SUPREME COURT OF QUEENSLAND

CITATION:	*Horton Geoscience Consultants P/L v Energy Minerals P/L* [2005] QCA 169
PARTIES:	**HORTON GEOSCIENCE CONSULTANTS PTY LTD** ACN 010 813 279 (plaintiff/respondent) **v** **ENERGY MINERALS PTY LTD** ACN 010 031 464 (defendant/applicant)
FILE NO/S:	Appeal No 9278 of 2004 DC No 1462 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	20 May 2005
DELIVERED AT:	Brisbane
HEARING DATE:	17 March 2005
JUDGES:	Williams JA, Fryberg and Holmes JJ Separate reasons for judgment of each member of the Court, Williams JA and Holmes J concurring as to the orders made, Fryberg J dissenting
ORDER:	**1. Application for leave to appeal granted** **2. Appeal allowed** **3. Order that the judgment of the District Court of 28 September 2004 be varied as follows:** **(i) delete the sum of $43,395.13 and insert in lieu thereof $36,430.87;** **(ii) delete paragraph 2 thereof and in lieu insert the following paragraph 2: "Declare that Horton Geoscience Consultants Pty Ltd is obliged to contribute 50% of the expenditures associated with years 4 and 5 of the Dooloo Creek Exploration Permit"** **4. Set aside the judgment of the District Court of 17 December 2004 and in lieu thereof order that each party pay its own costs of and incidental to the proceedings at first instance** **5. Order that the respondent pay the applicant-appellant's costs of and incidental to the application for leave to appeal and appeal to be assessed** **6. Grant the respondent an indemnity certificate**

pursuant to s 15 of the *Appeal Costs Fund Act* 1973 with respect to the costs of the appeal

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTIONS AND INTERPRETATION OF CONTRACT – OTHER MATTERS – where the parties entered into a joint mineral exploration venture agreement – under the agreement, the applicant was required to contribute the application fees, security deposits, rental, field expense and assay costs – applicant paid all fees and expenses for the first year and in the second year requested 50% contribution to expenditure from respondent – issue of construction – whether on proper construction, the obligation of the applicant to pay the whole of the expenses applied to year 1 of the agreement only and thereafter the position reverted to common law principle of equal sharing of expenditure

INTERPRETATION – ADMISSIBILTY OF EXTRINSIC EVIDENCE IN RELATION TO INSTRUMENTS – WHERE EVIDENCE ADMISSIBLE – TO PROVE INTENTION OF PARTIES – LATENT AMBIGUITY - latent ambiguity of agreement – reliance placed on the 'direct statements of intention' of the applicant and respondent in entering into the agreement – *Codelfa* principle

Appeal Costs Fund Act (Qld) 1973, s 15
Mineral Resources Act 1989 (Qld), Part 5
Partnership Act 1891 (Qld), s 27

ACI Operations Pty Ltd v Bawden [2002] QCA 286; Appeal No 3970 of 2002, 6 August 2002, applied
Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99, applied
Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337, applied
D T R Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423, cited
Hope v RCA Photophone of Australia Pty Ltd (1937) 59 CLR 348, cited
Pacific Carriers Ltd v BNP Paribas (2004) 78 ALJR 1045, considered
Prenn v Simmonds [1971] 1 WLR 1381, applied
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 79 ALJR 129, considered
Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd (1968) 118 CLR 429, cited

COUNSEL: G A Thompson SC, with M T Brady, for the applicant
S J Keim SC for the respondent

SOLICITORS: Clayton Utz for the applicant
Woodgate Hughes for the respondent

[1] **WILLIAMS JA**: This is an application for leave to appeal from the decision of a District Court judge. In the proceedings the respondent, the plaintiff in the court below, sought to recover from the appellant the sum of $35,164.92 pursuant to the terms of an agreement between the parties. By the defence and counter-claim the applicant sought to recover from the respondent $5,187.53 pursuant to that agreement, and more importantly sought "a declaration that the plaintiff is obliged to contribute 50% of the expenditures associated with years 4 and 5 of the Dooloo Creek EPM." For reasons delivered by the learned primary judge on 28 September 2004 judgment was given for the respondent in the sum of $43,395.13 and the judge refused to grant the declaratory judgment sought by the applicant. Those reasons did not provide any explanation for the refusal of the declaratory judgment and in consequence further reasons were sought by the applicant. Supplementary reasons, including the reasoning of the learned primary judge for rejecting the claim for declaratory relief, were delivered on 17 December 2004.

