) said in ***Akins v National Australia Bank*** (1994) 34 NSWLR 155 at [160]:

> "Although it is not possible to formulate a test which should be applied in every case to determine whether or not special grounds exist there are well understood general principles upon which a determination is made. These principles require that, in general, three conditions need be met before fresh evidence can be admitted. These are: (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) The evidence must be such that there must be a high degree of probability that there would be a different verdict; (3) The evidence must be credible."

135 In ***Nowlan v Marson Transport Pty Ltd*** [2001] NSWCA 346; (2001) 53 NSWLR 116 Heydon JA (with whom Mason P and Young CJ in Eq agreed) at [14], 124 quoted the passage I have set out from ***Akins***, and made two separate points. His Honour determined that the three criteria identified in ***Akins*** are *"not exhaustive"* and, citing Dixon CJ, Fullagar, Kitto and Taylor JJ in ***McCann v Parons*** (1954) 93 CLR 418 at 430-1, he determined that by analogy with the powers of courts at common law to grant a new trial, the tests

> "… have always possessed some flexibility and have been governed by the overriding purpose of reconciling the demands of justice with the policy in the public interest of bringing suits to a final end."

136 The second, and somewhat antithetical point is that *"until such cases as the **Akins** case are overruled, they continue to bind this Court."* I take the synthesis of these two propositions to be that section 75A(8) should not be approached on the basis that it confers a completely untrammelled discretion on the court to receive further evidence whenever it can identify *"special grounds"*. That imprecise

expression ought to be construed in its context and in the light of the purpose of the ***Supreme Court Act***. It should be approached on the basis that the three ***Akins*** tests are the ones usually applied, though there can be circumstances in which the balancing of the demands of justice and the public interest of bringing suits to a final end, comes down on the side of allowing a particular item of further evidence to be received, notwithstanding that it does not comply with the ***Akins*** tests. In ***Nowlan*** itself, certain medical evidence was admitted on appeal pursuant to section 75A(8) notwithstanding that it had been available at first instance, and the Court assumed for the purpose of the argument that the ***Akins*** tests had not been satisfied. The demand of justice that led to its being admitted was that it had not been lead in the court below because the opposite party had adopted a *"litigation by ambush"* approach that had misled the appellant into thinking that there was no issue about a topic to which the medical report would have been relevant.

137 The first of the ***Akins*** tests is not met in the present case. Insofar as the evidence consists of matters within Mr Agresta's knowledge, and a document within his possession, it was readily available for use at the trial. Insofar as the evidence is part of the affidavit of Mr Nixon, it was not only obtainable, but actually obtained, for the purpose of the hearing below, but was not relied upon.

138 Nor is the second of the tests met. The evidence, if sought to be read in the court below, should have been rejected. If the evidence should have been rejected, there is no way it can be evidence that, if allowed, would have led to a high degree of probability that there would be a different result. In explaining why it should have been rejected I shall assume, for the purpose of argument, the application of the test of admissibility that is most favourable to the Appellant, which is that any evidence of surrounding circumstances that would be admissible to construe a contract in writing is admissible to construe the disputed words in this lease. I discuss below at para [148]-[177] whether that assumption is actually correct.

139 On the assumption about the test of admissibility that I am making, the reason why it should have been rejected is that it is not evidence of surrounding circumstances, in the sense of objective facts known to both of the contracting parties and capable of bearing upon the meaning of the words contained in a written contract. Rather, it is evidence of their respective subjective intentions. Evidence of negotiations and of the parties' intentions is not admissible, except to the extent that it might show some fact that both parties knew and that was relevant to construction: ***Prenn v Simmonds*** [1971] 1 WLR 1381 at 1385; ***Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*** (1979) 144 CLR 596 at 606; ***Codelfa Construction Pty Ltd v State Rail Authority (NSW)*** (1982) 149 CLR 337 at 352; ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] HCA 52; (2004) 219 CLR 165 at [40], 179; ***Franklins Pty Ltd v Metcash Trading Ltd*** [2009] NSWCA 407 at [24], [51].

140 That the evidence is inadmissible has the effect that, regardless of whether the ***Akins*** tests are met, and regardless of whether there is a discretionary reason for receiving the evidence notwithstanding that it does not comply with the ***Akins*** tests, it cannot be received in this Court. In that circumstance there is

no need to consider whether the basis on which the evidence is sought to be admitted (which is, essentially, a lack of preparation in the court below) can ever constitute a basis for receiving additional evidence on appeal.

141 The Notice of Motion that the Court receive additional evidence should be dismissed with costs.

PART D – ARE THE BUS SHELTERS "GENERAL ADVERTISING STRUCTURES"?

Planning Controls Relating to Advertising

142 Several provisions of the law relating to planning controls over advertising were referred to in the course of argument about whether the bus shelters were *"general advertising structures"* within the meaning of clause 15(d). Ordinance No 55 under the ***Local Government Act* 1919** was proclaimed in February 1933. It defined a *"General Advertising Structure"* as meaning, *"[a]ny structure used or to be used for the display of advertisements other than a commercial sign …"*. A *"commercial sign"* was defined so that it must be 4 feet or less in length and 2 feet or less in height, not illuminated, and with contents that related in one or more of several specified ways to the activities carried on in the premises in or on which the sign was displayed. The advertisements that could be displayed on the bus shelters involved in this litigation were clearly not commercial signs, within this definition.

143 Ordinance No 55 as proclaimed in 1933 was repealed and replaced by a different Ordinance No 55 on 30 March 1973 (*Government Gazette*, No 41, 30 March 1973, p 1062). That new Ordinance did not contain any definition of *"general advertising structure"*. Instead, clause 3 contained a definition: *"'advertising structure', means a structure used or to be used principally for the display of an advertisement"*.

144 That version of Ordinance No 55 was itself repealed, pursuant to the ***Subordinate Legislation Act* 1989**, on 1 September 1995.

145 The **Concord Planning Scheme Ordinance** was published in the New South Wales *Government Gazette* on 22 August 1969. As originally proclaimed, it contained clause 47:

> "(1) A person shall not erect a general advertising structure in Zone No 2(a), 2(b) or 2(c).
>
> (2) The provisions of subclause (1) of this clause shall not apply to a general advertising structure erected on premises within these zones to indicate the purpose for which the premises are used.
>
> (3) For the purposes of this clause, 'general advertising structure' shall have the meaning ascribed to it in **Ordinance No 55** under the Act."

Clause 47 continued to be in force for the whole of the time relevant to this litigation. Thus, it continued to include the definition of *"general advertising structure"* that had been contained in the version of Ordinance 55 that was current at the time the planning scheme was made, notwithstanding the later repeal of that version of Ordinance 55.

146 The ***Environmental Planning and Assessment Amendment Act* 1997** (No. 152 of 1997) inserted a definition of *"advertising structure"* into section 4 of the ***EPA Act***. That legislation was assented to on 19 December 1997, and commenced on 1 July 1998 (contrary to a submission made to us). The definition so inserted was *"a structure used or to be used principally for the display of an advertisement"*.

The Judge's Finding

147 The judge held that the bus shelters were *"general advertising structures"* within the meaning of clause 15(d). He rejected submissions that the expression *"general advertising structure"* in the lease should be construed by reference to any legislative instrument, whether it be the ***EPA Act***, Ordinance No 55, or the Concord Planning Scheme Ordinance. Instead, he construed the expression as a matter of ordinary language. In substance, he held a *"general advertising structure"* to be a structure for the purpose of carrying advertising that was not restricted to advertising of one particular person. He accepted that the primary function of the shelters was to provide seating and shelter for bus commuters, but held that that primary purpose did not stop them from also being general advertising structures.

