

You're only as good as your best templates – the importance of careful drafting

By Sriram Srikrishnan

The digital age has generated many one-size-fits-all legal template solutions through organisations such as Legal Vision, LawPath and Fiverr. These agencies provide affordable and convenient fixed-fee options which may be commercially attractive. However, the High Court decision in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12 (**Ecosse**) has highlighted the risk of using such templates without due consideration for the nature of the relationship.

In *Ecosse*, the lessor intended to sell the land to the lessee and the lessee intended to subsequently subdivide the land. However, due to local planning scheme restrictions, this sale and subdivision did not proceed. In Victoria, however, a 99-year farm lease whereby rent is paid in advance, does not require approval as a subdivision.^[1] The parties sought to replicate a sale and purchase by using a standard form farming lease,^[2] and amending the lease to achieve the following objectives:

- the term of the lease was to be for the duration of 99 years; and
- the lessee was required to pay consideration of \$70,000 upon entry into the lease (being the approximate market value of the land).^[3]

The amendments to the standard form lease included the following:

"Clause 3 THAT the Lessee will pay the rent hereinbefore reserved on the days and in manner hereinbefore appointed for payment hereof....

Clause 4 AND [the Lessee] also will pay all rates taxes assessments and outgoings whatsoever ~~excepting land tax~~ which during the said term shall be payable by the ~~Landlord or~~ tenant in respect of the said premises (~~but a proportionate part to be adjusted between Landlord and Tenant if the case so requires~~).

...

Clause 13 The parties acknowledge that it was the intention of the Lessor to sell and the Lessee to purchase the land and improvements hereby leased for the consideration of \$70,000.00 and as a result thereof the parties have agreed to enter into this Lease for a term of ninety-nine years in respect of which the total rental thereof is the sum of \$70,000.00 which sum is hereby acknowledged to have been paid in full."

(~~striketthrough~~ included in the Lease document)

During 2013, the lessor commenced proceedings at the Supreme Court of Victoria,^[4] seeking a declaration to clear the

ambiguity in clause 4 concerning the responsibility of the lessee to pay all rates, taxes, assessments and outgoings in respect of the land.^[5]

The ambiguity was with respect to the inclusion of the words 'shall be payable by the tenant' in clause 4, resulting in either one of the following interpretations:

- 1 - The lessee was required to **pay all** rates taxes assessments and outgoings whatsoever in respect of the land; or
- 2 - The lessee was **only required to pay those** rates taxes assessments and outgoings levied on it in its capacity as 'the tenant', leaving the lessor liable to pay those rates taxes assessments and outgoings that levied on it as 'the owner'.^[6]

The High Court resolved the ambiguity by turning to the commercial purpose of the lease set out in clause 13.^[7] The aim of the parties was for the lessee to assume ownership of the land and it was the intention of the parties to 'recreate as far as possible, in a lease, the conditions which would have obtained following a sale' including adoption of all the owner's liabilities.^[8] On majority, it was held that it did not make commercial sense for the lessor to remain liable for payment of rates taxes assessments and outgoings and clause 4 imposed an obligation on the lessee to pay all such outgoings in respect of the land.

An important takeaway point from *Ecosse* is the risk of using a standard lease template without due regard for the definitions and commercial intentions of the parties. Gageler J described clause 4 as '*a clumsily tailored variation of an ill-fitting off-the-shelf precedent. To bring linguistic and grammatical precision to its construction would be to burden the clause with more weight than its jumble of words will bear*'.^[9]

Fortunately, in *Ecosse*, the operation and commercial intention of the parties had been conveniently set out in clause 13, however there are other circumstances where the intentions may have been simple assumptions between the parties, requiring the Court to construe the documents as best as it could.^[10] In *Electricity Generation and Retail Corporation (trading as Synergy) v EIT Kwinana Partner Pty Ltd* [2022] WASCA 3, the tradable purchase agreement was the instrument in question and it had been poorly and clumsily drafted. The Supreme Court of Western Australia applied Gageler J's principle above and looked toward the purpose of the policy in place 'in an attempt to bring linguistic and grammatical harmony to its construction' and the Court proceeded with the commercially sensible interpretation of the instrument.^[11]

Courts generally may try to preserve the contract and avoid finding a contract void for uncertainty.^[12] It is useful to consider the Australian Capital Territory Court of Appeal decision in *Springrange Pty Ltd v Australian Capital Territory & Anors* (2010) 174 ACTR 15. In this case, the Court looked beyond the fact that the Territory Authority had used similar templates for all its leasing transactions and the Court recognised the need to interpret the template lease in an abstract sense to determine whether the lease itself had a 'clear and rational operation'.^[13] The Court considered that the lease had an entirely rational operation when properly interpreted as a whole, taking into account that it is a template.^[14] When documents are found to be templates, they may be interpreted in the abstract before drawing a conclusion concerning its drafting flaws.^[15]

Local governments and small businesses alike utilise templates for tenancy agreements, contracts, hire-purchase agreements, to name a few. Template documents are useful in frequent transactions especially when engaging in many similar transactions with different parties. The key is to ensure that the template documents capture the commercial

intentions of both parties, convey a ‘businesslike interpretation’ and provide consistent definitions and terminology.^[16] While the templates are simple and a good option for straightforward situations, we nevertheless recommend that you seek legal advice to ensure they are fit for the commercial purpose. As demonstrated in *Ecosse*, it may prove to be more cost effective to seek advice as to the adequacy of the template ahead of time rather than incur further costs with unintended consequences.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information on matters discussed in this Update please contact Sriram Srikrishnan (Sri) by email to ssrikrishnan@mcleods.com.au.

- [1] Australian Tenancy Law and Practice, Chapter 3.6, [3.6.005] Lease affecting a subdivision.
- [2] *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12, [22].
- [3] *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12, [4].
- [4] *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2014] VSC 479.
- [5] *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2014] VSC 479, [7].
- [6] *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12, [6].
- [7] *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12, [16].
- [8] *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12, [7].
- [9] *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12, [51].
- [10] See *Ottoway Engineering Pty Ltd v Westpac Banking Corporation (No 3)* [2017] FCA 1500.
- [11] *Electricity Generation and Retail Corporation (trading as Synergy) v EIT Kwinana Partner Pty Ltd* [2022] WASCA 3, [283].
- [12] *Shree Shirdi Sai Sansthan Sydney Limited v Nirmal Taluja* [2014] NSWSC 1825, [20].
- [13] *Springrange Pty Ltd v Australian Capital Territory & Anors* (2010) 174 ACTR 15 at 19, [18].
- [14] *Springrange Pty Ltd v Australian Capital Territory & Anors* (2010) 174 ACTR 15 at 19, [28].
- [15] *Springrange Pty Ltd v Australian Capital Territory & Anors* (2010) 174 ACTR 15 at 19, [17].
- [16] *Star Entertainment Group Limited v Chubb Insurance Australia Ltd* [2022] FCAFC 16, 14.

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