SUPREME COURT OF QUEENSLAND

CITATION:	*Monash Land P/L v Townsville City Council* [2003] QSC 037
PARTIES:	**MONASH LAND PTY LTD** ACN 061 995 319 (applicant) **v** **COUNCIL OF THE CITY OF TOWNSVILLE** (respondent)
FILE NO/S:	SC No 732 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Townsville
DELIVERED ON:	26 February 2003
DELIVERED AT:	Townsville
HEARING DATE:	5 February 2003
JUDGE:	B W Ambrose J
ORDER:	**Application dismissed. I order that the applicant pay the costs of the respondent to be assessed on a standard basis. Liberty to apply with respect to the order for costs.**
CATCHWORDS:	CONTRACT – Construction and interpretation – Deed – application for declaration – where deed executed between developer and Council to facilitate development of leased Crown land – whether clause 11 of deed gave moratorium on rates payable to Council for two years from date land became available for sale *Land Acts* 1910-1962 (Qld) *Land Act* 1962 (Qld), Part IX, Div 1 *Land Act* 1962-1974 (Qld), s 214A *Land Act* 1975 (Qld), s 214, s 215, s 216, s 216(1), s 216(2), s 216(5)(a), s 216(5)(b), s 216(5)(c), s 216(5)(d), s 217, s 218, s 218(2) *Land Act* (Qld) 1962-1988 (Qld), s 215 *Local Government Act* 1936-1965 (Qld), s 3, s 21, s 21(1), s 22(1), s 24(1)(a)-(j), s 24(2), s 33, s 34 *Valuation of Land Act* 1944 (Qld), s 11, s 11D *Valuation of Land Act and Other Acts Amendment Act* 1985 (Qld) *Maggbury Pty Ltd & Anor v Hafele Australia Pty Ltd & Anor*

(2001) 185 ALR 152, considered

COUNSEL:	M A Drew for the applicant
	A M Daubney SC for the respondent
SOLICITORS:	Connolly Suthers for the applicant
	Townsville City Solicitor for the respondent

[1] **AMBROSE J:** This is an application by BMD Yarrawonga Pty Ltd (formerly Monash Land Pty Ltd) ("Monash") seeking a declaration that pursuant to clause 11 of a deed dated 9 November 1987 between its predecessor in title of certain land, Yarrawonga Pty Ltd ("Yarrawonga"), and the Council for the city of Townsville ("TCC"), Monash is not liable to pay rates to TCC with respect to certain residential allotments referred to in that deed for a period of two years after the time when they might first be sold.

[2] Other relief sought in the application was not pursued before me, the parties agreeing that the matter to be determined was the proper construction of cl 11 of the deed to which I have referred.

[3] The overall design plan for future subdivision of the land dealt with in the deed to which reference is made in cl 2 is exhibit 1 in the application. In construing cl 11 of the deed it is necessary to have regard to the history of subdivisional development of the land in question in the context of the statutory constraints upon subdivisional development of that land and the obligations of its owner to pay rates under the *Local Government Act* to the Council upon a valuation of land pursuant to the *Valuation of Land Act* in force at time of execution of the deed.

[4] It is helpful at the outset to trace briefly the history of the subdivisional development of the Yarrawonga land prior to the execution of the deed to be construed.

[5] Prior to 1963 an area of about 127 acres of elevated land on the outskirts of Townsville City was held on a Crown lease and used for pastoral purposes. I infer that it was a pastoral lease granted under the *Land Acts* 1910 to 1962.

[6] In 1963 Yarrawonga (the predecessor in title of Monash) obtained from the Crown, through the relevant Minister of the day, a development lease designed to permit Yarrawonga to achieve a staged subdivision of that land for residential purposes in conformity with specifications, standards and requirements contained in the lease. This development lease was granted under Part IX, Division 1 of the *Land Act* 1962.

[7] In 1982 Yarrawonga sought a ten year extension of that development lease. However, in lieu of extending the 1963 lease the Crown offered to grant a new development lease of undeveloped parts of the Yarrawonga site yet to be residentially subdivided under s 214A of the *Land Act* 1962-1974.

[8] Eventually a new development lease was granted to permit the balance of the Yarrawonga site to be subdivided in accordance with s 216 of the *Land Act* 1975. The new development lease was for a period of 13 years from 1 March 1983.

