

SUPREME COURT OF QUEENSLAND

CITATION: *Emaas P/L v Mobil Oil Aust Ltd* [2002] QSC 267

PARTIES: **EMAAAS PTY LTD** (ACN 010 766 104)
(plaintiff)
v
MOBIL OIL AUSTRALIA LTD (ACN 004 052 984)
(defendant)

FILE NO: 6016 of 1999

DIVISION: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 5 September 2002

DELIVERED AT: Brisbane

HEARING DATES: 20 September 1999 – 21 September 1999; 22 November 1999 – 26 November 1999; 22 December 1999; 15 June 2000; 8 December 2000; 10 December 2001; 26 February 2002.

JUDGE: Byrne J

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – whether purported termination of lease valid.

COUNSEL: Mr PH Morrison QC, with him Mr PW Hackett, for the plaintiff
Mr AJH Morris QC, with him Mr D Toombs, for the defendant

SOLICITORS: H Drakos & Co for the plaintiff
Porter Lawyers for the defendant

Notice to determine

- [1] On 28 June 1999, Emaas Pty Ltd (“Emaas”) commenced proceedings against Mobil Oil Australia Ltd (“Mobil”) seeking a declaration that a notice dated 18 May 1999 (“the first notice”), by which Mobil claimed to have determined a lease between Emaas as lessor and Mobil as lessee, was “invalid”. The lease, of premises at 459 Manly Road, Manly West, was for a term of 15 years commencing in mid-September 1996, with two, five-year options to renew. The lease permitted the site to be used¹ as a “Service Station including ... shop, car wash, motor vehicle servicing and repairs and other associated normal, usual or incidental uses”.

¹ See cl 7.1 and the definition of “Permitted Use” in the Reference Schedule: Ex 1.

- [2] The first notice informed Emaas that Mobil exercised “the option of termination contained in cl 6.1(b) of the lease ...”. Clause 6.1(b) provided that:

“If ... the streets giving access to ... the Demised Premises are ... significantly altered”, Mobil “may at any time thereafter elect to terminate this Lease by not less than 90 days’ prior Notice ...”.

Course of the Litigation

- [3] On 13 July 1999, Emaas’s litigation was ordered to be tried, without pleadings, over two days starting on 20 September 1999.
- [4] When the first notice was given, roadworks had been undertaken on streets giving access to the site. More were planned. Presumably anticipating that it might not succeed in resisting Emaas’s challenge to the first notice, on the first day of trial, Mobil sought and was given leave to apply for a declaration that it would be entitled to give a cl 6.1(b) notice upon completion of the alterations. Nonetheless, confidence was expressed on both sides that the trial of Mobil’s claims to have put an end to the lease, or that it would become entitled to do so once the further roadworks were constructed, would finish within the allotted two days. But there were no pleadings to define the issues, and the optimism that the contests would soon be over proved to be misplaced. The trial was adjourned, part-heard, on 21 September.
- [5] When the trial resumed, on 22 November 1999, the roadworks were finished. Other progress had been made: Mobil’s Points of Claim and Emaas’s Points of Defence had been delivered. The disputes thereby received better definition. Regrettably, however, no narrowing of the issues resulted. The pleadings revealed differences about many things: principally, the interpretation of cl 6.1(b) and the impact of the roadworks on the site’s suitability for a service station.
- [6] Mobil’s “primary contention” as to the meaning of cl 6.1(b) was that whether the changes to the streets affording access to the site were “significant” depends on “the physical nature and extent of the alteration”², it being “irrelevant whether ... the alteration ... significantly affects the business conducted on the site (“the business”)”.³ Mobil’s alternative contention was that an alteration triggers an entitlement to determine the lease if it “has a significant detrimental impact affecting the business”.⁴ Factually, Mobil asserted⁵ that the roadworks had such an adverse impact on the capacity of the site to attract motorists that:

- “(i) The number of motorists utilising the business has fallen and will continue to fall;
- (ii) The sales of motor spirits from the business have fallen and will continue to fall;
- (iii) The sales of merchandise from the business, other than motor spirits, have fallen and will continue to fall; and

² Exs 19, 38 para 5(b).

³ Ex 19 para 5(c)(ii); cf Ex 38 para 5 (c)(ii).

⁴ Ex 19 para 6(b)(ii).

⁵ Exs 19, 38 para 11(c).

- (iv) The profits of the business have fallen and will continue to fall.”