Relevant Principles of Construction

Available Surrounding Circumstances

148 The orthodox approach to construction of a written agreement is that it involves:

> "… the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

(Per Lord Hoffmann, ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 WLR 896 at 912, approved in ***Maggbury Pty Ltd v Hafele Australia Pty Ltd*** [2001] HCA 70; (2001) 210 CLR 181 at [11], 188 per Gleeson CJ, Gummow and Hayne JJ (with whom Kirby J at [62], 205 and Callinan J at [89], 212 agreed generally on this point). To similar effect is ***Pacific Carriers Ltd v BNP Paribas*** [2004] HCA 35; (2004) 218 CLR 451 at [22], 462 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

149 As recognised by the Court's judgment in ***Pacific Carriers Ltd v BNP Paribas***, carrying out that task *"… requires consideration, not only of the text of the documents, but also the surrounding*

circumstances known to [the contracting parties], and the purpose and object of the transaction." In ***Reardon Smith Line Ltd v Hansen-Tangen*** [1976] 1 WLR 989 at 996 Lord Wilberforce said:

> "… When one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties."

150 The ordinary principles of contract law apply to leases: ***Progressive Mailing House Pty Ltd v Tabali Pty Ltd*** (1985) 157 CLR 17 at 29 per Mason J (with whom Wilson and Dawson JJ agreed), 40 per Brennan J, 53 per Deane J. This suggests that the construction of a lease should be carried out in accordance with the same principles as those applicable to any other written agreement. In ***Royal Botanic Gardens and Domain Trust v South Sydney City Council*** [2002] HCA 5; (2002) 76 ALJR 436 Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at [10]-[12] accepted the applicability to a registered lease of the principles of construction of a contract by reference to surrounding circumstances, that had been outlined by Mason J in ***Codelfa Construction Pty Ltd v State Rail Authority of NSW*** (1982) 149 CLR 337.

151 However, the way those principles come to be applied to a particular contract can be affected by aspects of the contract such as whether it is assignable, whether it will endure for a longer time rather than a shorter time, and whether the provision that is in question is one to which indefeasibility attaches by virtue of the contract being embodied in an instrument that is registered on a Torrens title register. All these are matters that would be taken into account by the reasonable person seeking to understand what the words of the document conveyed. That is because the reasonable person seeking to understand what the words convey would understand that the meaning of the words of the document does not change with time or with the identity of the person who happens to be seeking to understand the document. That reasonable person would therefore understand that the sort of background knowledge that is able to be used as an aid to construction, has to be background knowledge that is accessible to all the people who it is reasonably foreseeable might, in the future, need to construe the document.

152 ***Burns Philp Hardware Ltd v Howard Chia Pty Ltd*** (1987) 8 NSWLR 642 concerned the construction of a rent review clause in a lease that was registered under the ***RPA***. The rent review clause was one whereby the parties agreed that in certain circumstances they would abide by the decision of a valuer about the amount of the rent. The dispute related to the proper construction of the lease provision that stated the criteria by reference to which the reviewed rent was to be decided. Priestley JA (with whom Glass JA) said, at 655:

> "The contract was a lease for a term of ten years with options for renewal for two further ten year terms. The leased premises were commercial and in a city in which continual rebuilding was going on. The lessee was a public company. Changes in control of public companies were taking place as part of the ordinary course of commercial life in spasmodic and unpredictable ways. Either the reversion, or, in certain circumstances, the term might be assigned to parties ignorant of the pre-lease negotiations. The persons who negotiated a lease which might run for thirty years were almost certain not to be always available for

> consultation by lessor and lessee throughout the term. Of more particular importance in the present case, the lease itself shows that the parties to it intended that it should be read and acted on by a third person, a valuer, if the lessee so required, at times some distance from its commencement. These circumstances combine to make me think the parties negotiating and then executing the lease never contemplated and never intended that subsequent persons dealing with the lease on behalf of the lessor, the lessee or the valuer should in the event of doubt about the meaning of the lease have recourse to any but the most obvious extrinsic circumstances in order to be able to understand it and make it work. Stated positively, the terms of the lease itself and those few extrinsic circumstances I have mentioned make it clear that the parties to the lease intended it to state their full agreement and intended that its meaning be derived from the document itself and those surrounding circumstances likely to be within the knowledge of the persons who would be concerned with the administration of the lease during its existence."

153 Priestley JA cast his remarks about construction in terms of ascertaining what "*the parties to it intended*", rather than in terms of the modern orthodoxy that construction involves ascertainment of the meaning which a document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. However, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ said in ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** at [40], 179:

> "… References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction ***Pacific Carriers Ltd v BNP Paribas*** (2004) 218 CLR 451 at 461-462 [22]."

154 If references to the intention of the parties in the passage of Priestley JA are understood in the way explained in ***Toll***, it continues, in my respectful view, to correctly state the law. The fact that a lease is to endure for a long time, is assignable, is to be registered as a dealing under the ***RPA***, and may well on occasions need to be understood and acted upon by people other than the original parties to its creation are themselves relevant surrounding circumstances to the entering of the lease. They are the sort of background circumstances that anyone could infer from a perusal of the lease document itself. They are not background circumstances that are the particular, private knowledge of the people who entered the lease, but rather background circumstances of a type ascertainable by anyone who set out to understand the lease, even many years after it was entered. They are the type of background circumstances not dependent upon the chance of the person seeking to understand the document being able to locate and communicate with the people who negotiated it, and the negotiators still having documents or enough reliable memory for the surrounding circumstances to become known. They are surrounding circumstances that should lead a reasonable person seeking to understand the meaning of the document, to leave out of consideration other surrounding circumstances that are not likely to be ascertainable by others who wish to construe the document in the future.

155 ***Westfield Management Ltd v Perpetual Trustee Co Ltd*** [2007] HCA 45; (2007) 233 CLR 528 concerned the construction of the terms of a registered easement over ***Real Property Act*** land. The

easement had been created by the registration of an instrument under section 88B ***Conveyancing Act* 1919**. The dispute concerned the extent of user that was permitted by the terms of the grant. Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ described the types of extrinsic evidence that one party sought to use as aids to construction of the grant at [36] as including evidence of events after a deed that contained a covenant to grant the easement, evidence of the subjective intention of the then owner of the servient tenement, and evidence of a preceding oral agreement. Their Honours gave another characterisation of the disputed evidence at [41], as being evidence that *"goes to the intentions and expectations of the parties to the Instrument respecting the development of an area in the Central Business District of Sydney."* (The detail of the evidence that was in dispute appears from the judgment of Hodgson JA in the decision that the High Court upheld, ***Perpetual Trustee Company Ltd v Westfield Management Limited*** [2006] NSWCA 337; (2007) 12 BPR 23,793 at [16]-[17]). Their Honours rejected the admissibility of all that evidence, at [45]:

> "But none of the foregoing supports the admission in this case of evidence to establish the intention or contemplation of the parties to the grant of the Easement."