[9] It is convenient at the outset to consider the procedure by which Crown development leasehold land might be subdivided for residential purposes preparatory to its conversion to freehold land when the leasehold residential allotments were sold to persons seeking an estate in fee simple in them.

[10] Under s 215 of the *Land Act* 1962-1988 the Governor-in-Council was empowered to subject any development lease to conditions specifying *inter alia* –

(a) that it was to be developed for residential purposes, the construction of roads and other works

(d) the levelling and in particular top dressing, draining, subdivisional roads and other works and things to be done or constructed for developing the land for any purpose specified in the lease.

[11] Section 216 of the *Land Act* 1975 provides –

"**216. Subdivisions of development leases (8 Eliz. 2 No. 25, s.4).**

(1) The land, or any part or portion of the land, comprised in a development lease shall not be subdivided without the prior permission in writing of the Minister.

The requirement imposed by this subsection shall be deemed a condition of the lease.

(2) The Minister may, in respect of an application to subdivide the land, or any part or portion of the land, comprised in a development lease require, according as he deems fit, having regard to the circumstances of the case, any of the conditions of the lease to be performed in full or to the extent determined by him.

(3) The lessee shall apply in writing to the Minister for permission to subdivide the land, or any part or portion thereof, and shall lodge with the application a design plan, prepared and signed by an authorised surveyor, of the land or of the part or portion thereof to which the application relates, which shall exhibit distinctly delineated all roads, streets, passages, thoroughfares, lanes, pathways, parks, squares or reserves to be appropriated or set apart for public use and all subdivisions into which the said land or part or portion thereof, as the case may be, is proposed to be divided, marked with distinct numbers or symbols.

(4) The lessee shall endorse on such plan that he agrees to the plan of subdivision.

(5) (a) If the Minister is of the opinion that the proposed method of subdivision is satisfactory and that every requisition made by him pursuant to subsection (2) of this section has been carried out he shall forward two copies of the plan to the Local Authority for its consideration of the subdivisional design as set out in the plan.

The Local Authority shall after consideration of the subdivisional design notify the Minister –

(i) that it has no objection to the subdivisional design as set out in the plan; or

(ii) as to any objection it has thereto, or any amendment it desires to have made thereto.

(b) Upon notification from the Local Authority that such Local Authority has no objection to the subdivisional design as set out in the plan or, where the Local Authority has notified the Minister as to any objection it has thereto, or any amendment it desires to have made thereto, after consideration by the Minister of such objection or desired amendment, and determination by the Minister thereof, the Minister shall grant permission for subdivision in accordance with the original plan or, as the case may be, the plan determined by him after such consideration.

(c) Upon granting such permission the Minister shall cause –

(i) the plan in accordance with which permission for subdivision has been granted by him (hereinafter in this section referred to as the "approved plan") to be registered and deposited in the office of the Surveyor-General and, subject to the provisions of subsection (9) of this section, thereupon and thereafter, whilst comprised in the development lease, the land shall not be dealt with under this Act otherwise than in accordance with the design of the approved plan;

(ii) a copy of the approved plan to be forwarded to the Local Authority who shall notify the lessee of its decision as to the type, standard and specifications of the works required to be performed by the lessee to give effect to the approved plan other than the type, standard and specifications of any works required to be performed by the lessee in accordance with the conditions attaching to the development lease.

(d) The lessee may appeal to the Minister for Public Works and Local Government (or other Minister of the Crown for the time being charged with the administration of *"The Local Government Acts, 1936 to 1961*,") –

(i) against any decision of the Local Authority as to the type, standard and specifications of any works to be performed by the lessee; or

(ii) in any case where the Local Authority fails to notify the lessee within forty days, or such further time as the said Minister for Public Works and Local Government (or other Minister of the Crown for the time being charged with the administration of "*The Local Government Acts, 1936 to 1961,*") may allow, after the receipt by the Local Authority from the Minister of the approved plan, of the decision of the Local Authority as to the type, standard and specifications of works to be performed by the lessee.

For the purposes of any such appeal the provisions of subsection (15) of section thirty-four of "*The Local Government Acts, 1936 to 1961."* (or, as the case requires, section thirteen of "*The City of Brisbane (Town Plan) Act of 1959*") shall, with and subject to all necessary adaptations, extend and apply.