- [7] Emaas put in issue the interpretations of cl 6.1(b) advanced by Mobil. Its pleading also challenged several of Mobil’s factual contentions: in particular, Emaas denied that the roadworks had, or would have, “a significant detrimental impact affecting the business”.⁶
- [8] On 22 November 1999, Mobil gave Emaas another notice⁷ purportedly in reliance on cl 6.1(b) (“the second notice”). Two days later, Mr Morris QC announced that the reference to “the business” in Mobil’s Points of Claim was not intended to relate to the particular business conducted on the site. It was to be understood as a contention that the roadworks had adversely affected the use of the site, with such physical infrastructure as was in place when the lease commenced, as a service station. The significance to be attributed to evidence about such things as sales and prices at the service station was that those facts and figures showed that a “hypothetical”⁸ service station at the site would be detrimentally affected by the roadworks.
- [9] Mobil’s pleading was amended to include the new “secondary” interpretation: that whether an “alteration is significant” turns on whether it “has... a significant detrimental affectation in respect of the use of the site (including fixtures erected on the site at the time when the lease was granted) as a service station...”.⁹ The pleading went on to assert that “the use of the site... as a service station had been and would be significantly detrimentally affected”¹⁰ by the roadworks. Resulting declines in motorist visitations, sales of motor spirits and merchandise, and profits of “the business” were allegedly impacts “reasonably apprehended as being likely to ... apply to any service station business conducted at the site...”.¹¹ Unsurprisingly in litigation where so little that matters is common ground, Emaas put these contentions in issue.¹²
- [10] By the end of the trial, evidence had been adduced from a number of witnesses concerning the significance of the roadworks for the site’s potential to suit a service station. Factually, much remained in contention. The traffic engineers, Mr Beard and Mr Holdsworth, could not agree¹³ on what the alterations had achieved or portended. Nor could the economists, Mr Norling and Mr Murphy. More unfortunately as it happens, the parties were still advancing a variety of interpretations of the unhappily expressed cl 6.1(b). To promote efficiency in the eventual presentation of arguments on matters of fact, directing them to the interpretation of cl 6.1(b) to be judicially imposed, at the request of the parties, I proceeded first to decide which of the several interpretations agitated was correct.

- [11] On 22 December 1999, I held that:

⁶ Ex 20 para 8(g).

⁷ Ex 27, curiously, dated 22 May 1999.

⁸ T 377; cf T 369-371.

⁹ Ex 38 para 6(b).

¹⁰ Ex 38 para 13(d).

¹¹ Ex 38 para 11(d)(i).

¹² By Ex 47, Emaas’s Amended Points of Defence.

¹³ Indeed, the difference was greater than either of them appears to have realized.

“The entitlement to determine the lease arises under cl 6.1(b) upon the occurrence of a significant – in the sense of major or substantial – physical change to Manly Road in the vicinity of the site, whether or not such a change considerably detrimentally affects either Manly Road access or the site’s suitability for the defined ‘permitted use’.”

- [12] On Christmas Eve 1999, after argument concerning the extent of the changes to Manly Road between September 1996 and 22 November 1999, I pronounced against the first notice and in favour of the second.
- [13] Emaas appealed. Before the appeal was entertained, Mobil vacated the premises, and Emaas began to operate a service station business there.
- [14] The Court of Appeal had heard, but not decided, the appeal when Emaas sought to adduce evidence concerning the volume of fuel sales achieved at the site while under its administration. The application to reopen its case was refused. That same day, Mobil asked for findings of fact related to those interpretations of cl 6.1(b) which the parties had propounded on appeal. Both sides then made their submissions on the facts. Barely a week later, and before factual findings were made, the Court of Appeal announced its decision.¹⁴
- [15] My orders were set aside and a declaration granted that termination “under cl 6.1(b) is valid only if Manly Road has been altered in the immediate vicinity of the site in such a way as to cause significant economic disadvantage to the lessee”. This idea had not been suggested on either side. Emaas had contended that economic consequences for Mobil were irrelevant: on its case, to put an end to the lease, Mobil had to prove that the Manly Road works (i) so altered “access” to the site as to significantly, and detrimentally, affect the “permitted use” or (ii) were otherwise such that the “permitted use” was significantly, detrimentally affected. Mobil’s attempt to support my decision – a declaration which, obviously, proceeded upon the basis that Mobil need not prove economic detriment resulting from the roadworks – was also rejected. On one of the few important matters on which the parties were agreed, they were wrong.
- [16] The substituted declaration meant that the parties had to be heard again on the factual issues, with fresh arguments directed to the new meaning of cl 6.1(b). The Court of Appeal’s declaration, however, has not quietened disputation about cl 6.1(b). Mobil and Emaas are, and in more than one respect, in contest about the content of the new declaration. Nonetheless, with an optimism which experience of this litigation suggests is scarcely warranted, hoping that at least most of the disputes concerning the meaning and effect of the declaration should prove to be of no moment once the facts are found, neither side is interested¹⁵ in seeking clarification or modification¹⁶ of the declaration from the Court of Appeal.

¹⁴ [2000] QCA 513.

¹⁵ Despite attention having been drawn to this possibility in January last year: See Ex 53.

¹⁶ Not only to eliminate the scope for continuing conflict about how cl 6.1(b) is triggered but also in case the formulation of the declaration was influenced by the mistaken impression that Mobil was the proprietor of the service station: see Thomas JA at [28] and White J at [43], [44].

Significance of the Court of Appeal's Declaration

- [17] So it must be decided whether, on 22 November 1999¹⁷, the alterations made to Manly Road in the immediate vicinity of the site were such “as to cause significant economic disadvantage to” Mobil as “the lessee”.
- [18] Mobil has not pleaded such a case. The main allegation pertinent to economic disadvantage to it is that the changes to Manly Road “constituted ... a significant detrimental impact affecting the business”.¹⁸ “The business”, it will be recalled, means “the business conducted on the site”.
- [19] Mobil had not conducted a business on the site. The service station was Mr Leamon’s business. Mobil had let him into possession under an agreement by which he:
- paid Mobil a monthly “rental” to occupy the site for a “12 monthly tenancy”;¹⁹
 - met “all the ongoing costs”²⁰ associated with his venture;
 - received a “set commission”²¹ on sales of fuel from the site, all the fuel (gasoline, distillate and LPG) being supplied by Mobil “on consignment”;²²
 - “subleased”²³ a workshop and ran a carwash, deriving income from these arrangements;
 - earned income from operating the convenience store housed in the service station complex.
- [20] Consistently with the interpretations of cl 6.1(b) they advanced, both sides had conducted their cases at trial on the assumption that the arrangements with Mr Leamon were not really to the point. It has since been established, however, that Mobil’s right to determine turns on whether the changes to Manly Road are such “as to cause” it “significant economic disadvantage”. So an evaluation of the extent to which Mobil is worse off financially as a consequence of those roadworks seems necessary. And as nobody suggests that there was much of a chance that the arrangements with Mr Leamon might not have been renewed annually for the balance of the 15 year term, in view of the deal²⁴ – with Mobil deriving income only from Mr Leamon’s “rent” and a few cents per litre on his fuel sales – Mobil’s “economic disadvantage”, past and prospective, was bound to be affected by the arrangements with Mr Leamon.
- [21] Although the essential factual question is different from all those previously suggested as being pivotal, Mobil has not asked to amend its pleading in the light of

