SUPREME COURT OF QUEENSLAND

CITATION:	*Kitchen v Vision Eye Institute Ltd & Anor* [2016] QCA 226
PARTIES:	**DAVID KITCHEN** (appellant) **v** **VISION EYE INSTITUTE LIMITED** ACN 098 890 816 (first respondent) **ICON LASER (AUST) PTY LTD** ACN 094 059 220 (second respondent)
FILE NO/S:	Appeal No 4961 of 2015 SC No 10366 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2014] QSC 260
DELIVERED ON:	9 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	15 February 2016
JUDGES:	Margaret McMurdo P and Fraser JA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. The parties have leave to make submissions about costs in accordance with the Practice Direction.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – CUSTOM AND USAGE – DEFINITION – where the appellant was a practising ophthalmologist – where the first respondent acquired the appellant's practice under a Share Purchase Agreement, and a Service Agreement was made between the appellant and second respondent – where the appellant purported to terminate the Service Agreement – where, at first instance, the respondents alleged, among other matters, that the termination of the Service Agreement was a wrongful repudiation – where the respondents were substantially successful in the trial proceedings – where the primary judge, among other things, ordered judgment for the second respondent against the appellant for damages for breach of the Service Agreement – where the appellant contends that the trial judge should have held that the second respondent breached

clause 9.1(a) of the Service Agreement in failing to notify the appellant as soon as the first respondent or any related body corporate entered into any "New Doctor Agreement" with another "Salaried Doctor Partner" in circumstances where the appellant would then have a right under clause 3.3 of the Service Agreement – where the appellant seeks a declaration that the second respondent's failure to notify the appellant of seven second term agreements, breached clauses 3.3 and 9.1(a) of the Service Agreement – where the respondents adopt the trial judge's reasons – whether the trial judge erred in construing the term "New Doctor Agreement" to exclude seven second term agreements

BMA Special Opportunity Hub Fund Ltd v African Minerals Finance Ltd [2013] EWCA Civ 416, cited
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337; [1982] HCA 24, cited
McGrath v Sturesteps; Sturesteps v HIH Overseas Holdings Ltd (in liq) (2011) 81 NSWLR 690; [2011] NSWCA 315, cited
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37, cited
Segelov v Ernst & Young Services Pty Ltd (2015) 89 NSWLR 431; [2015] NSWCA 156, cited
Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd [2006] EWCA Civ 1732, cited
Vision Eye Institute Ltd & Anor v Kitchen & Anor [2014] QSC 260, related

COUNSEL: W Sofronoff QC, and D A Quayle, for the appellant
L F Kelly QC, and S R R Cooper, for the respondents

SOLICITORS: Russells for the appellant
Clayton Utz for the respondents

[1] **MARGARET McMURDO P:** I agree with Fraser JA's reasons for dismissing this appeal and with the orders he proposes.

[2] **FRASER JA:** The appellant is an ophthalmologist practising in central Queensland. At the time of the transactions relevant to this appeal, his practice was owned by the second respondent, all of the shares in the second respondent were owned by Swordfish Nominees Pty Ltd, and the sole share in it was held by the appellant and his wife as trustees. In early 2006 the first respondent (a public company) acquired the appellant's practice by buying the share in Swordfish Nominees Pty Ltd under a Share Purchase Agreement, and a Service Agreement was made between the second respondent and the appellant. Completion of the Share Purchase Agreement was expressed to be conditional on completion of other contracts, including the Service Agreement,[1] and the parties' obligations under the Service Agreement were expressed to be conditional upon completion of the Share Purchase Agreement.[2] The value of the total consideration received upon the sale of the practice, which was made up of cash payments, the issuing of shares in the first respondent, the assumption of

1 Share Purchase Agreement, cl 4.1(j).
2 Service Agreement, cl 2.2.

liabilities by the first respondent, and payments to the appellant for the recruitment of other doctors, amounted to some $20,712,000.[3]

[3] In September 2009 the appellant purported to terminate the Service Agreement. In proceedings in the Trial Division, the respondents alleged, amongst other matters, that Dr Kitchen's purported termination of the Service Agreement was a wrongful repudiation, and the second respondent had validly terminated it. The second respondent sought damages. The respondents also sought to enforce restraints of trade to which the appellant had agreed in the Service Agreement and the Share Purchase Agreement, and other orders. The appellant and his wife defended and counterclaimed on various bases. The respondents were substantially successful in the proceedings. The trial judge ordered, amongst other things, that there be judgment for the second respondent against the appellant for damages for breach of the Service Agreement in an amount which exceeds $10 million.