[2] The applicant needs leave to appeal to this court because on its face the judgment does not "relate to a claim for, or relating to, property that has a value equal to or more than the Magistrates Courts jurisdictional limit": s 118 (2) *District Court of Queensland Act* 1967 (Qld). In consequence leave is required pursuant to s 118 (3) of that Act. The Court of Appeal has a general discretion whether to grant leave to appeal pursuant to that provision: *ACI Operations Pty Ltd v Bawden* [2002] QCA 286; Appeal No 3970 of 2002, 6 August 2002. Counsel for the appellant submitted that the critical issue between the parties was the proper construction of the contract of 30 May 2000; the consequence of the construction arguably placed on the contract by the learned judge at first instance would expose the applicant to a potential liability of something in the order of $400,000.00 over ensuing years. I use the term "arguably" because it would appear that there is an inconsistency between the construction placed on the agreement by the learned primary judge in his reasons delivered on 28 September 2004 and that in the reasons given on 17 December 2004. Because it could be argued that the applicant was estopped from disputing the construction placed on the contract by the learned judge at first instance in his first set of reasons (which was contrary to the construction contended for by the applicant) it was submitted that this was an appropriate case in which to grant leave. The declaration sought related to those ongoing liabilities.

[3] Because the proper construction of the contract has ongoing serious financial implications for the parties it is in my opinion appropriate for the court to grant leave and consider the appeal on the merits.

[4] The contract could broadly be described as a joint venture agreement between the parties and was not drafted by lawyers. The document was prepared by Mr Wallin, a geologist, and the principal director of the applicant. The agreement is in the following terms:

> "From September 1999 HGC and EMPL have jointly pursued exploration for certain minerals in Queensland. The initial target being copper gold Mt Morgan style deposits associated with Devonian age rocks. The initial applications were for EPM 127780 'CALLIDE' of 100 sub blocks. approximately 300 km^2 and EPM

> 13050 'TOONARAH CREEK' consisting of 89 sub blocks, approximately 270km^2. On 1 June 2000 a further application will be made for 'DOOLOO CREEK' consisting of 81 sub blocks covering ground recently relinquished by North ex EPM 11308.
>
> The equity shares in EPM 127780, 'DOOLOO CREEK', EPM 13050 'TOONARAH CREEK' and any other joint areas, will be 50% HGC and 50% EMPL. EMPL will contribute the application fees, security deposits, rentals and field expenses and assay costs. HGC will contribute geological consulting services. With 'DOOLOO CREEK' EMPL will contribute $30 000 for drilling and assay costs in year 1. For the other areas year 1 exploration costs are expected to be low, of the order of a few thousand dollars. EMPL and HGC will jointly try to attract a joint venture partner to expend considerable funds on the exploration and development of these areas. If this is achieved before drilling is required at 'DOOLOO CREEK' then the $30 000 EMPL would have otherwise contributed will be directed to drilling the other areas, or if no suitable targets are identified, paid to HGC. If any security deposit or rental funds are obtained from an incoming joint venture partner then these will be paid to EMPL.
>
> Progress to year 2 will depend on results of year 1. If one party decides to withdraw they will transfer their equity to the other party at no cost if so requested.
>
> Both HGC and EMPL agree to bring new projects in Queensland, South of Mackay to the other's attention and negotiate the opportunity to jointly progress them on a similar basis. This specifically excludes opal exploration and development presently being progressed by HGC and areas adjoining existing application areas for EPM's by EMPL."