156 The specific reasons that their Honours gave for rejecting it are at [37]-[39]:

> "However, in the course of oral argument in this Court it became apparent that what was engaged by the submissions respecting the use of extrinsic evidence of any of those descriptions, as an aid in construction of the terms of the grant, were more fundamental considerations. These concern the operation of the Torrens system of title by registration, with the maintenance of a publicly accessible register containing the terms of the dealings with land under that system. To put the matter shortly, rules of evidence assisting the construction of contracts inter partes, of the nature explained by authorities such as ***Codelfa Construction Pty Ltd v State Rail Authority (NSW)*** (1982) 149 CLR 337 at 350-352, did not apply to the construction of the Easement.
>
> Recent decisions, including ***Halloran v Minister Administering National Parks and Wildlife Act 1974*** (2006) 229 CLR 545 at 559-560 [35], ***Farah Constructions Pty Ltd v Say-Dee Pty Ltd*** (2007) 230 CLR 89 at 167-172 [190]-[198], and ***Black v Garnock*** (2007) 230 CLR 438 at 443 [10], have stressed the importance in litigation respecting title to land under the Torrens system of the principle of indefeasibility expounded in particular by this Court in ***Breskvar v Wall*** (1971) 126 CLR 376. See also ***Figgins Holdings Pty Ltd v SEAA Enterprises Pty Ltd*** (1999) 196 CLR 245 at 264 [26]-[27]..
>
> The importance this has for the construction of the terms in which easements are granted has been remarked by Gillard J in ***Riley v Penttila*** [1974] VR 547 at 573 and by Everett J in ***Pearce v City of Hobart*** [1981] Tas R 334 at 349-350. The statement by McHugh J in ***Gallagher v Rainbow*** (1994) 179 CLR 624 at 639-640, that: '[t]he principles of construction that have been adopted in respect of the grant of an easement at common law ... are equally applicable to the grant of an easement in respect of land under the Torrens system' is too widely expressed. The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee cf ***Proprietors of Strata Plan 9968 v Proprietors Strata Plan No 11173*** [1979] 2 NSWLR 605 at 610-612."

157 The unavailability of extrinsic evidence to construe even a grant of an easement is not complete. In ***Westfield v Perpetual Trustee*** the High Court judgment at [44] acknowledges that evidence could be admissible

> "… to make sense of that which the Register identifies by the terms or expressions found therein. An example would be the surveying terms and abbreviations which appear on the plan found in this case on the DP."

Sometimes an indefeasible right might be granted in terms not fully understandable as a matter of general knowledge, eg an easement for rock anchors (***Pennant Hills Golf Club Limited v Roads and Traffic Authority of NSW*** [1999] NSWCA 110), and in such a case it may be necessary to resort to extrinsic evidence to understand the meaning of the words that identify the legal right to which indefeasibility attaches. Such extrinsic evidence is, however, of the meaning of an engineering or building technical term, and is in principle available to anyone.

158 It is important that what their Honours state is that it is *rules of evidence* assisting the construction of contracts inter partes, of the type referred to in ***Codelfa*** at 350–352, that do not apply to construction of the easement. They do not deny the applicability of the principle whereby a document will be construed as having the meaning that a reasonable reader, with such knowledge of the surrounding circumstances as is available to him or her, would attribute to it. If surrounding circumstances cannot be established by evidence to construe an easement, that does not mean that one is thrown back onto the discredited exercise of seeking to construe a document simply by reference to a supposed *"natural and ordinary meaning"* of the words. Rather, it means that the sort of surrounding circumstances to which one can look are limited to those that one can know without evidence from outside the terms of the document itself.

159 A question arises of how the principles that their Honours stated at [37]-[39] apply concerning covenants in a registered lease. Their Honours did not state the principles at [37]-[39] any wider than by reference to what extrinsic evidence could legitimately be used to construe the words of the grant of an easement. There are some differences between the grant of an easement, and the entering of a registrable lease that is ultimately registered. The grant of an easement is the creation of a legal property right. When the easement is created by registration of a section 88B instrument, it can be a unilateral act by the grantor, rather than a consensual one. (Indeed, frequently the creation of an easement is a unilateral act, occurring when a subdivider of land registers a plan of subdivision and an 88B instrument in anticipation of eventual sale of lots in the subdivision). A lease, by contrast, is a consensual document, and creates both contractual rights and property rights.

160 Even recognising these differences, the reasons that their Honours give are capable of applying to a registered lease. The first reason that their Honours give concerns the importance of indefeasibility. Insofar as the inapplicability of the ***Codelfa*** rules of evidence rests on the importance of indefeasibility,

one would expect that the same result would apply concerning the construction of the terms of any estate or interest, or covenant, to which indefeasibility attached.

161 Relevantly for present purposes, there can be some provisions of a registered lease to which indefeasibility does not attach: ***Mercantile Credit Ltd v Shell Co of Australia Ltd*** (1976) 136 CLR 326; ***PT Ltd v Maradona Pty Ltd*** (1992) 25 NSWLR 643 at 681; ***Pyramid Building Society (in liq) v Scorpion Hotels Pty Ltd*** (1998) 1 VR 188 at 196; ***Small v Tomassetti*** [2001] NSWSC 1112 (*"indefeasibility for what?"*); ***Chandra v Perpetual Trustees Victoria Ltd*** [2007] NSWSC 694. The covenant contained in the new clause 15(d) that was introduced by the Variation of Lease does not create any interest in the land. It is in the nature of a contractual right only, that the Lessee has if the Council engages in a particular type of conduct. That conduct need not have any connection with the land the subject of the lease. Clause 15(d) is not a covenant that touches and concerns the land itself, or that delimits or qualifies a registered interest. For those reasons, it is not the type of covenant to which indefeasibility attaches: ***PT Ltd v Maradona Pty Ltd*** at 679; ***Karacominakis v Big Country Pty Ltd*** (2000) 10 BPR 18,235 at 18,247, and see generally Peter Butt, *Land Law*, 6th ed (2010) at para [20 22]. Thus, any limitation on the availability of extrinsic evidence as an aid to construction by reason of indefeasibility of a registered instrument would not apply in relation to the construction of the new clause 15(d).

162 However, the final sentence in para [39] of ***Westfield v Perpetual Trustee*** is not dependent upon any considerations of the extent of indefeasibility, but rather on the inherent probabilities concerning the inquiries that a purchaser of Torrens title land will make. An example of the type of evidence that their Honours evidently (from the *"cf"* before the reference to ***Proprietors SP 9968 v Proprietors SP 11173*** [1979] 2 NSWLR 605 at 610-612) had in mind as unlikely to be sought out by someone searching the Register was the sort of evidence admitted in ***Proprietors SP 9968 v Proprietors SP 11173***. That litigation was conducted in 1977 about the permitted extent of use of a *"right of way"*. Evidence was received about the physical layout of the *locus in quo* and its surrounds at the time of the grant in 1928, including the relative land levels at the time, and the *"intended use"* of an area near the *locus in quo*, being a use that would make the site of the right of way unsuited for vehicular traffic. (However, as one would expect from Needham J, that evidence was not decisive, and the construction that he adopted depended on facts ascertainable on a search of the register.) The inherent probabilities of what inquiries a purchaser of the benefit of the leases in the present case are likely to make are not changed by the particular covenant in clause 15(d) not having the benefit of indefeasibility.

163 The terms of the leases show that there might be such a purchaser. The Leases as originally executed did not contain any prohibition against assignment. There were provisions that specifically contemplated assignability of the lease. There was a definition whereby:

> " 'The Lessee' means and includes the Lessee and where the Lessee is a Body Corporate its successors and assigns and where a natural person his executors, administrators and assigns."

The definition of *"the Lessor"* similarly contemplated that the Lessor might assign its interest.

164 The Variation of Lease documents narrowed the original definition of Lessee by replacing it with:

> " 'Lessee' means and includes Phoenix Commercial Enterprises Pty Limited".

Similarly, the Variation of Lease documents replaced the definition of *"Lessor"* with one whereby it *"means and includes Concord Council"*.

165 However, the combination of the *"means and includes"* terminology in these definitions and the new clause 1.2(f) (quoted above at para [99]) reintroduced the notion that either the Lessor or the Lessee might assign. Notwithstanding the reference to *"permitted assigns"* in clause 1.2(f), the Variation of Lease documents did not impose any restriction on the Lessee or Lessor assigning the benefit of the lease. Thus, at all times the lease in question in this case was assignable by both parties.