(6) As soon as practicable after registering and depositing the approved plan in the office of the Surveyor-General the lessee shall cause the land to which the plan relates to be surveyed by an authorised surveyor.

(7) A plan of such survey, certified by an authorised surveyor as accurate and conforming with or as nearly as practicable to the approved plan, together with all field notes necessary to permit the plan to be examined, shall be lodged with the Surveyor-General who, when he has satisfied himself that the plan survey conforms with or as nearly as practicable to the approved plan shall cause the survey plan to be registered and deposited in his office.

(8) Such plan of survey shall thereupon for all purposes of this Division become the approved plan and all land thereunto exhibited and delineated on such plan shall become and be dedicated and set apart for public use as roads, streets, passages, thoroughfares, lanes, pathways and squares respectively and shall vest in the Crown, and all land exhibited and delineated on the plan as parks and reserves shall be set aside as such under the applicable provisions of this Act.

(9) If it subsequently appears to the Minister (either of his own motion or upon application by the lessee) desirable to deal with any part of the land comprised in a development lease other than in accordance with the approved plan he shall cause two copies of an amended design plan of such part to be forwarded to the Local Authority for its consideration of the amended design as set out on such plan.

The provisions of subsections (5), (6), (7) and (8) of this section shall, with and subject to all necessary adaptations, apply to such amended design plan so that for the part of the development lease concerned such design plan and subsequent survey plan thereof shall become the approved plan.

Before, of his own motion, causing any amended design to be forwarded to the Local Authority the Minister shall cause to be given to the lessee two copies of a design plan showing the amendments proposed by him and shall have regard to (but shall not be bound by) any objections made to him by the lessee within two months thereafter."

[12] Under s 217 of the *Land Act* the Minister could require security to be deposited to ensure performance of the conditions of the approved residential subdivision.

[13] Under s 218 of the *Land Act* a lessee might purchase from the Crown for an estate in fee simple any residential subdivision of land contained in a development lease permitted by the Minister pursuant to s 216 of the Act.

[14] Section 218(2) provides –

"(2) Save as prescribed by subsection (3) of this section a lessee shall not be entitled to so purchase any such subdivision until he has satisfied the Minister that he has bona fide contracted to sell the subdivision in question to a buyer at a price not less than the value thereof, and he has paid to the Crown the purchasing price specified in the lease, or as calculated according to the method specified in the lease.

> For the purposes of this subsection the value of any subdivision shall be the amount which, in the opinion of the Minister, an experienced person would be willing to pay for the fee-simple of the subdivision, assuming it were offered for sale on such reasonable terms and conditions as a bona fide seller would require."

The 'subdivision' to which this section refers in my view means the allotment(s) contemplated by s 217(2) capable of sale for immediate residential use.

[15] Under the scheme for development and sale of the Yarrawonga estate which had always applied and which applied at the date of the execution of the deed in question on 9 November 1987 the Yarrawonga land had been developed in stages by the developer-lessee. The staged development is recorded in the drawing which was annexure 'A' to the deed and is exhibit 1.

[16] The procedure was that the developer-lessee would subdivide the leasehold land in stages as indicated in the plan. The developer-lessee would then offer for sale the residential allotments of leasehold land in each stage undertaking apparently to give the purchaser(s) a deed of grant entitling it or them to an interest in fee simple in those allotments. When a residential allotment of leasehold land had been sold the developer-lessee would then upon payment of a sum to the Crown (5% of the gross sale price) obtain from it a deed of grant for an estate in fee simple in that allotment in the name of the person with whom it had contracted to sell a fee simple interest in it. This procedure is recorded in conditions 11, 12, 13 and 14 of the first schedule to the deed which is incorporated in it by cl 1 thereof.

[17] The important point I think to keep in mind is that until each of the residential size allotments resulting from the staged subdivision of the leasehold land had actually been sold by the developer-lessee leading to the issue of a deed of grant for an estate in fee simple for it, all those allotments would remain Crown leasehold land with the incidents of the development lease.

[18] It is in that context that I refer to recitals E and F which record that –

> "E. The Land Administration Commission has intimated to Yarrawonga that rather than proceed with the said application for an extension of the term it is prepared to seek Executive approval for a new Development Lease upon certain conditions including a condition that the requirements of the TCC be first satisfied.
>
> F. The matter of the requirements of TCC have been negotiated between the parties the parties hereto who have agreed to enter into this Deed to record their agreement."