The agreement was signed by Mr Horton on behalf of the respondent; he is the managing director of the respondent and also a geologist.

[5] The contract is to be construed bearing in mind the approach to the construction of such a document outlined by Gibbs J in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109-10 and by Barwick CJ in *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429 at 436-7. As Barwick CJ said, in the case of "commercial arrangements" no "narrow or pedantic approach is warranted." One must ascertain the intention of the parties from the words used in the document, endeavouring to give force and effect to all clauses therein. But, of course, the Court cannot, to use the words of Gibbs J, "remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust."

[6] As will become obvious later in these reasons it is also necessary to bear in mind the parol evidence rule and its exceptions. There is no doubt that a commercial agreement such as this is not to be construed "isolated from the matrix of facts" in which it was set, to use the words of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381 at 1384. That reasoning has been adopted and applied by the High Court in cases such as *D T R Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138

CLR 423 especially at 429 and *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 especially at 347-353. In the latter case Mason J at 347 expressed the parol evidence rule in the following terms:

> "The broad purpose of the parol evidence rule is to exclude extrinsic evidence (except as to surrounding circumstances), including direct statements of intention (except in cases of latent ambiguity) and antecedent negotiations, to subtract, add to, vary or contradict the language of a written instrument."

[7] Later at 352-3 Mason J particularised a situation in which evidence of the actual intention of the parties could be received, he said: "it is possible that evidence of mutual intention, if amounting to concurrence, is receivable so as to negative an inference sought to be drawn from surrounding circumstances." In other words, if the language of the agreement might give rise to a presumed intention contrary to the actual mutual intention of the parties, evidence of that intention may be received. It will be necessary to return to these legal principles later.

[8] It was agreed between counsel on the hearing of the appeal that, because the arrangement between the parties was a joint venture, profits and expenditure were to be apportioned equally between the parties unless there was an agreement to the contrary. (cf *Partnership Act* 1891 (Qld) s 27 and *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 10-11.) It was also agreed that, at least to some extent, the document in question evidenced an agreement to the contrary. The agreement must also be construed in the light of the terms and conditions upon which an EPM (exploration permit for minerals) is issued pursuant to the applicable legislation. The permits referred to in the agreement oblige the holder to expend specified minimum amounts on, inter alia, field expenses and assay costs, each year from year 1 to year 5. Security deposits must be lodged with the appropriate Government department as a guarantee of performance of those obligations. Exploration permits are generally dealt with in Part 5 of the *Mineral Resources Act* 1989 (Qld).

[9] In the second paragraph of the agreement there is a reference on two occasions to "year 1" and the first sentence of the third paragraph is in terms: "Progress to year 2 will depend on results of year 1." The words which became critical in the litigation at first instance were: "EMPL will contribute the application fees, security deposits, rental and field expenses and assay costs. HGC will contribute geological consulting services." The question was whether those words represented an agreement varying the equal apportionment of expenditure not only in the first year, but for the entire period relevant to the EPM.

[10] Relevantly the applicant paid all the "rentals" in the first year and subsequently the "rentals" were initially shared equally between the parties. But then in the proceedings the respondent sought to recover $6,964.26 being the amount it had paid by way of "rentals" and which it asserted ought to have been wholly paid by the applicant given the construction it placed on the agreement. The learned judge at first instance, in his first set of reasons, construed the agreement as requiring the applicant to pay the "rentals" throughout the whole period. Therein he said:

> "The record of agreement clearly provides that the defendant is to contribute the "rentals" and it has not done so. I allow the plaintiff the amount of $6,964.26 claimed."

[11] That set of reasons primarily deals with other issues between the parties raised in the proceedings which are not relevant for present purposes. The learned judge at first instance did not expand in those reasons on the critical question of construction for present purposes. But it is clear from his allowing the respondent to recover the amount of $6,964.26 for "rentals" that he was construing the agreement as obliging the applicant to pay all "application fees, security deposits, rentals and field expenses and assay costs" throughout the whole period of operation of the relevant EPM.