[4] The appellant and his wife appealed. Mrs Kitchen was subsequently removed as a party to the appeal. The grounds of appeal which remain in issue concern only the proper construction of cl 3.3 of the Service Agreement. The appellant contends that the trial judge should have held that the second respondent breached cl 9.1(a) of the Service Agreement. Clause 9.1(a) required the second respondent to notify the appellant as soon as the first respondent or any related body corporate entered into any "New Doctor Agreement" with another "Salaried Doctor Partner" in circumstances where the appellant had or would have a right under cl 3.3. The appellant sought a declaration that the second respondent's failure to notify the appellant of certain agreements was in each case a breach of cls 9.1(a) and 3.3 and a remitter to the trial judge to determine the consequences of the declaration.

The Service Agreement

[5] The Service Agreement recites that the second respondent ("the Company") carries on the business of providing ophthalmic services and has agreed to employ the appellant ("the Ophthalmologist") on the terms and conditions set out in the Service Agreement. By cl 2.1, the Company agrees to employ the Ophthalmologist on the terms and conditions contained in the Service Agreement. Clause 2.2 provides that the parties' obligations are conditional on completion under the Share Purchase Agreement having occurred. Under clause 3.1 the "initial term" of the employment is five years, commencing on the "Effective Date". Clauses 3.2 and 3.3 provide:

> "3.2 The Ophthalmologist and the Company will extend this Agreement at the end of its Initial Term (or will enter into a new employment agreement) in the following circumstances on the following terms:
>
> (a) by mutual agreement between the Company and the Ophthalmologist on the terms agreed at that time; or
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> (b) at the Ophthalmologist's request, subject to the Ophthalmologist continuing at the same or higher level of performance, on terms no less favourable than those applying at the expiry of the Initial Term and so that the extended term runs for a period nominated by the Ophthalmologist being a period not exceeding five years from the expiry of the Initial Term or until the Ophthalmologist is 63 years of age (whichever is earlier).

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[3] Details of the consideration are set out in the primary judgment, [2014] QSC 260 at [48] – [57].

3.3 The Ophthalmologist and the Company will, if the Ophthalmologist elects (in the Ophthalmologist's sole discretion) promptly amend the terms of this Agreement as necessary from time to time so that the terms of this Agreement (severally and overall) are no less favourable to the Ophthalmologist than terms offered under any service or employment agreement (***New Doctor Agreement***) to any Salaried Doctor Partner by the Company, VGH[4] or any Related Body Corporate of VGH at any time after the Effective Date during the Term, other than in relation to:

(a) Salary;

(b) the Accrued Entitlements;

(c) annual leave;

(d) conference leave;

(e) the Business Plan;[5] and

(f) the PI Cover Amount,

which shall remain as proved for in this Agreement.

3.4 Any amendments made for the purposes of clause 3.3 will take effect from the commencement date of the relevant New Doctor Agreement."

[6] The term "Salary" in cl 3.3 is defined to have the meaning given to it in cl 10.1. Clause 10.1 provides that the Company "will pay the Ophthalmologist a total salary at the rate of $400,000 gross per annum, payable in fortnightly instalments in arrears (***Salary***)." Provision is made for the Salary to be increased during the Term in accordance with the "Salaried Doctor Partner Incentive Scheme" in certain circumstances: cl 10.2. The term "Salaried Doctor Partner Incentive Scheme" is defined to mean "the bonus scheme offered to the Ophthalmologist by the Company as set out in Annexure 3". Annexure 3 describes the purpose of that scheme as being "to encourage and reward salaried partners to continue to grow their practices through the provision of an annual performance bonus and salary increases linked to increased maintainable performance": cl 1. Another paragraph in the same clause provides that, "[t]hrough sharing overachievement of agreed targets, the scheme ensures consistency with the underlying principle of the doctor partnership model with the doctor receiving direct reward through a cash/equity bonus and indirectly through the increase in the value of Vision Group and the value of the doctor's existing shareholding". The expression "Term" is defined to mean, "the term of this Agreement including Initial Term and any extension of the Initial Term under clause 3". The term "Salaried Doctor Partner" in cl 3.3 is defined to mean "an ophthalmologist who is a party to a service or employment agreement with VGH or a Related Body Corporate of VGH and such other persons as the Board approves from time to time to be classified as Salaried Doctor Partners".