[19] In my view it was obviously to the advantage of both Yarrawonga and TCC to avoid if possible the rather cumbersome procedure under s 216 of the *Land Act* encapsulated in subsections (5)(a)(b)(c) and (d) in the event of disagreement concerning the subdivisional design or the standards and specifications of works to be performed by the developer-lessee to achieve eventually an approved residential subdivision. The deed was executed *inter alia* to achieve this result. It recorded a commercial agreement negotiated between persons experienced in land

development each concerned to enhance and protect its own financial position. I propose to construe it as such.

[20] Clause 1 of the deed provides –

> "This Deed shall have no force or effect unless and until the Governor in Council has issued or has intimated that he will issue to Yarrawonga a Development Lease in respect of the balance of the land comprised in the 1963 Development Lease pursuant to the provisions of Section 214 of the Land Act for a period of 13 years from the first day of March, 1983, upon the special conditions set out in the First Schedule hereto."

[21] Clause 2 provides –

> "(1) Subject to subclause (3) of this Clause the Council hereby approves of Drawing No. TSK R285-1H (a copy of which is annexed hereto marked "A" and which has been signed by the parties hereto for the purpose of identification) as the overall design plan for the future subdivision of the land comprised in the Development Lease…
>
> (2) The Overall Design Plan may be varied from time to time by mutual agreement as between Yarrawonga, TCC and the Crown.
>
> (3)…"

The Crown was not a party to this application.

[22] Clause 3 (1) provides –

> "(1) The land and any part or portion of the land comprised in the Development Lease shall be subdivided by Yarrawonga only in accordance with and subject to the provisions of Section 216 of the Land Act and the conditions of the proposed Development Lease."

[23] Clause 5 then deals specifically with various aspects of development works involved in residential subdivision of the developer-lessee's land.

[24] Clause 6 then requires Yarrawonga to pay certain fees to the Council, the equivalent of the fees which would have been payable had the land not been Crown leasehold land. Clauses 7, 8 and 9 relate to payment of fees to Council of the kind that would have been payable were the land subdivided pursuant to ss 33 and 34 of the *Local Government Act*.

[25] Clause 9 then provides –

> "(1) Yarrawonga shall not apply to the Minister for approval to sell any land shown on an approved plan unless and until it has obtained from TCC a certificate in writing stating that the works required to be performed by Yarrawonga to give effect to the relevant approved subdivisional design plan have been carried out to the satisfaction of TCC and that TCC is prepared to take over such works on maintenance and further that all fees, contributions and other money payable to TCC by Yarrawonga under this deed have been paid…
>
> (2) Yarrawonga shall pay to TCC a fee in respect of its issuing a certificate for the purposes of subclause (1) of this Clause such fee to

be equivalent to the fee that would have been payable to TCC as a sealing fee had the land in question been freehold land and had the request for a certificate been a submission of the survey plan for sealing in accordance with Chapter V." (*i.e. of the Council's subdivisional by la*ws).

[26] Clause 10 of the lease provides –

"10. For the purpose of levying rates in respect of the development lease all parts of the development lease remaining to be subdivided shall be regarded as a single rateable property."

This clause refers to the balance of the development lease land in respect of which no ministerial consent for residential subdivision had been received pursuant to s 216(5)(b) of the *Land Act* leading to its subdivision. It does not relate to leasehold land in fact already subdivided pursuant to s 216 of that Act.

[27] It is important to observe that the land leased would remain within the development lease until each subdivided residential allotment had been sold by the developer-lessee and a deed of grant had issued to its purchaser.

[28] Clause 11 the effect of which is in issue between the parties provides –

"11. (1) Yarrawonga shall pay to TCC in respect of each and every allotment not sold by Yarrawonga after a period of two (2) years from the issuing of a certificate for the purpose of subclause (1) of Clause 9 hereof in respect of such allotment an amount equivalent to the amount which would have been payable to TCC had such allotment been sold by Yarrawonga and then rated in the hands of the purchaser

PROVIDED THAT appropriate apportionments shall be made on a monthly basis when a period of less than a year is involved, but so that no amounts shall be attributed to any allotment for any period prior to the expiration of the said period of two (2) years

PROVIDED FURTHER the amounts payable by Yarrawonga shall be based upon the Valuer-General's valuation of the allotments (if any) sold within the particular subdivisional stage.