166 In these circumstances, the surrounding circumstances that can be used as an aid to construction of clause 15(d) are limited to ones that one can know without evidence from outside the terms of the document itself. That is consistent with the account that Priestley JA gave in ***Howard Chia***. It is also consistent with the surrounding circumstances that the majority judgment in ***Royal Botanic Gardens*** at [11] approved and took into account to construe the scope of *"additional costs and expenses"* in a clause of the lease of the site of the Domain parking station:

> "(a) the parties to the transaction were two public authorities;
>
> (b) the primary purpose of the transaction was to provide a public facility, not a profit;
>
> (c) the lessee was responsible for the substantial cost of construction of the facility;
>
> (d) the facility was to be constructed under the lessor's land and would not interfere with the continued public enjoyment of that land for its primary object, recreation;
>
> (e) the parties' concern was to protect the lessor from financial disadvantage from the transaction; and
>
> (f) the only financial disadvantage to the lessor which the parties identified related to additional expense which it would or might incur immediately or in the future."

Technical Legal Terms

167 There has long been a principle of construction concerning words or phrases that have a specialised or technical meaning in the law whereby*: "[w]hen technical words or phrases are made use of, the strong presumption is, that the party intended to use them according to their correct technical meaning …",* per Plumer MR ***Cholmondeley v Clinton*** (1820) 2 Jac & W 1 at 91; (1820) 37 ER 527 at 559. That presumption is rebuttable. To similar effect is ***Leach v Jay*** (1878) 9 ChD 42 at 45 per Bramwell LJ;

Smith v Butcher (1878) 10 ChD 113 at 114 per Jessell MR, and ***Re Bostock's Settlement; Norrish v Bostock*** [1921] 2 Ch 469 at 480 per Lord Sterndale MR.

168 In ***Sydall v Castings Ltd*** [1967] 1 QB 302 at 313-314 Diplock LJ explained the principle:

> "Documents which are intended to give rise to legally enforceable rights and duties contemplate enforcement by due process of law, which involves their being interpreted by courts composed of judges, each one of whom has his personal idiosyncracies of sentiment and upbringing, not to speak of age. Such documents would fail in their object if the rights and duties which could be enforced depended on the personal idiosyncracies of the individual judge or judges on whom the task of construing them chanced to fall. It is to avoid this that lawyers, whose profession it is to draft and to construe such documents, have been compelled to evolve an English language, of which the constituent words and phrases are more precise in their meaning than they are in the language of Shakespeare or of any of the passengers on the Clapham omnibus this morning. These words and phrases to which a more precise meaning is so ascribed are called by lawyers 'terms of art', but are in popular parlance known as 'legal jargon'. We lawyers must not allow this denigratory description to obscure the social justification for the use of 'terms of art' in legal documents. It is essential to the effective operation of the rule of law. The phrase 'legal jargon', however, does contain a reminder that non-lawyers are unfamiliar with the meanings which lawyers attach to particular 'terms of art', and that where a word or phrase which is a 'term of art' is used by an author who is not a lawyer, particularly in a document which he does not anticipate may have to be construed by a lawyer, he may have meant by it something different from its meaning when used by a lawyer as a term of art."

169 Kim Lewison, *The Interpretation of Contracts*, 4th ed, (2007) states the principle at [5.08]:

> "Where a document contains a legal term of art the court should give it its technical meaning in law, unless there is something in the context to displace the presumption that it was intended to carry its technical meaning."

170 In ***Ferris v Plaister*** (1994) 34 NSWLR 474 at 498 Mahoney JA recognised:

> "… a legitimate predisposition to conclude that the draftsman intended the words used by him to be construed in the light of the recent judicial considerations of them."

171 The existence of any presumptions of construction might at first sight appear not to sit particularly comfortably with the approach to construction that the High Court has now clearly established. That approach involves ascertaining what the reasonable reader would take the words of the particular document, in its context, to mean. It seems to require that it is by reference to the individual document, in its individual context, that one arrives at a construction.

172 But the context that can be relevant to construction of a contract can include the setting of social practices and institutions (including the law) within which the contract will operate. In ***Maggbury Pty Ltd v Hafele Australia Pty Ltd*** [2001] HCA 70; (2001) 210 CLR 181 at [11], 188, Gleeson CJ, Gummow and Hayne JJ explicitly acknowledged that the "*background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract … may include matters of law*". Their Honours cited the speech of Lord Clyde in ***Bank of***

Credit and Commerce International SA v Ali [2001] UKHL 8; [2001] 2 WLR 735 where he said (at [78]) that *"[t]he knowledge reasonably available to [the parties] must include matters of law as well as matters of fact."* In ***Royal Botanic Gardens*** at [12] the majority judgement said that, in construing the lease in question:

> "… both parties to the lease and their successors have been public bodies, moving within legislative regimes with which the common law respecting contracts for leases and leases interacts. Therefore … it is necessary to view the particular circumstances with an appreciation of the legislation."

173 In ***Gardiner v Agricultural and Rural Finance Pty Ltd*** [2007] NSWCA 235, Spigelman CJ construed a contract that dealt with a field of commerce that was the subject of detailed legislative regulation (in that case, making available prescribed interests to potential investors). A relevant surrounding circumstance was the regulatory scheme itself. He said, at [24]:

> "Many of the detailed provisions of the interrelated agreements reflect requirements under the **Corporations Law** including, perhaps most materially, the requirement for an independent Trustee with defined rights and obligations. For these reasons the task of interpretation before the court must commence with an understanding of the **Corporations Law** requirements."

The persuasiveness of those remarks is not altered by the subsequent reversal of the decision in the High Court: ***Agricultural and Rural Finance Pty Ltd v Gardiner*** [2008] HCA 57; (2008) 238 CLR 570.

174 If the document in question is drawn by a lawyer, is manifestly intended to effect a legal transaction, and uses an expression that is not an expression in common use but that has a meaning in an area of legal discourse that is relevant to the document in question, that in itself provides a basis for the reasonable reader concluding that that expression is used in its special legal sense, unless there are other factors present that show it is not used in that special legal sense. So understood, the presumption is consistent with the current approach to construction.

175 The leases in the present case were obviously drawn by lawyers, and effect a legal transaction. Thus, if they use an expression that is not an expression that is part of everyday English but that has a special meaning in the law, that in itself is a reason for a reasonable reader taking the view that, unless there are other factors, the expression is used in its legal sense. The Court is able to know the meaning of technical legal terms without the calling of extrinsic evidence (*Cross on Evidence*, 8th Aust ed (2010) para [3075]), so taking such a meaning into account does infringe any limitations on the availability of extrinsic evidence.

176 In particular, as a specific application of the general test about when surrounding circumstances can be used as an aid to construction, if a reasonable person with the relevant background knowledge would read some particular contractual provision in light of the provisions of a statutory context within which the contract is to operate, then that statutory context can be a legitimate aid to construction.

177 I do not see any particular difficulty, if this test is met, arising from the use of a statutory context to construe a provision in a registered dealing. The state of the statute law governing a particular area of human activity is ascertainable by anyone minded to find it out, and notwithstanding that many years might have passed.

Construction of "General Advertising Structure"

178 While each of the words *"general"*, *"advertising"*, and *"structure"* is an ordinary English word, the composite expression *"general advertising structure"* is not an expression in ordinary use. Further, it is not at all clear, as a matter purely of ordinary English use, what the concatenation of the three words means. It might mean a structure that is used for general advertising, in the sense of advertising directed at everyone, rather than advertising directed to a particular group in the way that cinema advertising is directed. It might mean an advertising structure of a general type, rather than some specific type of advertising structure. It might have the meaning the judge held it to have. While, under the principles for construction of contracts in writing, it is not necessary for there to be ambiguity before resort can be had to surrounding circumstances (***Franklins v Metcash*** at [14]-[18], [42]-[43], [239]-[305]), when there is significant ambiguity in the text, the reasonable person seeking to understand the words is likely to look to such surrounding circumstances as are properly available for assistance.