¹⁷ Mobil is not relying on the first notice any more.

¹⁸ Ex 38 para 13(c).

¹⁹ T299. Mr Leamon also described the annual payment as a “licence fee”; cf the adoption of this characterization by Mr Maguire, Mobil’s Queensland Business Manager (Retail): T477-478.

²⁰ T299.

²¹ *Ibid.* 2.9c per litre for gasoline and distillate; 2.5c per litre for LPG: T307.

²² T299.

²³ As Mr Maguire put it: T 476.

²⁴ The “document” (T 325) recording the bargain has not been proved. The arrangements have therefore to be gathered from such testimony as there is.

the new declaration. Nor has it²⁵ sought to adduce more evidence concerning the economic disadvantage to it said to be attributable to the changes to Manly Road. However, despite the absence of reference in Mobil's pleading to having been prejudiced by the need to assist Mr Leamon financially²⁶, Emaas has not disputed Mobil's entitlement to urge that its economic position "as lessee" has been jeopardized because its interests with "its sub-lessee or licensee" are "quite likely to be affected"²⁷ adversely by any decline in motorist visitations sustained (and to be sustained) in consequence of material alterations to Manly Road.²⁸

Roadworks Alterations

- [22] Since the commencement of the lease, roadworks near the service station have resulted in substantial changes to Manly Road and to other streets that meet it. When the lease began, three streets led straight to the site: Manly, Green Camp and Whites Roads. In those days, access was provided to Manly Road through driveways at the southern and northern sides. Manly Road met Green Camp and Whites Roads at a nearby, single-lane roundabout. Manly and Green Camp Roads were, and remain, relatively high volume, sub-arterial roads.
- [23] Construction of the first stage of the roadworks began in October 1998 and was completed shortly before Christmas 1998. It included:
- the relocation of Whites Road to intersect with Manly Road opposite Amberjack Street – the first street encountered after leaving the northern access point, heading towards Manly;
 - the upgrading of the intersection of Manly Road, Amberjack Street and the new Whites Road to a signalised intersection;
 - provision of a channelized right-turn entry to the site from Manly Road north of the roundabout.
- [24] The second stage, under construction from May to 9 October 1999, involved:
- replacing the single-lane roundabout with a channelized, signalised T-junction, with Manly and Green Camp Roads forming the "head" of the T;
 - redirection of Manly Road on the southern side of the site so that it veered away from the site towards its intersection with Green Camp Road, where Manly Road resumed its original path;

²⁵ Emaas has not tried to reopen since the Court of Appeal's decision either.

²⁶ or in its capacity to keep him or, if need be, in its prospects of securing a replacement operator on terms as advantageous for Mobil as those under which Mr Leamon was in occupation before the roadworks.

²⁷ Mobil's further submissions, Ex 56 para 19.

²⁸ Incidentally, Mobil has not set up a case that the roadworks have impacted on its capacity to assign the lease or on the value it might have received from that. Nor was the possibility that Mobil might itself have become obliged to operate the service station canvassed.

- increasing the width of Manly Road from a street carrying one lane of traffic in each direction to a double-lane facility leading to and from Green Camp Road;
- increasing the size of median strips²⁹ between the lanes of traffic travelling in opposite directions on Manly Road;
- construction of a slip lane from Manly Road (west) to Manly Road (north).

Apart from the relocation of Whites Road³⁰, all the alterations were to Manly Road in the immediate vicinity of the site.

Fuel sales lost by 22 November 1999

[25] During the year or so that elapsed between starting and finishing the alterations, the service station experienced the “inevitable”³¹ downturn in sales of fuel. There is no consensus on the extent to which the reduction was caused by the roadworks. Emaas contends that Mobil had set about “running down the service station”³², or at least “not pushing it along”³³: propositions that cannot be accepted³⁴. Still, in so competitive a business as Mr Leamon’s, highly price sensitive as it was, a small part of the loss of sales might not have been roadworks related. But subsequent effects can at least largely be attributed to the alterations to Manly Road.³⁵

[26] In the nine months before the Stage 1 roadworks began, fuel sales averaged roughly 315,000 litres a month.³⁶ After construction commenced, monthly volumes of less than 300,000 litres became more frequent. In the last three months of 1998, the figures were: October, 295,000; November, 253,000; and the holiday month of December, 384,000. In January 1999, sales declined to 278,000 litres. February saw 308,000. In March, the pre-roadworks nine months average of 315,000 litres was reached. April witnessed a decline to 277,000 litres. Then from the time construction of Stage 2 started in May, monthly volumes of 300,000 litres were not achieved again: May realised 265,000; June 299,000; July, 271,000; and August, 291,475. On 9 September, a temporary roundabout was placed “much closer to the final position”³⁷ of the Green Camp Road intersection. Volumes that month dropped to 218,001 litres. In the month the roadworks were finished and the traffic lights at

²⁹ Medians were “constructed into all T intersection approaches such that right turns into and out of” the site are “not allowed”, except “into” at the northern driveway: Ex 22 p 1. No right turns into the site were lawful before the Stage 1 works.