The issues

[7] Five categories of doctors contracted with the respondents:

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4 "VGH" is defined to mean Vision Group Holdings Ltd.

5 A "business plan" is a yearly agreement between a selling doctor and Vision which details matters such as budgets which it is anticipated the selling doctor will meet in the subsequent year.

(1) a doctor who, like the appellant, sold a practice and is in the initial term of a Service Agreement;
(2) a doctor who, upon effluxion of the initial term under a Service Agreement, entered into a new contract after the expiry of the initial term (which was described at trial as a "second term agreement");
(3) an employee working for wages who did not sell a practice (an "associate");
(4) such an associate who, after working for the respondents generated goodwill as an employee and with whom the respondents were prepared to contract upon terms that the associate would share in the goodwill by being issued shares and otherwise being treated as a "salaried partner"; and
(5) a doctor who is not an employee but who contracted with the respondents as an independent contractor on terms that the parties will share revenue and the respondents will supply infrastructure, staff and equipment.

[8] A doctor in any one of those five categories employed or engaged by the respondents is an Ophthalmologist who is a party to an agreement which might be described as a "Service or Employment Agreement" with a person referred to in the definition of "Salaried Doctor Partner". Thus the literal meaning of that definition is capable of comprehending any such doctor, including a doctor employed under a second term agreement in category (2). The trial judge concluded that upon the proper construction of the Service Agreement a doctor in category (2) does not fall within the definition of "Salaried Doctor Partner" and, for the same reasons as were given for that conclusion, that a second term agreement was not a "New Doctor Agreement", for the purposes of cl 3.3. The appellant challenges those conclusions.

[9] A schedule to appeal ground 1.2(a) identifies seven second term agreements within category (2) which the second respondent had made and of which notice had not been given to the appellant under cl 9.1(a) of the Service Agreement. Three such second term agreements were provided to the Court by way of example. The appellant submitted without contradiction that each second term agreement extended the Initial Term under a doctor's Service Agreement by mutual agreement on terms agreed at the time of the extension under cl 3.2(a), rather than pursuant to a request by the doctor pursuant to cl 3.2(b), and that each such Service Agreement had been concluded before the Effective Date which marked the commencement of the appellant's Initial Term under his Service Agreement.[6] A heading in the schedule describes the allegedly more favourable term in each second term agreement of which the second respondent failed to notify the appellant under cl 9.1(a) as "Contracted for a term of less than five years". In each second term agreement the Initial Term is shorter than five years. (In one of the three examples to which the Court was referred, that Initial Term was one year so that, on the appellant's case, he was entitled to have the Initial Term of his Service Agreement shortened from five years to one year.) In terms of cl 3.3, the appellant's case is that the provision for a five year Initial Term in his Service Agreement was less favourable to him than the provision for a shorter term offered under the seven second term agreements, which the appellant contends are New Doctor Agreements.

[10] The grounds of appeal were very substantially narrowed before and at the hearing of the appeal. The remaining grounds raise questions which may be summarised as follows:

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6 Transcript 15 February 2016, 1-17.

(a) Did the trial judge err in construing the term "New Doctor Agreement" as excluding the seven second term agreements? (Ground 1.1(a).)

(b) Did the trial judge err in not finding that the provision for the five year Initial Term in the appellant's Service Agreement "severally and overall" was less favourable than provisions for Initial Terms offered under those seven second term agreements? (Ground 1.1(e).)

(c) If the contention in Ground 1.1(a) is accepted, were more favourable terms offered to the seven second term doctors without notifying the appellant, contrary to cl 9.1(a) of the Service Agreement? (Ground 1.2(a).)

(d) Did the trial judge err by failing to give adequate reasons for finding upon any other ground that the terms offered to the second terms doctors were not more favourable for the purposes of cl 3.3? (Ground 1.2(b)).