[12] The applicant's case at first instance, and on appeal, is that on the proper construction of the agreement it was only obliged to pay all of those expenses in the first year. The submission was that, properly construed, the second paragraph of the agreement did not vary the common law principle of equal sharing of expenditure in the second and later years. It was on that basis, relying on the common law position, that the applicant sought the declaratory judgment in the terms set out above. In the first set of reasons the learned judge at first instance merely said that he declined "to grant the declaratory judgment sought by the defendant with respect to years 4 and 5 of the Dooloo Creek EPM."

[13] In the reasons delivered 17 December 2004 the learned judge at first instance explained "why I declined to grant that declaratory judgment". His Honour noted that the agreement "cannot be described as carefully drawn" and noted that it was "silent as to duration of the joint venture." Relevantly his reasoning went on:

> "The record of agreement is silent as to what the parties would or might do with relation to Dooloo Creek EPM or any other EPM they held in the second or any subsequent year. They would continue to be bound by the conditions of the permit . . . In general, I preferred Mr Horton's evidence to that of Mr Wallin. . . . I consider that the parties' immediate intention - certainly for the first year - was to find a joint venture partner and that explains the record of agreement focussed on the obligations of each in the first year and especially on the Dooloo Creek area. What was to happen in subsequent years was left to the future save that, prior to the commencement of the second year, each party had a right to withdraw . . . That point having passed and the record of agreement being silent as to what would happen next, this Court cannot devise a program of explorations, expenditure, and anything else for the parties to put into effect. The parties are simply left in the position where they are persons to whom an exploration permit for certain land has been granted and issued for a term of years specified in the permit and subject to conditions prescribed or permitted by the Mineral Resources Act 1989. . . . So far as the evidence before me be concerned the Dooloo Creek EPM remains on foot and the obligations of the parties under it remain. Whether the liabilities of the parties under that EPM is a joint one or is one owed jointly and severally was not debated before me. The question which arose before me relates to the manner in which each of the parties is to participate in or contribute towards the fulfilment of their obligations to the Crown. Looking at the respective contributions in money terms, I have no reason not to find that each of the parties has to contribute equally. That is, each will pay 50% of the total cost. However that does not mean that the

> obligation to so contribute cannot be in "kind" and the value thereof in monetary terms agreed by the parties. I am satisfied that that is the sense in which Mr Horton (and so the plaintiff) understands the obligation to contribute towards fulfilment of the conditions of the exploration permit. . . . The power to grant a declaration of rights "should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not be issued unless there are circumstances that care (sic) for their making". . . . In this case, where the two parties as joint permit holders of Dooloo EPM have not, whether by the record of agreement or subsequently, reached an agreement as to whether their future expenditure contributions will be on a 50/50 or equal contributions, the general rule of equity ought to apply but, since Mr Wallin has conceded . . . that the parties have agreed to "visit" the contribution question after the trial, I considered it inappropriate to make a binding declaration of right at this time. There has been no suggestion that either party will not participate in that visitation or that either will contend that the contribution of either is not 50/50."

[14] It seems clear from those passages that the learned judge at first instance was holding that the agreement in question did not provide a basis for a division of profits and expenditure after year 1; in particular that must mean that the words in the agreement: "EPM will contribute the application fees, security deposits, rentals and field expenses and assay costs" were limited to year 1.

[15] In my respectful view that conclusion is clearly contrary to the basis on which his Honour had determined that the respondent was entitled to recover the $6,964.26; that is why it becomes necessary for this Court to place a definitive construction on the agreement so that it is clear on what basis the parties must contribute for expenses, including "rentals and field expenses and assay costs" in years 4 and 5 with respect to the Dooloo Creek EPM.