³⁰ Which has no present significance.

³¹ As Emaas put it: Ex 45 para 8.6(a).

³² Ex 45 para 8.6(b).

³³ Ex 45 para 8.6(c).

³⁴ In view of evidence of Mr Leamon (T299-300; 357) and Mr Maguire (T464, 480-481; affidavit filed 26 August 1999, paras 17-20).

³⁵ An attempt to establish the contrary by reference to sales at the nearby Wondall Road service station fails. Circumstances there were not shown to be similar enough to yield a satisfactory comparison: T440-441, 459 (Mr Murphy); 460 (Mr Maguire).

³⁶ Ex 31, which shows the volumes ranging from 289,000 in April to 358,000 in July.

³⁷ Mr Maguire’s affidavit filed 15 November 1999, para 6.

the intersection commissioned, sales rose to 231,396 litres. For the 21 days immediately preceding the second notice, 178,769³⁸ litres were sold.

- [27] An assessment of fuel sales lost because of the changes depends on an assumption about the trading that would have obtained were it not for the roadworks. The 315,000 figure seems a satisfactory³⁹ basis for projecting the sales that might otherwise have been expected to 22 November 1999.
- [28] On this approach, for the thirteen months from October 1998 to October 1999, Mobil missed out on sales of less than 410,000 litres. The three weeks in November witnessed the loss of perhaps another 40,000 litres. In all, the fuel sales lost at the site because of the alterations to Manly Road in the immediate vicinity amount to about 450,000 litres.
- [29] Now, Mobil received no more than 3.6 cents per litre on fuel sales at the site.⁴⁰ Accordingly, its lost gross revenue on the lost sales does not exceed \$16,200.⁴¹

Reduced receipts from Mr Leamon to 22 November 1999

- [30] By November 1999, Mr Leamon had not been paying the full amount of his "rent" for a year, by arrangement with Mobil. This "discounting"⁴² was at least mainly related to declining fuel sales. In 1997, when sales were much greater⁴³ than 315,000 litres monthly, Mr Leamon paid an annual fee of \$200,000.
- [31] Mr. Leamon renewed his arrangements on 16 September 1999⁴⁴. Nominally, he was to pay \$150,000⁴⁵ or thereabouts⁴⁶ - the annual rent payable on his 1998 renewal. The roadworks "weren't a consideration"⁴⁷ in his decision to remain. His "allegiance"⁴⁸ to Mobil, coupled with his confidence that their financial relations would be adjusted so as to maintain his venture as a viable business, persuaded him to stay on. To compensate him for reduction in his revenues resulting from the roadworks, Mr Leamon was to pay Mobil less. The amount of this "discounting" is a detriment to Mobil caused by the roadworks.
- [32] But the size of the concession has not been revealed. Presumably, the omission reflects the shared assumption that such things were not germane. However that

³⁸ Exs 28 and 31.

³⁹ Despite the preference of Mr Norling for a somewhat lower figure.

⁴⁰ Arrived at by subtracting from Mobil's 6.5 cents per litre upper (T 477) margin (Ex 11, section 5.3) the 2.9 cents per litre paid to Mr Leamon as his commission on sales of gasoline and distillate.

⁴¹ This makes no allowance for any reduction in the cost of delivering fuel associated with the lower volumes. Emaas, incidentally, has undertaken a variety of analyses: Ex 54 pp 14-16. No such exercise suggests that Mobil's lost receipts could have exceeded \$21, 375. Mobil has not put a figure on this component of its "disadvantage".

⁴² As Mr Leamon described the concession: T325.

⁴³ In 1997, the service station was selling, on average, about 450,000 litres monthly. The 30% decline to the low 300,000s in 1998 was caused by intensive price competition: affidavit of Mr Maguire filed 26 August 1999, paras 14, 15.

⁴⁴ The anniversary of his occupation in 1996.

⁴⁵ T 478: Mr Maguire.

⁴⁶ T 325: Mr Leamon.

⁴⁷ T 334: Mr Leamon.

⁴⁸ *Ibid*; cf T 345.

may be, it is not possible to quantify the diminution in rent received from Mr Leamon. It would be speculation, not an inference warranted by evidence, to suppose that the discount matched the loss which Mr Leamon sustained through a decline in fuel sales. For one thing, Mr Leamon's commission on fuel sales was only part of the income he derived from the site. He was paid for letting out the workshop; and he derived income from his car wash. These receipts were taken into account in fixing the sum payable to Mobil. Profit on sales from the convenience store might also have mattered. Yet the evidence is silent on the extent of the influence of these variables on the negotiations about rent reductions.

Aggregate quantifiable loss to 22 November 1999

- [33] In the result, all that has been proved as the amount of Mobil's loss which had fallen in by 22 November 1999 is at most a \$16,200 diminution in receipts on fuel sales.