(2) Yarrawonga agrees to pay the aforementioned amounts on a continuing annual basis in respect of each allotment for as long as it remains unsold under exactly the same conditions as in the case of rateable land under the provisions of the Local Government Act."

[29] It is convenient now to turn to the *Local Government Act* 1936 to 1965 and consider the powers of and obligations upon TCC to levy rates within the area over which it has jurisdiction under that Act.

[30] Section 21 empowered TCC generally to make and levy rates on rateable land and to impose various other fees and charges to enable it to exercise and perform its functions of local government under that Act.

[31] Under Section 21(1) it is provided *inter alia* –

"(1) **General rate.** The Local Authority shall in each year make and levy a general rate equally upon the rateable value of land in the Area.

> The general rate may be made and levied to defray the expenses to be incurred by the Local Authority in exercising and performing all or any of the functions of local government with the following exceptions, namely:–
>
> (i) …
> (ii) …
> (iii) …
>
> **Case of divisions**. When an Area is divided the amounts of the general rates made and levied upon the rateable land in the several divisions need not be the same, but every general rate made and levied in respect of a division shall, except as to so much thereof as is comprised within a mineral field or gold field, be made and levied equally upon all rateable land in the division."

[32] It is notable that TCC was obliged under the Act to levy a general rate on all land within its jurisdiction whether it was freehold or leasehold land. It was not suggested in the course of argument that the land to which the deed under consideration relates came with any of the exceptions under s 24(1)(a)-(j) of the Act. Yarrawonga – and later Monash – as lessee from the Crown came within the definition "owner" – I refer to the particular definitions in (a) and (b) of "owner" under s 3.

[33] In my view therefore at all material times prior to the disposal of residential allotments still part of the development lease and in respect of which a deed of grant had not been obtained from the Crown, Monash was the "owner" of all development lease land, for rating purposes under the *Local Government Act*.

[34] Under section 24(2) of the *Local Government Act* in force at material times it was provided –

> "(2) The rateable value of any rateable land granted by the Crown in fee-simple shall be the valuation of the unimproved value of the land made by the Valuer-General in pursuance of the provisions of "The Valuation of Land Act 1944," or of any Act amending or in substitution of such Act.
> …
>
> The rateable value of any rateable land (not being land granted by the Crown in fee simple) shall be the valuation of the unimproved value of the land made by the Valuer-General made in pursuance of the provisions of the Act or Acts hereinbefore specified in this subsection as if such land were granted by the Crown in fee-simple."

[35] At the time of execution of the deed in question then, quite apart from the effect of cl 11, before an allotment of land within the development lease, was converted to freehold title upon the issue of a deed of grant by the Crown, it was valued by the Valuer-General for the purpose of the levying of rates as if it was land held in fee simple.

[36] Section 11 of *Valuation of the Land Act* was inserted by the *Valuation of the Land Act and Other Acts Amendment Act* 1985 which received assent on 4 April 1985.

[37] The new s 11D provided –

> "**11D. Valuation of Subdivided Land** (1) Notwithstanding any other provision of this Act except subsection (2), where an owner subdivides his land in 6 or more parts the parts that continue to be owned by him (being not less than 6) shall be deemed to form a single parcel and shall be valued as such pursuant to this Act (notwithstanding that the same may not adjoin) and in valuing that parcel any enhancement in the value thereof by reason of works carried out by that owner on the land so subdivided shall be disregarded:
>
> Provided that the unimproved value of that parcel shall be not less than 5 times the average unimproved value of the parts continuing to be so owned and for the purpose of determining the unimproved value of each such part it shall be taken to be a part to which this section does not apply.
>
> (2) …"

[38] The effect of this amendment a couple of years prior to the execution of the deed was that pursuant to s 11D and subject to the constraints contained in that section, unsold subdivided allotments of land of which the developer was owner (whether leasehold or freehold land) would be valued on a concessional basis for rating purposes. The concessional basis was apparently designed to give some financial relief to a subdivider who had not less than 6 unsold allotments in his subdivision at date of valuation in respect of the holding costs of those unsold residential allotments. The benefit of the amendment however did not make otherwise rateable land unrateable. In effect it provided the developer with a concessionally based valuation so that not less than 6 allotments subdivided but remaining unsold could be given a reduced unimproved value for rating purposes. The important concession seems to be the required disregarding of the enhancement of the value of such allotments by reason of the subdivisional works such as road construction, water and sewerage reticulation facilities, etc available to each allotment.