[16] In my view the approach of the learned judge at first instance in his second set of reasons to the construction of the agreement is to be preferred. When the agreement is read in the context of the joint venture between the parties the second paragraph of the agreement is limited to year 1 of the Dooloo Creek EPM. That to my mind is made clear by the reference therein to "year 1" on two occasions and then the statement in the third paragraph that "Progress to year 2 will depend on results of year 1."

[17] But if it be wrong to say that such construction is to be preferred given the wording of the document, it would have to be said that there was at least a latent ambiguity. In that case, given the passage quoted above from *Codelfa*, reliance could be placed on the "direct statements of intention" of Wallin and Horton in entering into the agreement.

[18] In that regard reference can be made to the following evidence of Horton:

> "Q. If a joint venture partner was not attracted . . . who was going to pay the expenses of the EPM for years 2, 3 and 4? - A. It was never discussed. . . .

> Q. Are you saying that no agreement was reached? - A. Essentially, yes.
> . . .
> Q. There's no suggestion, is there, that it was your understanding that you would have to provide all of the geological services for the term of the EPM? - A. That is correct.
>
> Q. So you weren't going to have to provide them all for ever? - A. No, that is correct.
>
> Q. Well, equally, it wasn't your understanding that Mr Wallin's company would provide all of the rental and field expenses for the whole term of the EPM? - A. Partly correct.
> . . .
> Q. But Mr Wallin didn't have to provide a 100% of the rental and field costs? A. That is correct.
>
> Q. For the whole of the term? - A. That is correct.
>
> Q. What I'm putting to you, there was really no agreement so far as the expenses were concerned and obligations were concerned, your obligations and his obligations after the first year? - A. It has not been discussed.
> . . .
> Q. And I'm suggesting to you that you hold a 50% equity with Energy Minerals; you accept that? - A. Correct.
>
> Q. That you are obliged to meet half of the minimum expenditure requirements for years 4 and 5? - A. Yes we are."

[19] While it is not as easy to isolate from the evidence of Wallin passages expressly stating that the division of expenditure in the years subsequent to year 1 was not discussed at the time the agreement was entered into, it is abundantly clear from the whole of his evidence that he accepts that expenditure in those subsequent years was not discussed between he and Horton.

[20] If there be a latent ambiguity in the agreement then that evidence of intention in my view clearly resolves the issue in favour of the applicant. The evidence I have referred to essentially amounts to an agreement between the parties limiting the operation of the second paragraph of the agreement to year 1 and in consequence it is evidence of mutual intention negativing an inference sought to be drawn from the words of the agreement to the effect that the obligation imposed by the words used in the second paragraph extended throughout the whole term of the EPM.

[21] It follows in my view that on the proper construction of the agreement the obligation of the applicant to pay the whole of the "rentals and field expenses and assay costs" only applied to year 1 of the Dooloo Creek EPM, and thereafter the position reverted to that derived from the general law, there being a joint venture between the parties, that such liabilities should be shared 50/50.

[22] As is apparent from the last two sentences in the foregoing quote from the reasons for judgment of 17 December 2004, the reason why the learned judge at first

instance refused to make the declaration, given that he concluded that the general rule of equity ought to apply, was that the parties had "agreed to 'visit' the contribution question after the trial". In saying that the learned judge at first instance was obviously referring to a passage towards the end of the evidence in chief of Mr Wallin. The witness referred to the fact that the respondent had "consistently refused to pay their 50%", and then came the following question and answer:

> "Q. Alright. Well, to be fair, they say that it awaits the outcome of this trial, do they not? It is to be visited after this trial? - A. Yes, but . . .
> Q. But up till then they won't pay? - A. No."

That was no more than an observation by the witness that, whatever be the outcome of the litigation, it would be necessary for the parties to have further discussions about the basis on which the joint venture would be conducted in the future. That in no way impacted on what was the position in law at the time the litigation was being conducted. That answer provided no basis for refusing to grant the declaration sought, if otherwise the applicant had established an entitlement to it.

[23] It follows that the learned judge at first instance was wrong in ordering the applicant to pay $6,964.26 to the respondent and was wrong in refusing to make the declaration sought by the applicant.