Loss in prospect on 22 November 1999

- [34] Mobil also relies on the continuing effects of the roadworks during the almost 12 year balance of the term remaining when the second notice was given.
- [35] The site was selected, and the service station planned, mainly to take advantage of outbound traffic on Manly Road. The roundabout provided other, substantial benefits: it allowed inbound motorists to enter without turning across traffic; and after leaving the site, a motorist could travel easily in any of three directions – towards Manly, Capalaba, or the City. In short, the service station had “excellent accessibility... because of the roundabout”.⁴⁹
- [36] The roadworks had two objectives: to alleviate congestion at the roundabout in peak periods, and to cater for an increase in traffic in years to come. The alterations will achieve those aims and provide “greater capacity in the local road network, less congestion, and consequently, more potential for future growth”.⁵⁰ In the near term, however, the roadworks have created difficulties for the service station in relation to traffic both outbound to Green Camp Road and inbound.
- [37] The alterations made to Manly Road in the immediate vicinity have impacted on the site as a service station in two main ways. These relate to accessibility – ingress at the northern driveway and ingress and egress at the southern – and site visibility, especially for motorists travelling outbound to Green Camp Road.
- [38] Not every change has been detrimental. A stage 1 alteration – provision of a right-hand turn lane affording ingress at the northern driveway – had a slight beneficial impact.⁵¹ Inbound motorists who would otherwise have arrived after driving through the roundabout could enter through the northern driveway. But the added convenience of access did not generate sales.⁵² Since removal of the roundabout at any rate, there is little tangible benefit from this means of ingress.

⁴⁹ Mr Beard: T 263.

⁵⁰ To adopt Mr Beard's summary: Ex 24 p 3.

⁵¹ Mr Holdsworth: T 516.

⁵² Mr Norling: T 241-2; Mr Beard seems to agree: T 259.

- [39] Motorists leaving the site to travel along Green Camp Road will traverse a left-turning, slip lane to join the outbound flow. Some will find this unappealing, at least when there is traffic about; it requires them to cross an unbroken white line surrounding a painted chevron that leads to a median strip. But as hesitant motorists see bolder customers leaving this way, most will become less reticent; a few may look to another of the several service stations in the area. Anyhow, congested traffic made departing the southern driveway a problem in peak periods in the past; and November traffic surveys did not demonstrate a decline in use of the southern driveway by motorists heading towards Green Camp Road.⁵³ On balance, the slip lane seems but a small disadvantage.
- [40] Manly Road has been moved. It now veers away to the right as an outbound motorist destined for Green Camp Road approaches the site: that motorist is now “pointed away from the business”.⁵⁴ Accordingly,
- more of the site is beyond the periphery of the forward field of vision. There is less opportunity for the prudent driver to notice the service station and its signage. Instead, as motorists progress, the curve of the road to the right diverts attention from the site. And visibility is usually crucial to a service station’s success.
 - the southern driveway has had to be lengthened to reach the carriageway. The service station presents as distant and not so accessible. And an appearance of convenient access is important to customer attraction.
 - to enter the southern driveway, motorists must “consciously turn”⁵⁵ left. The old road configuration had them fall⁵⁶ into the site. And “easing the customer into the site is a prerequisite”⁵⁷.
- [41] Most customers are “regulars”⁵⁸ for whom, generally, such things will not matter⁵⁹ as much as for itinerants. Even so, the reduced visibility of the service station, and

⁵³ T 529. November 1999 traffic surveys show that the impact had not appeared by then to be detrimental, revealing “a marginal improvement” in attracting motorists travelling to and from Green Camp Road: T 531. But the figures included motorists illegally turning into the site who, in time, would mostly cease to patronize the service station: T 537-538.

⁵⁴ As Mr Leamon put it: T 300; cf T 357. Mr Dempsey also saw it as disadvantageous that the relocation had “swung ... traffic away” from the site: T 406.

⁵⁵ As Mr Dempsey described the position: T 407. Mr Leamon agrees: T 357.

⁵⁶ T 407.

⁵⁷ Mr Dempsey: T 373. Mr Holdsworth shares this view: T 510-511.

⁵⁸ As Mr Norling called them: T 233. “Demand from itinerant motorists is ...relatively insignificant”: Ex 12 p 1: Mr Murphy.

⁵⁹ Three other consequences may as well be touched upon. An adverse impact may be associated with the double lane traffic. Vehicles near the middle may find it more difficult to access the site than when one lane of traffic passed by: T 472-474. Secondly, there is another visibility downside. Previously, drivers approaching from Green Camp Road had the price board directly in front of them. This is no longer so. Thirdly, some motorists have been confused about where to enter the southern driveway because its mouth is very near the entrance to an adjacent property: T 357; T 406. But, even in aggregate, these things do not matter a lot.

the impact on accessibility⁶⁰, seem likely to continue to affect visitations, adversely.⁶¹