[39] Counsel did not address on the practical effect of the application of s 11D to the valuation of subdivisional residential allotments still within the development lease which remained unsold. I have not attempted to research the matter for the purpose of this application. It suffices to say that in my view it was obviously designed to reduce the rateable value of those allotments remaining in the lessee-developer's hands after subdivision if the number remaining unsold was 6 or more. I would assume that the benefit was a significant one; for example if there remained say ten 1000m^2 residential blocks unsold at date of the Valuer-General's valuation those blocks would be valued on the basis of a 1 ha parcel of unimproved land without the benefit of any of the subdivisional works which they would enjoy upon sale.

[40] In spite of the absence of evidence on this point, it seems clear to my mind that s 11D of the *Valuation of Land Act* was of significant benefit to the lessee-developer. On the other hand it was a significant constraint upon TCC's rating capacity. In my view in the performance of its rating function TCC would have an interest in procuring the early sale of residential allotments once they could be disposed of by Monash because of course once the allotments in the residential subdivision were put on the market, it would incur the obligation of providing to each one all the services provided to the various allotments in the overall development-lease area

which had in fact been disposed of and converted to freehold land. It seems clear therefore that TCC at the time of execution of the deed would be conscious of the advantage to it of avoiding as far as possible the effect of s 11D of the *Valuation of Land Act* at the earliest opportunity – perhaps by Monash being motivated to sell promptly the various residential allotments which it had subdivided with all the residential amenities available to lands in the same subdivided area held in fee simple. In my view TCC would have been (or should have been) anxious to avoid residential allotments being held in such numbers as perhaps to constitute a "land bank" upon which minimum rates were payable in the hands of the lessee-developer. On the other hand of course the lessee-developer had obviously borne significant development costs (and presumably consequent liability to pay interest thereon) and market forces presumably would motivate it to make every effort to recover its outlays as soon as possible. Should however it obtain the benefit of s 11D at a time when the development costs had been substantially recouped and liability to pay interest discharged or reduced the commercial realities of its land development business might make it profitable to so market its land as to be left with perhaps 6 or 10 residential allotments in each subdivision stage forming a land bank in respect of which the development costs had been recovered and the holding costs had been significantly reduced by virtue of the application of s 11D in the valuation of those allotments for rating purposes.

[41] In my view it is permissible to take these matters into account when construing cl 11 of the deed. I record only that neither development leases nor any antecedent agreements between Yarrawonga and TCC (under cl 12) were put in evidence or their terms referred to.

[42] In *Maggbury Pty Ltd & Anor v Hafele Australia Pty Ltd & Anor* (2001) 185 ALR 152 at 155 para 11 in the majority judgment of the High Court it is observed –

> "[11] Interpretation of a written contract involves, as Lord Hoffmann has put it:
>
> > …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.
>
> That knowledge may include matters of law, as in this case where the obtaining of intellectual property protection was of central importance to the commercial development of Mr Allen's ironing board."

[43] In para 43 at page 163 it is observed –

> "Upon the proper construction of the agreements did the restraints upon use continue to operate after the public disclosure and the collapse of negotiations? It was said by Lord Diplock that:
>
> > …if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.

> Of course, what in respect of a particular contract comprises "business commonsense", as an apparently objectively ascertained matter, may itself be a topic upon which minds may differ and in respect of which an imputed consensus is impossible…"

[44] Keeping in mind the obligation of TCC to levy rates on all rateable land within its jurisdiction pursuant to s 22(1) of the *Local Government* Act, s 11D obviously operates directly on the rating of residential allotments of land after a certificate of performance has been obtained from TCC as required by cl 9(1) of the deed.

[45] The principal object of cl 11(1) seems to have been to require Monash to pay rates to be levied in a specified way in respect of every residential allotment of leasehold land not sold by it within a period of 2 years of the issue of TCC's certificate of performance of the work necessary to permit each residential allotment to be sold – that is in an amount equivalent to that which would have been payable by Monash to TCC had it been sold and converted to fee simple and then rated in the hands of a purchaser.