179 *"General advertising structure"* is a technical legal term, which has a meaning in the precise field of discourse with which clause 15(d) deals. The factors that I mentioned at para [175] above provide a reason why a reasonable reader would, absent countervailing reasons, understand it as having that technical meaning.

180 I turn to consider whether there are any countervailing reasons. The lease documentation refers to a structure having something to do with advertising by various different expressions. In the original leases the signs that the Appellant was contemplating constructing on the land were referred to as being, simply, either an *"advertising display structure"* or an *"advertising structure"* (clause 7, clause 8, clause 10(a)). The specific improvements that the Appellant was proposing to erect were referred to as being the *"Advertising Display Structure"*, capitalised (definition clause 1, clause 15(a), (d) and (e), clause 19). The type of entity, approval to the erection of which would trigger an abatement of the additional Lease Fee under clause 18 of the original leases, was an *"advertising structure"*. The two Building Approvals referred to *"your application to erect advertising sign structure at the above premises"*.

181 It was in the new clause 15(d), introduced by the Variation of Lease documents, that the expression *"general advertising structure"* first appears in the lease documentation. Clause 15(d) is the only place in the registered leases where that expression appears. That provides some textual basis for

construing it as having a meaning different to that of the other expressions used for a structure that has something to do with advertising.

182 However, clause 7 of each of the original leases (para [89] above) and the replacement clause 7 in the Variation of Lease documents (para [103] above) each incorporated into the lease the terms of both the Development Approval, and any building approval. Each of the original Development Approvals gave consent *"for the erection and use of a general advertising structure"*, and made specific reference to Ordinance 55 (twice) (para [106] above). Each modification of the Development Consent was expressed to be in terms of *"the erection and use of a general advertising structure"* (para [107] above). That these consents are incorporated by reference into the leases, and use the expression *"general advertising structure"* in a way that makes clear that it is the defined meaning in Ordinance 55 that is intended, provides a reason for reading that expression in clause 15(d) in the same way.

183 Another aspect of the context leads to the same conclusion. The context in which *"general advertising structure"* appears in clause 15(d) shows that a *"general advertising structure"* is the sort of thing of which the Council might *"approve"*, and approve when acting *"in its capacity as consent authority"*. This provides, in my view, a textual link between *"general advertising structure"* and the types of things that the Council *"in its capacity as consent authority"* has the power to *"approve"*. Whatever the precise shade of meaning of *"in its capacity as a consent authority"* might be, it fairly clearly has something to do with the Council exercising an official power to grant a consent. In my view, the reasonable person seeking to ascertain the meaning of the words in the documents would seek to find out, as an aid to construction, the types of structures connected in some way with advertising that the Council had an official power to grant a consent to. That leads one to Ordinance 55.

184 As observed earlier, the amendment of the ***EPA Act*** to insert a definition of *"advertising structure"* did not commence until after the Variation of Lease documents were entered, and thus that definition is not part of the relevant surrounding circumstances.

185 In my view, the expression *"general advertising structure"* in clause 15(d) should be construed as having the meaning given it by the relevant planning instrument, namely the Concord Planning Ordinance 1969. In accordance with that construction, the bus shelters were *"general advertising structures"*.

186 The Council argued that a reasonable and commercial approach to construction of the leases would lead to the view that the bus shelters were not *"general advertising structures"*. The Council drew attention to the vast difference in size between the advertisements displayed on the bus shelters and those displayed on the Appellant's billboard, and the much lower traffic flow on the suburban streets in which the bus shelters are located by comparison with the traffic flow on the motorways that is exposed to the Appellant's billboards. It is not even as though the bus shelters were in close and direct competition with the Appellant's billboards, as they could not be used to display smaller versions of the

same advertisement as were displayed on the Appellant's billboards. This was because the bus shelters display advertisements that are in portrait mode, while the Appellant's billboards displayed advertisements that were in landscape mode.

187 These differences might lead one to wonder why the parties had agreed (if this is indeed the effect of clause 15(d)) that approving the erection of a bus shelter should bring about such a large abatement in the rental (particularly when there were already 17 bus shelters on the streets of the Council bearing advertisements at the time of entry of the Variation of Lease documents), but those matters do not lead me to conclude that the words *"general advertising structure"* have any meaning different to that which I have decided is the correct one.

PART E – "In its Capacity as Consent Authority"

Legislative Provisions

188 Some provisions about ownership and control of roads, and about the seeking and obtaining of development consents, were referred to as part of the argument about whether the Council grant its approval *"in its capacity as consent authority"*.

Legislative Provisions Concerning Roads

189 Section 232 ***Local Government Act* 1919** vested the fee simple of roads within a local council's area in that council, unless another statutory provision said otherwise. In the present case we were not informed of any other statutory provision that said otherwise. Section 249 ***Local Government Act*** conferred the care, control and management of roads on the local council.

190 At the time, section 7(4) ***Roads Act* 1993** had the effect of making the Council the *"roads authority"* for those public roads within its area that are relevant to the present case.

191 Other relevant provisions of that version of the ***Roads Act*** were:

> "138(1) A person must not:
>
> (a) erect a structure or carry out a work in, on or over a public road; …
>
> otherwise than with the consent of the appropriate roads authority.
>
> Maximum penalty: 10 penalty units.
>
> 139(1) A consent under this Division:

(a) may be granted on the roads authority's initiative or on the application of any person; and

(b) may be granted generally or for a particular case; and

(c) may relate to a specific structure, … or to structures, … of a specified class; and

(d) may be granted on such conditions as the appropriate roads authority thinks fit. …

140 A roads authority may at any time and for any reason revoke a consent under this Division by notice in writing served on the person to whom the consent was granted.

141 While a consent under this Division is in force, the taking of action in accordance with the consent is taken not to constitute a public nuisance and does not give rise to an offence against this or any other Act."

192 Section 145(3) ***Roads Act*** provides:

"All public roads within a local government area (other than freeways and Crown roads) are vested in fee simple in the appropriate roads authority."

Provisions of the ***EPA Act***

193 At the time of execution of the original leases the ***EPA Act*** included in section 4 a definition that:

"***consent authority***, in relation to a development application, means:

(a) the council having the function to determine the application, or

(b) where an environmental planning instrument specifies a Minister or public authority (other than a council) or the Director as having the function to determine the application—that Minister or public authority or the Director as the case may be.

development, in relation to land, means:

(a) the erection of a building on that land,

(b) the carrying out of a work in, on, over or under that land,

(c) the use of that land or of a building or work on that land, and

(d) the subdivision of that land,

but does not include any development of a class or description prescribed by the regulations for the purposes of this definition.

development application means an application for consent under Division 1 of Part 4 to carry out development.

development consent means consent under Division 1 of Part 4 to carry out development"

194 Division 1 of Part 4 stretched from section 75 to section 105. It contained a detailed regime regulating who could make development applications, the content of development applications, the procedures to be followed and matters to be taken into account in determining a development application.

The Decision Below

195 The judge accepted that in passing the resolution of 22 February 2000, the Council was not exercising any function as a consent authority under the ***EPA Act***. That finding is not challenged. However, the judge held that as section 138 ***Roads Act*** required the consent of (in this case) the Council before a structure could be erected in the part of the public road that constituted the footpath, and the Council gave that consent by its resolution of 22 February 2000 and its communication of that resolution to Adshel, that amounted to the Council approving of the erection of the structures in its capacity as consent authority.