[11] As to question (b), although the respondents argued that the terms of the appellant's Service Agreement were not comparable and were not required by cl 3.3 to be compared with the terms of any second term agreement, the respondents did not contradict the appellant's submission that it was common ground at the trial that a shorter term was more favourable than a longer term because, as the trial judge found, the appellant's remuneration in the Initial Term was worth less than the value of the doctor's work.[7] Upon a literal construction of cl 3.3, the required comparison was between the terms of the appellant's Service Agreement and the terms of the second term agreements. It is arguable that reference to the value of the doctor's remuneration is irrelevant to that exercise. Nevertheless, these reasons will proceed upon the basis of the suggested common ground that, if cl 3.3 is otherwise applicable, a provision in a second term agreement which specifies an Initial Term of that agreement of less than five years is more favourable than the provision in the appellant's Service Agreement that specifies the five year Initial Term. Question (c) also does not require separate consideration for the same reason and because the respondents did not contend that, if the appellant was entitled to be notified of the second term agreements under cl 9.1(a), he was given any such notification. Since the respondents did not rely upon any ground other than the trial judge's construction of cl 3.3, question (d) also does not require separate consideration. It follows that the real issue in the appeal is question (a).

The trial judge's conclusions

[12] As will be apparent, the trial judge was required to adjudicate upon many points which are not in issue in this appeal. I will refer only to such of the trial judge's conclusions as bear upon the issue in the appeal.

[13] The trial judge summarised relevant principles of contractual construction as follows:[8]

> "…The meaning of the terms of a commercial contract is to be determined by what a reasonable business person would have understood those terms to mean. It requires consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract.[9]

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7 Transcript 15 February 2016 at 1-8.

8 [2014] QSC 260 at [116]-[119].

9 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 306 ALR 25 at 33, [35] ("*Electricity Generation Corporation*").

> … Evidence of the surrounding circumstances known to the parties is admissible to assist in the interpretation of the contract if "the language is ambiguous or susceptible of more than one meaning."[10]
> … Appreciation of the commercial purpose or object is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating".[11]
> … A court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption that the parties intended to produce a commercial result. The contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".[12]
> … If the contract is open to two possible constructions, the preferred construction is the one which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust even though the construction adopted is not the most obvious."[13]

[14] The trial judge recorded that the defendant did not press a contention that the definition of "Salaried Doctor Partner" encompassed any retained or employed doctor but confined their case to doctors whose practices were acquired for cash and shares. The trial judge accepted that the term should be confined in that way. Important differences between doctors who had agreed to sell a practice and doctors, such as associates or visiting surgeons, who had not done so, meant that agreements with the latter category of doctors were not comparable with a Service Agreement with a doctor who had sold a practice. Clause 3.3 should not be construed to require the first respondent to amend the appellant's Service Agreement to match the terms of contracts with doctors who had not sold a practice because that would result in his service becoming "untethered from the terms on which [the first respondent] acquired his practice" and it would not make commercial sense.[14]

[15] The trial judge rejected the appellant's contention that the "New Doctor Agreement" comprehended second term agreements (category (2) in [7] of these reasons) and was not confined merely to doctors in the initial five year term after acquisition of the doctor's practice. The context in which the Service Agreement was made required a distinction to be made between a Salaried Doctor Partner in the initial five year period after acquisition of the practice, and a doctor who contracted after that five year period when there was no practice to acquire. Relevant surrounding circumstances included the fact that the "Vision Model" had been explained to the appellant before he sold his practice to the first respondent and entered into the Service Agreement. The trial judge's findings upon that topic establish that the appellant was aware that the first respondent had paid a multiple of between five and seven times "EBIT" (earnings before interest and tax) to buy other ophthalmic practices before contracting with the appellant.[15] The commercial basis upon which a practice was acquired, including the price, affected the terms of the Service Agreement, including the base salary and the agreed performance targets which determined whether the base salary

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10 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 352 ("Codelfa") and see Lindgren "*The Ambiguity of 'Ambiguity' in the Construction of Contracts*" (2014) 38 *Australian Bar Review* 153.

11 *Electricity Generation Corporation* at [35] citing *Codelfa*.

12 *Electricity Generation Corporation* at [35].

13 *Australian Broadcasting Commission v Australasian Performing Rights Associations Ltd* (1973) 129 CLR 99 at 109.

14 [2014] QSC 260 at [140].