- [42] The most important impact, however, concerns inbound motorists.
- [43] Pre-roadworks customers travelling inbound on Manly Road typically departed by the southern driveway, turned left to negotiate the roundabout, and drove towards the City. Since completion of the roadworks, these motorists need to exit from the northern driveway, retrace their steps to Amberjack Street, execute a U-turn in the often busy Manly Road, drive back to the Green Camp Road intersection and, when the traffic lights permit, turn right into Manly Road. This is a time-consuming, unattractive undertaking that distinctly prejudices patronage.
- [44] Traffic surveys on 5 November 1999 – a couple of days after the Amberjack Street U-turn was first permitted – showed about 10% of customers braving that manoeuvre. But Mr Leamon, an experienced service station operator, thinks that his patrons would bother with that journey only “once or twice”⁶² before taking their business elsewhere. Mr Dempsey, who has great experience with service stations and in recognizing the essentials for success in these ventures, shares this view.⁶³ And their opinions accord with that of Mr Holdsworth, who says of the Amberjack Street U-turn procedure:
- “This inconvenient path is highly uncharacteristic of service station customers. Over time these movements can be expected to reduce significantly as customers respond to the inconvenience by frequenting alternative service stations.”⁶⁴
- [45] This forecast looks to be correct.⁶⁵ So does Mr Holdsworth’s prediction concerning motorists observed using illegal manoeuvres – turning right from the northern driveway; and U-turning at the Green Camp Road intersection: that most of this unlawful activity would not persist, with these motorists eventually going elsewhere⁶⁶ rather than choosing some lawful means of egress.⁶⁷
- [46] The future loss of motorists who had returned by early November is not the entire effect of the roadworks. There are also pre-roadworks customers who had not, and would not, come back.
- [47] Mr Beard considers that the 10% of motorists U-turning at Amberjack Street represented two-thirds of the customers who, on a day in May 1998, were using the

⁶⁰ And perceptions of ease of access, which count for at least as much as the reality.

⁶¹ With the advantage I have had of two views to assist my understanding of the evidence, I am persuaded that these effects matter somewhat.

⁶² T 301; cf T 320. A handful might refuel on the way home; but the number of motorists willing to wait until the return journey seems small: T 521, 523-525.

⁶³ T 388, 391; Ex 36 p 4.

⁶⁴ Ex 22 p 4.

⁶⁵ Despite Mr Beard’s more optimistic view: see Ex 24, report of 19 November 1999, and his testimony that those making illegal turns would later U-turn at Amberjack Street or select nearby streets, such as Amberjack Street or Radford Road, to travel westwards: T 258; cf 290.

⁶⁶ T 509, 521, 537-538.

⁶⁷ Eg turning left to make the Amberjack Street U-turn.

roundabout to drive inbound on Manly Road.⁶⁸ On this approach, few motorists had been deterred from returning to the site.

- [48] The traffic engineers, however, disagree about the extent of the loss of custom evident at the time the second notice was given. According to Mr Holdsworth:⁶⁹

“The latest survey indicates that approximately 14% of motorists entering the site on the day of the first survey were directly affected by the works. All these customers would otherwise have travelled to Many Road (west) after leaving the site. If illegal movements (20 motorists or 5% of motorists) which are now occurring are added to that figure, the result is that 19% of motorists surveyed in August 1999 are now unable to practically leave the site in a convenient and legal manner as a direct result of the road modifications ...

The direct negative effect of road modifications on the service station site operation is equivalent to approximately 19% of customers. Over time, the latest survey indicates that the effect of the roadworks will be to reduce customers by up to 29% relative to the number of customers surveyed in the 6th August 1999 survey. The survey result indicates that the effects of the road modifications is significant with respect to both short and long term effects.”

- [49] The 29% comprises 14% of motorists who had already “disappeared” between Mr Holdsworth’s August and November surveys as well as others who could yet be lost: the 10% U-turning at Amberjack Street and the 5% making illegal turns.⁷⁰
- [50] Mr Beard’s view that few motorists had been lost is not consistent with the about 50% decline between August and November in the proportion of westward-bound customers surveyed by Mr Holdsworth.⁷¹ Nor can his opinion be reconciled with the post-Stage 2 low fuel sales, except upon the basis that some, unidentified, cause had depressed the volumes.⁷² Mr Holdsworth’s analysis, however, is not altogether free from peculiarity, at least if no more than 15 of the 29% reported in August as heading westwards were using the roundabout to travel directly inbound on Manly Road.⁷³ For it is not easy to see how the roadworks could have affected those motorists who used other nearby streets⁷⁴ to head west.⁷⁵ Still, Mr Holdsworth’s views, unlike Mr Beard’s, (i) are broadly consistent with fuel sales in the weeks preceding the second notice; (ii) accord with Mr Leamon’s (justifiable) expectation

⁶⁸ T 256-257, 289.

⁶⁹ Ex 22 p 4.

⁷⁰ T 525-526; cf 538.

⁷¹ A result that Mr Beard seemingly does not dispute: T 257; cf T 284.

⁷² T 275, 286, 290.

⁷³ Mr Holdsworth did not try to ascertain what proportion of his 29% westbound on 6 August (Ex 22 p 2) were using the roundabout and did not testify that he accepts that 15 of that 29% were doing so: cf T 506.

⁷⁴ Such as Amberjack Street and Radford Road.

⁷⁵ It was not suggested to Mr Holdsworth in cross-examination nor argued in Emaas’s submissions (Ex 54) that the 29% upper limit of motorists to be lost involved a double-counting of the 10% U-turning at Amberjack Street. Perhaps that was because Mr Holdsworth rejected a suggestion that that 10% represented two-thirds of the 15% of customers who, on that day in May, were seen by Mr Beard or his staff to use the roundabout to proceed directly inbound on Manly Road: T 525, 531.

that about 250,000 litres would be sold by the end of November;⁷⁶ and (iii) receive a measure of support from Mr Leamon and Mr Dempsey. Moreover, Mr Holdsworth presented as more detached. His analysis and opinions are, generally, acceptable.⁷⁷

[51] Mr Holdsworth acknowledges that not all those who could be lost would be. In testifying to the effect of the roadworks, he said that “we will see this impact settle down at somewhere between [a] 20 to 25”%⁷⁸ decline in motorist visitations.

[52] All considered, a near term patronage loss of about 20% is established.