Discussion

196 The expression *"in its capacity as consent authority"* appears in both clause 18 of the original leases (para [92] above), and in the new clause 15(d) inserted by the Variation of Lease documents (para [104] above). The expression *"consent authority"* is not defined in the leases. The words *"consent"* and *"authority"* are both ordinary English words (though each with multiple meanings). However, the composite expression *"consent authority"* is not a matter of ordinary English. It does not appear in the Macquarie Dictionary (though *"local authority"* and *"statutory authority"* appear there). It does not appear in the Oxford English Dictionary. It is, however, an expression that has a specific technical legal meaning, applicable in the precise field of discourse with which clause 15(d) deals. The matters to which I have referred at para [175] above provide some reason for the reasonable reader taking its meaning to be that technical meaning.

197 The implication one would ordinarily draw from the expression *"In its capacity as consent authority"* in clause 15(d) is that should the lessor, in some capacity other than as consent authority, approve the erection of a general advertising structure within its local government area, then clause 15(d) would not be triggered. That appears to leave open the possibility that such approval might be given other than *"in its capacity as consent authority"*. In other words, the mere fact that the Council approves the erection of a general advertising structure is not enough to show that the clause is triggered.

198 If one tries to make sense of the expression *"in its capacity as a consent authority"*, treating it as a clumsy piece of ordinary English, it appears to have something to do with the Council exercising an

official power to grant a consent. The type of consent that is relevant to section 138(1) of the ***Roads Act*** can only be described as being granted under an official power to grant consent in a stretched and artificial version of that expression. Section 138(1) does not take the form of conferring on the Council any statutory power to grant consent to the erection of a structure in a public road. Rather, it is a prohibition, directed to people generally, of erecting a structure in a public road in circumstances where the Council has not given its consent. Section 138 is a provision that creates a criminal offence. The power that the Council has to grant consent to the erection of a structure in a public road arises as a legal incident of the Council owning the road, not because it has a statutory power to grant a consent. While sections 139–141 refer to a *"consent under this Division"*, that means nothing more than a consent of the type that is referred to in the Division.

199 Some internal textual matters in the leases support the view that a *"consent authority"* means a consent authority within the meaning of the ***EPA Act***. Clause 7 of the leases as originally entered (para [89] above), and as replaced by the Deeds of Variation (para [103] above) each incorporated the provisions of the development building approval into the conditions of the leases. The original Development Consent (para [106] above) modified development consent (para [107] above) each use the expression *"consent authority"* in a sense meaning consent authority within the meaning of the ***EPA Act***.

200 In my view the consent of the Council to the advertising shelters was not given *"in its capacity as consent authority"* and thus clause 15(d) was not triggered.

PART F – ISSUES ON THE APPEAL

201 In light of the conclusion I have reached so far, the matters argued in the appeal do not arise. However, I will deal with one of them briefly, on the assumption that, contrary to my own view, the action of the Council in granting consent to the erection of the bus shelters triggered clause 15(d).

One Payment or Multiple Payments?

202 The judge found, at [75], that even though there was only a single resolution of the Council, multiple approvals were given. No cross-appeal is brought from that finding.

203 It will be recalled that the approval that the Council gave on 22 February 2000 was to the erection of an additional 10 bus shelters bearing advertising. Notwithstanding that, the basis on which the Appellant put its case related to only three of those approvals. It contended that clause 15(d) operated separately in relation to each of those approvals, so that the Council had an obligation to make a payment pursuant to clause 15(d) concerning each of those approvals.

204 In my view, the question of whether the Council can ever become liable to make more than one payment under clause 15(d) is resolved by considering the terms of the leases themselves.

205 Clause 15(d) is triggered by the Council giving the appropriate approval, not by the approval actually being acted upon.

206 If clause 15(d) is triggered, the Council must pay *"25% of the Rental corresponding to the amount of time remaining within the Term."* The *"Term"* is explicitly defined in the Variation of Lease documents. The only possible meaning for that expression in the Victoria Avenue lease is that it refers to the entire term of the lease, from 16 February 1997 (which is *"the date of this Lease"*) until 1 January 2008. Analogously, for the Young Street lease it is 24 April 1997 until 1 January 2008. *"Rental"* is also defined. The definition of *"Rental"* clearly means the *"amount stipulated in the schedule hereto"* of Lease Fee that accrued due up to the date of execution of the Deed of Variation, plus (*"for the remaining Term from the date of execution of this Deed of Variation"*) the amount of $900,000. While there is a difficulty of construction about what is meant by *"amount stipulated in the schedule hereto"* that I mentioned in para [99] above, a process of construction will be able to fix on one or other of those meanings, if it became necessary to do so. The *"Rental"* is a number of dollars that never changes, regardless of how much of the *"Rental"* the Appellant might pay, whether by payment in actual money or by set-off, if set-off were available.

207 If an event triggering clause 15(d) occurs, one is to ascertain the amount of time that remains within the Term. One then calculates the percentage (which I will call "X" percent) that the remaining amount of time is of the total amount of time in the Term. The amount that the Council must pay pursuant to clause 15(d) is X percent of 25% of the Rental. If clause 15(d) could be applied more than once, exactly the same amount of money would become payable pursuant to it every single time it was applied.

208 This construction of how the amount payable under clause 15(d) is calculated for each approval is consistent with how similar language in clauses 15(b) and (c) operates. Clause 15(b) and (c) deal with what is to happen in relation to two specific events, each of which would be calculated to destroy or damage the benefit the Lessee could get from its advertising signs. In either of those events, the Council is required to pay *"the proportional amount of the Rental corresponding to the amount of time remaining within the Term"*. Those amounts are calculated in the same way as the amount payable under clause 15(d) save only that it is a full X percent of the Rental that becomes payable if clause 15(b) or (c) is triggered, while it is only 25% of X percent of the Rental that is payable if clause 15(d) is triggered.

209 There are words in clause 15(c) that make clear that it can be exercised only once. That is because it is only after the Lessee has exercised its right to terminate the lease/s, because of the obliteration, obscuring or interference with the advertisements, that the obligation to make the payment arises. There are no corresponding words in clause 15(b) to make clear that a payment under it can be made

only once, but the fact that clause 15(c) can be exercised only once is consistent with clause 15(d) also being exercisable only once.

210 Each of clause 15(b), (c) and (d) take the form of imposing on the Council an obligation to pay a sum of money if an event occurs. The relevant event, under clause 15(d) is if the Council, in its appropriate capacity, approves *"the erection of **a** general advertising structure …"*. That use of the singular provides a further textual clue, though admittedly not a strong one, to the meaning of the words being such that clause 15(d) can operate only once. While the Deeds of Variation inserted, by the new clause 1.2, an interpretation clause (para [99] above), that interpretation clause did not include the provision commonly included in such clauses to the effect that the singular shall include the plural and vice versa.

211 A powerful aid to construction is the principle that a contract should be construed so as to result in a sensible commercial meaning: ***McCann v Switzerland Insurance Australia Ltd*** [2000] HCA 65; (2000) 203 CLR 579 per Gleeson CJ at [22], 589. If clause 15(d) were capable of multiple applications, it could happen that the amount payable pursuant to clause 15(d) came to exceed the Rental. It would take the giving of more than four approvals before that result arose. How many more would depend upon at what stage in the Term each approval in question was given. Even so, that possibility is one that is so uncommercial that it is unlikely to be the correct construction. Its uncommerciality is underlined by the fact that a *"general advertising structure"* could, depending on its size and location, be the sort of thing that had no effect, or a negligible effect, on the commercial value of the rights conferred on the Lessee by the leases. In my view, clause 15(d) operates only once.