[46] The first proviso in cl 11 in my view is clearly directed to an apportionment of rates between Monash and a purchaser of an allotment from it "on a monthly basis" when an allotment is sold before or after the expiration of a two year period from the issue of a performance certificate. In my view whenever rates might become payable by Monash, from time to time, a commercial negotiation resulting in an agreement that its obligation to pay TCC rates levied on the basis required by cl 11(1) should not arise within the first two years with respect to allotments remaining unsold is understandable. It was the object of the clause to give the lessee-developer and not purchasers from it a beneficial rating concession.

[47] Equally understandable is such a negotiation leading to an agreement that after two years had elapsed the same obligation would then be on Monash as it would be on any subsequent owner of an allotment when a deed of grant had issued in respect of it, to pay the same rates to TCC as would be payable if levied on a valuation of that allotment as if held for an estate in fee simple.

[48] It is the contention of the applicant that the qualification to the first proviso to cl 11 –

> "…but so that no amounts shall be attributed to any allotment for any period prior to the expiration of the said period of two (2) years…"

has the effect that no rates whatever are payable by Monash on any unsold residential allotments for a period of two years from the issue of the certificate under cl 9(1). In other words Monash contends that the effect of cl 11 is that TCC has agreed to a 'rates moratorium' for a period of two years from the issue of a certificate by TCC under cl 9(1) while those allotments remain unsold in the hands of Monash.

[49] It is conceded that cl 11(2) clearly imposes upon Monash an obligation to pay rates on allotments it retains after the expiration of the two year period to which I have referred on the same basis as rates payable upon freehold allotments.

[50] The contest between applicant and respondent in this case involves two considerations –

(1) The commercial likelihood of TCC, entitled if not indeed required to levy and recover rates upon the whole of the leasehold land held by Monash as at the date when the certificate of compliance has issued under cl 9(1), agreeing to cease levying and receiving rates for a period of two years after issue of the certificate.

(2) Whether cl 11(1) can or ought be construed as expressly or impliedly negating an obligation to pay any rates for a period of two years after the issue of a certificate of performance.

[51] With respect to the first consideration, I think it unlikely that TCC for no apparent reason would agree to levy and collect no rates upon residential allotments of land ready for sale – albeit having regard to s 11D of the *Valuation of Land Act* the concessional unit valuation of six or more unsold allotments would probably be significantly lower than the unit valuation of less than six such allotments.

[52] With respect to the second consideration, in my view disregarding the first proviso to cl 11(1) it is impossible to construe cl 11(1) as negating an obligation to pay any rates upon residential allotments of land for the specified period of two years. That clause imposes an obligation to pay rates to be levied on a specified basis after the specified period has ended. It is silent as to the lifting of the obligation to pay rates during the specified period which had existed at all material times up to the commencement of the specified two year period.

[53] There is no justification in my view to imply from the express terms of cl 11(1) an agreement that the obligation to pay rates which undoubtedly existed prior to the issue of the performance certificate under cl 9(1) ceased upon the issue of that certificate merely because upon the expiration of the two year period a specified, and I infer significantly higher rate, might then become payable.

[54] Far from cl 11 being designed to impose a "moratorium" upon the obligation of Monash to any pay any rates for a period of two years after issue of a performance certificate under cl 9(1), in my view it was probably designed to avoid whatever commercial benefit Monash may have been able to derive from "land banking" to attract a reduction in holding charges under s 11D of the *Valuation of Land Act* should it hold unsold six or more leasehold residential allotments produced during earlier stages of development, for sale at a time allotments in later stages were being marketed.

[55] Had the effect of cl 11(1) for which the applicant contends been in contemplation of the parties to the deed at time of its execution I cannot believe that the draftsman would have sought to achieve it by the drafting of the first proviso to cl 11(1) designed on its face merely to apportion the obligation to pay rates assessed between Monash and purchasers from it as specified in that clause in the event of some sales of subdivided allotments occurring during or after the expiration of the two year period.

[56] I dismiss the application. I order that the applicant pay the costs of the respondent to be assessed on a standard basis.

[57] Liberty to apply with respect to the order for costs.