[53] What of the longer term?

[54] Mr Beard thinks that the site would attract motorists in not less than pre-roadworks numbers within about a year after the second notice⁷⁹; and he expects that, after 10 years, the potential passing trade may be as much as 50% greater than if the roadworks had not been constructed.⁸⁰ Mr Norling considers that the roadworks should result in a “net improvement to ... accessibility.”⁸¹ Mr Murphy anticipates that it will take “some time for” the “increase” in “passing traffic to yield motorists who go into the service station and spend their money there.”⁸² His “guess”⁸³ is that the volumes sold between January 1998 and the start of the roadworks should be achieved in 1-3 years.⁸⁴ Mr Holdsworth believes that the increase in traffic will generate the pre-roadworks visitation numbers after about 4½ years.⁸⁵

[55] Others are not so sanguine. Mr Leamon thought that his November projection of about 250,000 litres would prove to be “indicative of an average month from here on”.⁸⁶ Mr Dempsey’s bleak assessment was that, after a brief period in which customers returned out of curiosity,⁸⁷ sales would fall to about 200,000 - 225,000 litres a month.⁸⁸

[56] Whose prediction is preferable?

[57] In the last nine days of construction, average daily sales were only 5,793 litres. For the rest of October, as motorists who had avoided the area during the disruptive constructions were returning, that figure increased to 8,148. In the first week of November, the daily average fell to 7,803. In the fortnight before the second notice, on average, 9,056 litres were sold daily. This and other information reveal that the

⁷⁶ T 345, although not too much can be made of this as, historically, sales have tended to be lower in November: T 424; cf Exs 15,16, and MM10 to the affidavit of Mr Maguire filed 26 August 1999.

⁷⁷ I express a general preference for the evidence of Mr Holdsworth to that of Mr Beard.

⁷⁸ T 510; cf T 525-526; 538.

⁷⁹ T 281.

⁸⁰ T 259, 262, 280. The 10 year projection is broadly consistent with other evidence (eg Mr Murphy’s: Ex 39 p 4) and is not, it seems, in contest: T 415-416.

⁸¹ Ex 25 p 1.

⁸² T 421.

⁸³ T 431.

⁸⁴ T 431, 450, 458 (notwithstanding obfuscation at T 446, 451).

⁸⁵ T 539.

⁸⁶ T 345; cf T 357.

⁸⁷ T 409.

⁸⁸ T 408. At that level, a service station on the site paying an annual rent of \$225,000 would not be viable: T 413; Ex 36.

six weeks between completion of the roadworks and resumption of the trial had witnessed the return of the majority of former customers who would ever bring their business to the service station again. No doubt there were a few yet to “bounce back”.⁸⁹ But some customers who had returned would soon be deterred by the new arrangements. So six weeks is, as the economists agreed,⁹⁰ too short a period on which to found a confident prediction about sales to come. An assessment of what the future held in store is more a matter for expert judgment. In this, the traffic counts and surveys, though useful, are but part of the stock of information on which the traffic engineers, applying their experience, have based their forecasts. Other experience also matters, especially that of the practical men of business, Mr Leamon and Mr Dempsey.

- [58] Mr Beard’s prediction of a quick return to pre-roadworks numbers seems unduly optimistic. Among other things, he has overestimated the short term rate of increase in visitations. Unfortunately, Mr Norling’s view is strongly influenced by Mr Beard’s opinions. Mr Murphy’s insufficiently recognises the disadvantages resulting from the roadworks. Mr Holdsworth’s opinion presents as better considered than all of theirs, although, as the apprehensions of Mr Leamon and Mr Dempsey indicate, there is a real risk that he too has not made enough allowance for the ways in which the alterations have jeopardised the capacity of the site to benefit from the gradual increase in passing traffic which the roadworks will encourage and allow.
- [59] Although there is no sure prognosis, Mr Holdsworth’s 4½ years to return to pre-roadworks numbers seems as good a prediction as might be made. On this basis, monthly fuel sales would progressively rise, in round figures, from 255,000 in November to the pre-roadworks average of 315,000 litres over 54 months – arithmetically, a loss of 1,620,000 litres.⁹¹ Assuming a 3.6 cent per litre reward for 4½ years, the diminution in Mobil’s receipts would be less than \$60,000. Thereafter, for the balance of the term,⁹² Mobil stood to sell more fuel from the site than if the roadworks had not been constructed – a prospect that must be recognized in assessing an overall balance of losses and gains. During the first five or so of those years, passing traffic is expected to grow at an annual rate of 3-5%.⁹³ But quantifying the benefit of potential gains so far ahead is plainly highly speculative.
- [60] The lease was costly. An initial annual rental of \$225,000 was subject to CPI adjustment; and Mobil was to meet all “outgoings” like rates, taxes and the costs of services supplied.⁹⁴ In the scale of things, a gross revenue drop of \$76,000 over 5½ years⁹⁵ does not sound “significant”. Whatever the loss of profit on such a reduction

⁸⁹ To use the expression mentioned more than once: eg Mr Leamon: T 343; Mr Murphy: T 422, 444-445, 454, 458. Some of those who had avoided the roundabout during construction, and who found other fuel outlets satisfactory, might be “difficult” to “entice...back”: Mr Norling: T 212. A marketing campaign, including site activities and signage, would be needed in an attempt to do so. No estimate was put on the cost of this.

⁹⁰ Mr Norling: T 218; Mr Murphy: T 421, 423-424, 451.