212 Both in the court below, and in this Court, the Appellant submitted that clause 15(d) had what it called a *"cascading operation"*, which could never result in the Council being liable to pay more under clause 15(d) than the outstanding rent for the balance of the term. The judge summarised the argument as follows, at [80]:

> "The plaintiff submitted that that liability was set off against the lessee's obligation to pay rent and the set-off operated as a payment. The second approval under clause 15(d) required the Council to pay an amount equivalent to 25 percent of the remaining *unpaid* rent corresponding to the amount of time remaining within the term, that is, 25 percent of 75 percent of the original amount of outstanding rent. The third approval required the Council to pay an amount equivalent to 25 percent of 56.25 percent of the outstanding rent. Had there been more approvals (as in fact there were, although the plaintiff did not rely on them) the Council's liability under clause 15(d) would be to pay 25 percent of a successively diminishing sum, to be set off against the plaintiff's liability for outstanding rent."

213 It seems to me that this manner of operation of the clause could more accurately be called an asymptotic operation, as under it with each succeeding approval the amount that the council is obliged to pay under clause 15(d) approaches closer to, but never actually reaches, zero.

214 It is to be observed that an essential component of this argument is that the Council's obligation to make a payment under clause 15(d) was set off against the Lessee's obligation to pay rent. The judge initially approached the construction of the clause by assuming, without deciding, that the Appellant was correct in contending there could be such a set off. He continued, at [81]-[82]:

> "Nonetheless, I do not accept the plaintiff's construction of clause 15(d). It requires reading clause 15(d) as if it required the Council to pay to the plaintiff an amount equivalent to 25 percent of the *unpaid* rent corresponding to the amount of time remaining within the term. The clause does not so provide. There is nothing in the definition of *'Rental'* which supports a construction that it means unpaid rent. There is no logical reason why the plaintiff should be in a worse position in terms of its ability to recover moneys under clause 15(d) if it paid all or part of the rent before the expiry of five years after the Deed of Variation was entered into than if it did not.
>
> Accordingly, I do not accept that the potentially harsh operation of the clause can be mitigated by the construction contended for by the plaintiff. That potentially harsh operation is highlighted by the fact that the Council gave approvals for the erection by Adshel of ten general advertising structures. The fact that the plaintiff relies only on three such approvals does not affect this. To avoid giving the clause an unbusiness-like construction, it should be interpreted as requiring the Council to pay an amount equivalent to 25 percent of the rent corresponding to the amount of time remaining within the term, whether it gave one or more than one approval to the erection of a general advertising structure or structures on other land within the Council's area."

215 In my view, that reasoning is correct.

216 The parties may have conducted the trial upon the basis that the Rental was $900,000, and that the Term was nine years and eleven months from 1 February 1998 to 1 January 2008. If that is the basis on which the parties conducted the trial, they would be held to it in relation to the calculation of any amount that was required to be reflected in any orders made in consequence of the appeal. If that were the correct construction, it would affect the mathematics of the calculation of amounts that fell due under each of clause 15(b), (c) and (d), but not the construction of them that I have outlined above. In the circumstance where I have decided that clause 15(d) did not operate at all, on the facts of the case, it does not matter.

217 It would be necessary for clause 15(d) to be capable of operating more than once for the remaining issues on the appeal to arise. In the circumstance where I have held that clause 15(d) does not operate at all, and that even if I were wrong in having concluded that the Council did not, in its capacity as a consent authority, give consent to the erection of a general advertising structure, clause 15(d) would operate only once, it is unnecessary to consider the remaining issues on the appeal.

PART G – LIVE REMAINING ISSUES

Application to Amend Statement of Claim and Re-open

218 The additional facts that the Appellant sought to allege in the amendment it sought to make to the Statement of Claim (para [74] above), related to the Council's approval of alterations to the portion of each of the existing bus shelters that contained advertising.

219 A facsimile bearing the date 12 July 1999 from an Adshel executive to an officer of the Council stated:

> "Further to our phone conversation this morning following are the details requested for Council to approve conversions of light boxes to the international standard format (1.8 meters by 1.2 meters):
>
> We are planning to do the conversions during the month of August 1999.
>
> The increased size panel will commend a better rate in the advertising market and subsequently Concorde [sic] Council will receive a larger amount of dollars as the revenue share is calculated as a certain percentage of the advertising revenue …"

220 A reply from the Council to Adshel that bears date 7 June 1999 (the date is clearly wrong, but that is of no consequence) said:

> "I refer to your facsimile dated the 12th July 1999 concerning the proposed conversion of the existing advertising panels on Adshel bus shelters, located within the Council LGA, to the international standard format (1.8m x 1.2m).
>
> Council approves this work and requests that this work is carried out with consideration to the safety of bus commuters and pedestrians."

221 This new size is only marginally wider than the size of the panels that Adshel had originally installed, but there is an increase in height of the order of 50%. Implementation of the Council's approval would necessarily have involved reconstruction of the end of each bus shelter that contained an advertising panel.

222 An additional argument that the Appellant wished to put was that approval of these alterations to the existing bus shelters amounted to the giving of twenty additional approvals within the meaning of clause 15(d). As well, further factual investigation suggested that the Council had given approval to the three bus shelters on which the Appellant based its claim for reduction of the rental on somewhat different dates to 22 February 2000. Amending those dates would alter the calculation of the amounts payable by the Council (on the Appellant's case) pursuant to clause 15(d) and (e). Some other amendments were also sought to be made to the allegations about why the termination was invalid, and why the Council had engaged in misleading and deceptive conduct. It was also sought to add a pleading that the Council's silence in not informing the Appellant that it had approved the erection of the bus shelters was itself misleading and deceptive conduct.

223 The judge refused the application. While the judge gave various reasons for refusing the amendments, one of them, at [128] is that they would be futile because they would not affect the outcome of the proceedings.

224 On the appeal, the application to amend was pressed only in relation to the alleged twenty additional approvals.

225 On the basis of the findings I have already made, the application to amend would have been futile. The application for leave to appeal from his Honour's refusal of leave to amend should be dismissed, with costs.

Cross-Appeal on Costs

226 When the judge gave his separate reasons for judgment concerning costs on 25 March 2009 he took the view that while the Council had had substantial success in the overall outcome of the litigation, the Appellant had succeeded in reducing the amount that the Council claimed because clause 15(d) had operated once. Thus he ordered the Appellant to pay three-quarters of the Council's costs of the proceedings.

227 The Council's cross-appeal includes an appeal against that costs order. It is not suggested that there is any basis for success of this part of the cross-appeal, independent of whether the Council succeeds in establishing that clause 15(d) was not triggered.

228 When the Council has established that clause 15(d) was not triggered, the basis for the costs order below has fallen away. Costs in the court below should follow what has become, as a result of this decision, the event.

Orders

229 The orders made in the court below were:

> "1. I give judgment for the first defendant against the plaintiff in the sum of $948,671.55.
>
> 2. I order that the plaintiff's claims for relief against the first defendant in the statement of claim be dismissed.
>
> 3. I declare that the lease between the plaintiff and first defendant registered 3842836T as varied by lease 3842837R was validly terminated by the first defendant;
>
> 4. Declare that the lease between the plaintiff and first defendant registered 3842834X as varied by lease 3842835V was validly terminated by the first defendant;

5. I declare that the advertising structures on the land, the subject of the leases referred to in declaration 3 and 4, become the property of the first defendant on termination of the leases.

6. I order that the first defendant's claims for relief in the cross-claim be otherwise dismissed.

7. I order that the plaintiff's notice of motion dated 4 February 2009 be dismissed.

8. I order that the plaintiff pay the first defendant's costs of the said notice of motion.

9. Except as otherwise provided by the preceding or earlier orders, I order that the plaintiff pay three quarters of the first defendant's costs of the proceedings.