[24] The judgment of the District Court dated 28 September 2004 should be varied by deleting the sum of $43,395.13 and inserting in lieu thereof $36,430.87. Further that order should be amended by deleting paragraph 2 thereof and inserting in lieu: "Declare that Horton Geoscience Consultants Pty Ltd is obliged to contribute 50% of the expenditures associated with years 4 and 5 of the Dooloo Creek Exploration Permit".

[25] The judgment of 28 September 2004 did not deal with costs of the proceedings; that matter was dealt with by the judgment of 17 December 2004. The order then made was in the following terms:

> "1. The defendant pay the plaintiff's costs of and incidental to the application of 26 June 2003 on a standard basis.
>
> 2. After the date of transfer to the District Court pay costs on a Magistrate's Court scale assessed on the standard basis."

[26] Given my reasoning the present respondent should have recovered in the District Court proceeding the sum of $36,430.87, and the present applicant should have been granted the declaration it sought. Both were significant issues and both issues seem to have been equally hard fought. The trial took four days and the issues on which each party was successful were to a large extent intertwined. It could be ordered that the plaintiff at first instance recover its costs of the claim and the defendant at first instance recover its costs of the counter-claim, but that in my view could only further complicate the disputes between the parties. In the circumstances the more appropriate order to make is that each party pay its own costs of the proceedings at first instance.

[27] So far as the appeal is concerned it was essentially necessitated because of the inconsistency in the reasoning of the learned judge at first instance as between his reasons delivered on 28 September 2004 and those delivered on 17 December 2004. The applicant should recover its costs of the application and appeal against the respondent, but the respondent should be granted a certificate under the *Appeal Costs Fund Act* 1973 (Qld).

[28] The orders of the court should therefore be:

1. Order that the judgment of the District Court of 28 September 2004 be varied as follows:

   (i) delete the sum of $43,395.13 and insert in lieu thereof $36,430.87;

   (ii) delete paragraph 2 thereof and in lieu insert the following paragraph 2: "Declare that Horton Geoscience Consultants Pty Ltd is obliged to contribute 50% of the expenditures associated with years 4 and 5 of the Dooloo Creek Exploration Permit".

2. Set aside the judgment of the District Court of 17 December 2004 and in lieu thereof order that each party pay its own costs of and incidental to the proceedings at first instance.

3. Order that the respondent pay the applicant-appellant's costs of and incidental to the application for leave to appeal and appeal to be assessed.

4. Grant the respondent an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973 with respect to the costs of the appeal.

[29] **FRYBERG J:** The inconsistency between the two sets of reasons published by the trial judge has been described by Williams JA.[1] Its existence supplies the reason why this court should grant leave to appeal. The issues should be reconsidered on their merits.

[30] The first issue is the proper construction of the contract between the parties. The appeal was conducted on the basis that the trial judge had found that the contract was wholly in writing. Its heading was, "JOINT MINERAL EXPLORATION PROGRAMS IN QUEENSLAND". Its terms have been set out in full by Williams JA.[2] Its interpretation depends upon the proper analysis of the second and perhaps the third paragraphs.

[31] As I understand it, the second paragraph contains three elements. The first is embodied in the first sentence:

> "The equity shares in EPM 127780, 'DOOLOO CREEK', EPM 13050 'TOONARAH CREEK' and any other joint areas, will be 50% HDC and 50% EMPL."

Standing alone that sentence constitutes an agreement that ownership of the named assets is to be vested equally in the two parties. As Williams JA has observed, it is common ground that because of the nature of the agreement, profits and

---

1 Paragraph [15].

2 Paragraph [4].

expenditure are also to be apportioned equally unless there be an agreement to the contrary. That is what one would expect where there is equal ownership of the assets.

[32] The second element is embodied in the second and third sentences:

> "EMPL will contribute the application fees, security deposits, rentals and field expenses and assay costs. HGC will contribute geological consulting services."