⁹¹ Assuming, which is not wholly unrealistic, a constant rate of change.

⁹² and, if exercised, the options.

⁹³ Ex 39 p 4.

⁹⁴ Ex 1, cl 4.1, cl 1.1 definition of “outgoings”, and Reference Schedule definition of “Lessee’s Proportion”.

⁹⁵ Comprising about \$16,000 before the second notice (see para [29]) and about \$60,000 afterwards (see para [59]).

in fuel sales receipts might have been, however, it is not the entirety of Mobil's financial detriment. Future "discounting" of the operator's "rent" is also material.

- [61] If Mobil had not vacated in February 2000, the fall in patronage would have resulted in even lower payments by Mr Leamon as Mobil succumbed to pressure to maintain the viability of his business. Had he left, the lower sales would have mattered to the chances of attracting another operator at as high a rental as Mr Leamon paid for about 4½ years, after which, as sales increased, more might be extracted. However, the rent foregone cannot be reliably quantified, for three reasons: uncertainty about what the future held; lack of attention on both sides to the detail of the losses; and roadworks-related consequences can be perceived from more than one perspective.
- [62] On Mr Holdsworth's forecast, Mr Leamon stood to lose sales of more than 2,000,000 litres over 5½ years.⁹⁶ Because of the low margins on fuels, this translates to a diminution in gross revenue of less than \$60,000. But "reasonably healthy"⁹⁷ profits – in the order of 30% – were "attainable"⁹⁸ on convenience store merchandise. So another part of Mr Leamon's business was, and for years to come would be, harmed by the decline in visitations. And the average monthly gross profit on shop sales may have fallen by more than \$1,000 in 1999.⁹⁹
- [63] A "financial model"¹⁰⁰ of Mr Murphy's affords another insight. On his information and analysis, for the year ended 31 August 1999, the business derived \$2,781,820 from all sales¹⁰¹ to motorists. This included \$483,420 in shop sales. On these figures, a 20% drop in motorists would diminish Mr Leamon's turnover by more than \$550,000 annually. Whatever his profit margins, such a reduction would inevitably impact on the negotiations with Mobil about rent.
- [64] Interesting as those things may be in identifying reasons for Mr Leamon's rent to fall, the visitation figures are better pointers to Mobil's predicament. The decline in visitations apparent in November would soon become about 20%. After that, the numbers would gradually rise to pre-roadworks levels, or so Mr Holdsworth thinks. Allowing for a post mid-2004 attraction of motorists in greater numbers than the roundabout would have permitted, the site is still appreciably less advantageous for a service station. Illustrative of the roadworks consequences is that the reduction in fuel sales volumes, sustained and forthcoming over 4½ years when the second notice was given, was equivalent to almost seven months of sales at the 1998 pre-roadworks monthly average.

⁹⁶ 450,000 (see [28]) plus 1,620,000 (see [59]).

⁹⁷ Mr Norling: T 235.

⁹⁸ Mr Dempsey: Ex 36 p 5.

⁹⁹ When compared to sales between January and September 1998. There cannot be much confidence in this exercise. Actual profit margins on store merchandise are not disclosed. Further, there are unexplained, substantial differences in the records: cf Exs 16, 17; see also Ex 12 p 4.

¹⁰⁰ Ex 12 p 4.

¹⁰¹ Fuel, shop merchandise and carwash.

Significant economic disadvantage?

- [65] Considering the roadworks impact, past and prospective, on the suitability of the site for a service station, rent from Mr Leamon, and Mobil's receipts from fuel sales, by 22 November 1999, Mobil had sustained substantial "economic disadvantage" because of the alterations to Manly Road in the immediate vicinity of the site. Now, is that disadvantage "significant"?
- [66] Presumably, Mobil can withstand the losses. Moreover, the lease is a long one, valuable to Emaas, not to go off lightly. And Mobil would have reaped additional reward eventually. Nonetheless, in all the circumstances, "significant" strikes me as an appropriate characterization of the nature and extent of Mobil's disadvantage.
- [67] So the second notice determined the lease.

A presently immaterial issue

- [68] The choice of significant economic "disadvantage", not loss of profits, as the decisive criterion prompts Mobil to contend that the uncertainty attending the post-roadworks future would sustain a conclusion of "disadvantage" even if Mobil had not proved a loss of profits.¹⁰² In case this notion matters, I should say that the predictions by Mr Dempsey and Mr Leamon, though I regard them as overly pessimistic, are thoughtful, respectable positions, genuinely held by honest witnesses, and founded on great, relevant experience. As such, those views at least establish that, when the second notice was given, there then existed a considerable risk of very large economic loss for Mobil because of the roadworks.

Witnesses

- [69] The opinions of the economists, though not without interest, are not as useful as those of Mr Leamon and Mr Dempsey. In the light of Mr Leamon's relationship with Mobil, I have, I hope, assessed his reliability with due caution. I consider that his evidence is generally acceptable, although, as with the Dempsey gloom, his pessimism probably gives insufficient weight to the opportunity for growth in customer numbers presented by the increase in passing traffic over time. Many of Mr Dempsey's views are of value. Mr Maguire's evidence on matters of fact was essentially reliable. I would not accept Mr Stavrianos on any controversial point; he testified with an eye to his interests rather than with an anxiety for candour.

Disposition

- [70] Mobil is entitled to a declaration to the effect that, by the second notice, it has determined the lease. I will entertain submissions as to the forms of order in respect of both proceedings.

¹⁰² Ex 54 para 36.