10. The exhibits may be returned after 28 days."

230 Of these, in my view only orders 1 and 9 that will require alteration to give effect to the results of this appeal. It will be necessary for calculations to be performed to take account of prejudgment interest in relation to a replacement for order 1. That means it is not possible to make orders now that finally dispose of the appeal. I envisage that if interest is calculated to a date that approximates when the final orders will be made, that date can be nominated as the effective date of the judgment, from which post-judgment interest will then run in accordance with the rules. Proceeding in that way means that any discrepancy between the date nominated as the effective date, and the date when the final orders are actually made, prejudices neither party.

231 As the appropriate amount of the judgment is simply a matter of arithmetical calculation, I see no reason why the parties should not be able to agree upon it, and the proceedings be disposed of by an order in chambers.

232 I have already indicated (para [141] above) that the Notice of Motion that the Court should receive additional evidence should be dismissed with costs.

233 While the Notice of Motion seeking to strike out the Notice of Cross-Appeal was not proceeded with (para [77] above), the reason why the Notice of Motion was filed at all was that the Council did not comply with the court direction for the filing of submissions. In those circumstances, the bringing of the Notice of Motion was justified. The Council should pay the Appellant's costs of that Notice of Motion.

234 I propose the following orders:

(1) Cross-appeal allowed.

(2) Set aside orders 1 and 9 in the court below.

(3) Appeal dismissed.

(4) Replace order 9 in the court below with an order:

"Except as otherwise provided by the preceding or earlier orders, I order the plaintiff pay the first defendant's costs of the proceedings:

(5) Direct the parties, within 14 days of the date of delivery of these reasons for judgment

(a) to provide to each judge hearing this appeal, agreed Short Minutes of the Order appropriate to be made in lieu of order 1 in the court below.

(b) in the event that agreement is not possible, to provide to each judge hearing this appeal their respective written submissions about the order that should be made in lieu of order 1 in the court below.

(6) Order the Appellant to pay costs of the Respondent of the appeal and of the cross-appeal.

(7) Reserve further consideration of the orders appropriate to give effect to these reasons for judgment.

(8) Dismiss with costs the Appellant's Notice of Motion to receive further evidence.

(9) Dismiss with costs the Appellant's application for leave to appeal from the trial judge's order refusing leave to amend the Statement of Claim.

(10) Respondent to pay costs of the Appellant of the Notice of Motion seeking to strike out the Cross-Appeal.

235 **HANDLEY AJA**: In this appeal I have had benefit of reading the reasons for judgment of Spigelman CJ and Campbell JA in draft. Campbell JA has set out the facts and the history of the proceedings. I agree with the orders he has proposed and will briefly state my reasons for coming to that conclusion.

236 The appeal concerns the meaning and application of a short clause in two leases from the Council to the appellant. Clause 15(d) in each lease as varied (the leases) provided:

"… should the lessor in its capacity as consent authority approve the erection of a general advertising structure on other land within the Lessor's Local Government Area or Control …".

237 The clauses then dealt with the financial consequences of any breach by the Council. The breaches relied on by the appellant were the approvals granted by the Council for the erection of bus shelters designed for the display of advertisements.

238 Two threshold questions arose in the appellant's case on liability, whether the bus shelters were general advertising structures, and if so, whether the Council had approved their erection in its capacity as consent authority.

239 The leases incorporated the terms of the relevant Development approvals. The original approvals for the Young Street property on 30 January 1995 and for the Victoria Avenue property on 17 November that year authorised "the erection and use of a general advertising structure" and referred twice to Ordinance 55 under the Local Government Act. The development approval for the Victoria Avenue property was modified on 27 August 1996, 14 and 23 January 1997 but continued to refer to "a general advertising structure". The development approval for the Young Street property was modified on 23 January and 10 February 1997 but also continued to refer to "a general advertising structure" (Appellant's Timeline).

240 Ordinance 55 1933 was repealed on 30 March 1973 and replaced by a new ordinance. The former included the following definition of "general advertising structure":

> "… [a]ny structure used or to be used for the display of advertisements other than a commercial sign".

241 A commercial sign as defined in the 1933 Ordinance was limited in size and the message had to relate to activities carried on in the premises which displayed the sign. Advertisements on the bus shelters were not commercial signs as defined.

242 The Concord Planning Scheme Ordinance (the Concord Ordinance) took effect on 22 August 1969. At all material times cl 47 provided:

> "(1) A person shall not erect a general advertising structure in Zone No 2(a), 2(b) or 2(c).
>
> (2) The provisions of subclause (1) of this clause shall not apply to a general advertising structure erected on premises within these zones to indicate the purpose for which the premises are used.
>
> (3) For the purposes of this clause, "general advertising structure" shall have the meaning ascribed to it in Ordinance No 55 under the Act."

243 Ordinance 55 1973 which replaced the 1933 Ordinance in force when the Concord Ordinance took effect did not contain a definition of "general advertising structure". Section 68(3)(d) of the Interpretation Act 1987 (NSW) relevantly provides:

> "Notwithstanding subsection (1), in any … instrument:
>
> (a) …

> (b) a reference to an instrument that has been repealed and re-made, with or without modification, extends to the re-made instrument, as in force for the time being,
>
> and a reference to a provision of the repealed … instrument extends to the corresponding provision of … the re-made instrument …".

244 There is thus an initial presumption that cl 47(3) of the Concord Ordinance referred, on and after 30 March 1973, to Ordinance 55 1973 then in force. However there was no "corresponding provision" in the new Ordinance which neither defined nor referred to a "general advertising structure". Section 5(2) of the Interpretation Act, so far as relevant, provides:

> "This Act applies to an … instrument except insofar as the contrary intention appears in this Act or in the … instrument concerned."

245 Clause 47(3), by referring to a specific definition in an existing instrument, which had no counterpart in the instrument which repealed and replaced it, revealed a contrary intention which excluded the application of s 68(3) to cl 47(3) of the Concord Ordinance. Thus after 30 March 1973 the reference in cl 47(3) to the definition of general advertising structure in Ordinance 55 continued to refer to the definition in the 1933 Ordinance.

246 The development approvals for the erection and use of general advertising structures on the subject properties should therefore be interpreted in accordance with the definition of general advertising structure in Ordinance 55 1933. Since the consents were incorporated in the relevant leases, and the documents must be read together, the words "general advertising structure" in cl 15(d) should be given the meaning those words bear in the approvals, which is their defined meaning in Ordinance 55 1933.

247 I agree with the Chief Justice, Campbell JA and the trial Judge that the bus shelters were general advertising structures as defined. I also agree with the Chief Justice and Campbell JA that the approvals for their erection and use on public roads were not granted by the Council "in its capacity as consent authority" within the meaning of cl 15(d).

248 The Concord Ordinance did not zone the public roads vested in the Council, and development on such roads was not controlled either by the Ordinance or the Environmental Planning and Assessment Act. The Council is the consent authority as defined in that Act when it has the function of determining applications for development consent under the Act. The Council had no such function in relation to its public roads.

249 The controls on development on public roads vested in the Council were those imposed by the Roads Act 1993. I agree with the Chief Justice and Campbell JA that the approvals for the erection of these bus shelters were granted by the Council under s 139 of the Roads Act in its capacity as a road authority as defined in that Act.

250 I also agree with them, for the reasons they have given, that the appellant's notice of motion for leave to adduce further evidence on the construction of cl 15(d) should be dismissed.

251 Since this Court is unanimously of the view that there was no breach of cl 15(d) there is no need for me to consider its effect if multiple breaches had been proved.

252 I agree with the orders proposed by Campbell JA.

****

AMENDMENTS:

20/09/2010 - Correction of paragraph references in Headnote. - Paragraph(s) Headnote

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20 September 2010