Those sentences modify the expenditure obligations of the parties, at least to the extent of the types of expenses described (it is unnecessary to consider whether there existed any other types of expenses). They contain no temporal limitation. The expenditure obligations which they modify were themselves implicit in the first element and were subject to no temporal limitation.

[33] The third element is embodied in the remainder of the second paragraph. It constitutes a modification for the purposes of "year 1" of the general obligations imposed in the second element. The amount of drilling and assay costs to be contributed by the present applicant in respect of one of the permits is fixed at $30,000.00 in that year. Other year one exploration costs are also impliedly limited. Provision is then made to determine the fate of the $30,000.00 in certain cases where its expenditure may turn out to be unnecessary.

[34] The third paragraph, as befits a fresh paragraph, deals with a different topic. It is concerned with the continuation of the venture to a second year; and with the withdrawal of a party. It contains its own problems of construction, but they do not arise in this appeal. In my judgment it does not affect the determination of the first issue in this appeal, namely whether the obligations imposed in the second element are limited to "year 1".

[35] With respect to those who are of a different view, I see no reason why the generality of the words in the second element should be read down. It is not suggested that to give those words their natural and ordinary meaning will produce an absurd or commercially impractical result. In the structure of the agreement the words perform a useful function. In determining their meaning, it is legitimate to take account "not only of the text of the documents, but also the surrounding circumstances known to [the parties], and the purpose and object of the transaction"[3]. Nothing in the purpose or object of the transaction suggests a different construction. As to surrounding circumstances, Mr Thompson SC on behalf of the applicant referred us to a number of passages in the evidence (albeit in relation to his second submission). The only facts to emerge from those passages were that the question of payment of expenses for years two, three and four was never discussed; that the respondent had paid half of the annual rental for years two and three; and that the parties were obliged under the terms of their tenement to spend $400,000.00 on exploration in year four. The trial judge accepted Mr Horton's evidence that the respondent was forced to pay half of the annual rental for years two and three "to keep the tenements in good standing". In my judgment those facts do not suggest that the words in question should bear a different meaning.

---

[3] *Pacific Carriers Ltd v BNP Paribas* (2004) 78 ALJR 1045 at pp 1050-51.

[36] In the alternative Mr Thompson submitted that the agreement was ambiguous as to whether the liability for the listed expenses by the respective parties was limited to the first year. He submitted that on that basis evidence of circumstances surrounding the preparation of the agreement could be considered. That submission was based on a passage in the judgment of Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*:

> "The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning."[4]

Although that passage is expressed in the language of admissibility of evidence, it is evident from an earlier passage that it was intended equally to apply to the interpretation of a written instrument.[5] In my judgment subsequent High Court decisions establish that in determining the meaning of the terms of a contractual document the surrounding circumstances known to the parties, and the purpose and object of the transaction, may *normally* be taken into account; their impact is not restricted to the case where the language is ambiguous (whether latent or patent) or susceptible of more than one meaning.[6] That is why I have taken account of the surrounding circumstances in the preceding paragraph of these reasons.

[37] However Mr Thompson's submission went further than those circumstances to which I have referred. He directed the court to the evidence of the parties regarding what they said or did not say during their negotiations, what they intended the contract to mean and what they thought when they gave their evidence that it did mean. Implicitly he urged that all of this was part of the surrounding circumstances which ought to be taken into account. This type of evidence is problematic in this context, as Mason J recognised:

> "It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable. The point is that such statements and actions reveal the terms of the contract which the parties intended or hoped to make. They are superseded by, and merged in, the contract itself. The object of the parol evidence rule is to exclude them, the prior oral agreement of the parties being inadmissible in aid of construction, though admissible in an action for rectification.
>
> Consequently when the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the

---

4 (1982) 149 CLR 337 at p 352.

5 *Ibid* at p 347.

6 *Pacific Carriers Ltd v BNP Paribas* (2004) 78 ALJR 1045 at pp 1050-51; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 79 ALJR 129.