15 [2014] QSC 260 at [40].

was to be increased by an annual performance bonus.[16] An object of the Service Agreement and the Share Purchase Agreement was to generate sufficient profit during the five year Initial Term of the Service Agreement to provide the first appellant with a return on its investment.[17] The Service Agreement under-rewarded the ophthalmologist in the Initial Term, in that the annual bonus was fixed in a way which made it difficult to achieve; instead of being fully rewarded for service in the Initial Term, an ophthalmologist who sold a practice received a substantial capital sum and other advantages under the Share Purchase Agreement.[18]

[16] Any extended agreement under cl 3.2 of the Service Agreement would be negotiated in a commercial context which differed from the commercial context in which the Service Agreement was negotiated.[19] The five year term having expired, the first respondent entered into a second term agreement to persuade the doctor to remain with it rather than to seek to recoup its capital expense.[20] The initial five year terms for different doctors started and concluded at different times, so that the first respondent would be entering into second term agreements at times when other Salaried Doctor Partners, including the appellant, remained within the initial five year term. Where the terms upon which a practice was acquired and the terms of the Service Agreement were inter-related, it did not make commercial sense that a doctor could require a Service Agreement to be amended in the initial five year term to match the terms of a second term agreement with other Salaried Doctor Partners; such a construction would result in the terms governing service during the initial five year term becoming "untethered from the terms on which Vision acquired [the doctor's] practice".[21]

[17] The trial judge did not accept the appellant's submission that the commercial object of cl 3.3 and cl 9.1(a) was "to ensure equality of employment terms as between ophthalmologists."[22] Having regard to the significance of the matters which were excepted in (a) – (f) of cl 3.3, that clause did not guarantee equality of employment terms. Although the exceptions could ensure that the commercial terms of a second term agreement were not taken into account in the required comparison with the terms of the appellant's Service Agreement, that approach would not sufficiently address terms which the first respondent might negotiate under a second term agreement in order to persuade a doctor to enter into that agreement. The trial judge considered that such an approach would not accommodate a case in which a Salaried Doctor Partner was only prepared to enter into a second term agreement for a period of less than five years.[23] A construction of cl 3.3 which permitted the appellant to require the reduction of the term of his Service Agreement from five years to, say, two years because a different Salaried Doctor Partner had entered into a second term agreement for two years would be inconsistent with the commercial context in which the service agreement was made, it would undermine the objects it was intended to secure, it would produce unreasonable and inconvenient consequences, and it would not make business common sense.[24] The trial judge concluded that the expression "New Doctor Agreement" did not comprehend a second term agreement made after expiry of the

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16 [2014] QSC 260 at [126].
17 [2014] QSC 260 at [127].
18 [2014] QSC 260 at [128].
19 [2014] QSC 260 at [135].
20 [2014] QSC 260 at [144].
21 [2014] QSC 260 at [145].
22 [2014] QSC 260 at [146]-[147].
23 [2014] QSC 260 at [147].
24 [2014] QSC 260 at [148].

initial five year term and that, "[t]he relevant point of comparison for the purpose of cl 3.3 of the Service Agreement is with an agreement entered into with a doctor for the initial five year service period after the acquisition of his or her practice."[25]

Summary of the arguments

[18] The appellant originally contended that the trial judge's construction disregarded the ordinary and plain meaning of the contractual text,[26] that the trial judge did not identify any expression that was ambiguous,[27] and that there was in fact no ambiguity, whether the Service Agreement was considered in isolation or together with the Share Sale Agreement.[28] In oral argument, and in an amended outline filed by leave on 17 February 2016, the appellant abandoned the contention that there was no ambiguity in the Service Agreement. The appellant thereafter contended that the trial judge misconstrued and over-emphasised the significance of the commercial context in which the Service Agreement was made; whilst a court is entitled to prefer one of two possible constructions which is more consistent with commercial common sense, that concept "is not to be elevated to an overriding criterion of construction and … the parties should not be subjected to '…the individual judge's own notions of what might have been the sensible solution to the parties' conundrum'"; "still less should the issue of construction be determined by what seems like 'commercial common sense' from the point of view of one of the parties to the contract."[29]