> contract came into existence, and to the parties' presumed intention in this setting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract."[7]

His Honour went on to suggest the existence of a possible exception, but it was not argued that this applied in the present case.

[38] In the light of this passage it is not easy to understand his Honour's reference to latent ambiguity in the passage, earlier in his judgment, referred to by Williams JA.[8] One would have thought that such ambiguities would be resolved by proof of "objective background facts which were known to both parties and the subject matter of the contract". Perhaps his Honour had some particular case in mind. In any event that passage appears inconsistent with the principle espoused in more recent High Court authority:

> "[40] This Court, in *Pacific Carriers Ltd v BNP Paribas*, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement."[9]

In my judgment most of the evidence referred to by Mr Thompson is not relevant to the interpretation of the agreement.

[39] In any event, even if there is an exception in the case of latent ambiguity which permits resort to direct statements of intention, there is in my judgment no ambiguity in the relevant part of the agreement, and certainly no latent ambiguity. "[A]mbiguity may be latent because a word or description, superficially referring to one person or thing, is found to be equally applicable to more than one person or thing".[10] There is no word or description of that nature in the present contract. Mere difficulty in construction is not ambiguity (latent or patent). There is therefore no occasion to refer to the additional evidence as an aid to construction of the contract.

[40] It follows that the applicant was liable to the respondent for the rental payments for the second and third years and that those amounts were correctly taken into account by the trial judge. It also follows that the applicant was not entitled to the declaration sought in its counterclaim. The orders made in the District Court were correct. The appeal should be dismissed.

---

7 (1982) 149 CLR 337 at p 352. See also his Honour's judgment in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at p 606.

8 Paragraph [6]. No such latent ambiguity exception is suggested in either *Halsbury's Laws of Australia* (vol 6 para [110-2305]) or *The Laws of Australia* (title 7 sect 7.4 para [55]).

9 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 79 ALJR 129 at p 136.

10 *Halsbury's Laws of Australia, loc cit.*; *Hope v RCA Photophone of Australia Pty Ltd* (1937) 59 CLR 348 at p 356.

[41] **HOLMES J:** I have had the advantage of reading the reasons of both Williams JA and Fryberg J. I agree with Williams JA that there was at least a latent ambiguity in the agreement as to the duration of the contribution arrangements, warranting resort to extrinsic evidence.

[42] The second sentence of the agreement's second paragraph imposes the respective obligations, on EMPL to contribute "application fees, security deposits, rentals and field expenses and assay costs" and on HGC to provide "geological consulting services". Those obligations are not confined by reference to area or duration, which might suggest they continue for the life of the agreement. But that sentence is followed by a specific requirement for contribution by EMPL of a set amount, $30,000, in respect of drilling and assay costs for "Dooloo Creek" in Year 1. There is then a reversion to consideration of the areas other than Dooloo Creek: exploration costs (which presumably include the field expenses and assay costs EMPL is to pay) are not expected to be high for Year 1. Those references rather suggest a concern with Year 1 in the arrangement, both as to Dooloo Creek and the remaining areas; but alternatively one might regard the specific limiting of the Dooloo Creek expenses to Year 1 as evidence of an intention that the preceding, more general undertaking of expenses was at large.

[43] The following paragraph commences with the sentence, "Progress to year 2 will depend on results of year 1." That is capable as being read as an indication that whether the agreement would progress in the terms outlined in the preceding paragraph would depend on year 1's results, or alternatively that the issue was solely whether the agreement would progress at all.

[44] Accepting that the agreement is ambiguous on its face, it seems to me permissible to have regard to Mr Horton's evidence that there was no discussion of obligations beyond the first year. That is not to say that one adopts his view of the contract's effect, at the time of its making or as currently expressed; rather the importance of that evidence is in establishing that contribution arrangements beyond year 1 were not part of the subject matter of the contract. For those reasons I agree with Williams JA's construction of the agreement and with the orders which he proposes.