[19] The appellant contended that the trial judge erred by assuming that regard should be had to the fact that the first respondent's objective might have been to obtain a return during the Initial Term upon the investment it made in the acquisition of the appellant's practice; the trial judge's conclusion that an object of the arrangements was that the first appellant would recover its initial investment, or obtain a return on that investment, or derive a profit or a substantial return, over the Initial Term of five years was not supported by evidence. The trial judge erred by relying upon a subjective assessment of the value of the benefits which passed under the transactions of which the Service Agreement formed part, by overlooking the fact that the share consideration which passed to the appellant made it vulnerable to adverse movements in the first respondent's share price, and by taking into account that upon what the appellant submitted was the ordinary and natural meaning of cl 3.3 that provision would inhibit the respondents from offering the more favourable terms which might be necessary to induce a Salaried Doctor Partner to enter into a second term agreement. The appellant argued that the trial judge erred by taking into account that this construction could cause "distinctly inconvenient, uncommercial and apparently unintended consequences" and that the trial judge "[arrogated] to [himself] overconfidently the role of arbiter of commercial reasonableness or likelihood".[30]

[20] The appellant argued that cl 3.3 was a guarantee of equality, subject only to the matters expressly excluded from the operation of that provision. The exclusions in (e)-(f) from the operation of the preceding provision in cl 3.3, including the exclusion for

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25 [2014] QSC 260 at [155].

26 Outline of argument, paragraphs 3 and 4 (last sentence).

27 The applicant quoted *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 367 (Mason J).

28 Appellant's outline of argument, paragraphs 11(b) and 12.

29 The applicant quoted *BMA Special Opportunity Hub Fund Ltd & Ors v African Minerals Finance Ltd* [2013] EWCA Civ 416 at [24] (Aikens LJ).

30 The applicant quoted *Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd* [2006] EWCA Civ 1732 at [21]-[22] (Neuberger LJ).

"salary", reflected the first respondent's business model, under which it acquired ophthalmic practices from specialists for a consideration comprised mainly of cash, shares in the first respondent, and remuneration annually for the Initial Term of the Service Agreement. The subject matter of the exclusions, including the remuneration, necessarily would vary because of variations in the nature and extent of each selling doctor's practice; some doctors would sell small practices producing modest revenue streams and other doctors would sell large practices with larger revenue streams and more doctors employed. The trial judge was wrong in thinking that it would be difficult for the respondents to offer improved terms in order to entice doctors to agree to a second term. That could readily be achieved by offering benefits (such as a higher salary) which were expressly excluded from the equalisation required by cl 3.3. This was submitted to supply a logical counterpoint to the trial judge's conclusion that first term doctors were deliberately under-rewarded for the work they performed. Commercial inconvenience or unintended consequences arising from the second respondent entering into a second term agreement was submitted to be irrelevant to the proper construction of cl 3.3 because its destiny was in its own hands.[31] The appellant also argued that the trial judge overlooked the fact that the only negative consequences arising from the operation of cl 3.3 would arise if a doctor in the appellant's position who was notified under cl 9.1 insisted upon his or her contract being "equalised".

[21] The appellant argued that each second term agreement made with the seven doctors identified in the schedule to the notice of appeal fell within the ordinary words of the definition of "New Doctor Agreement" and that each of those doctors was also a "Salaried Doctor Partner" as defined in the Service Agreement. There was nothing in the text of these provisions to restrict their scope of application to first term doctors. The expression "New Doctor Agreement" did not itself assist the second respondent's case; the word "Doctor" might (like the word "New") operate as an adjective qualifying the word "Agreement". It did not imply that the term applied only to a doctor who had not already entered into Service Agreement. The appellant also referred to authority for the proposition that a word which is defined should not be used to construe the definition, although the appellant acknowledged that this proposition might not be universally true.[32]

[22] The appellant argued that cl 3.2(b) supported its construction of cl 3.3; by application of the definition of Term and the text of cl 3, an extension of an Initial Term of Service Agreement under cl 3.2(b) for, say, one year would not produce a New Doctor Agreement with a term of one year but would instead extend the Term of the original Service Agreement by one year to six years which would be less favourable than the appellant's Initial Term of five years,[33] whereas the second term contracts were "mutual agreement" under cl 3.2(a) which created a new contract for a fresh term of one year (which was more favourable than the appellant's Initial Term of five years). (The appellant noted that the word "Term" was used in other contractual provisions, including in the non-competition provision (cl 17) and in the provision requiring the doctor to maintain his or her own professional indemnity insurance (cl 20).) The appellant argued that this difference between (a) and (b) of cl 3.2 gave the respondents an incentive not to make

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31 The appellant cited *McGrath v Sturesteps; Sturesteps v HIH Overseas Holdings Ltd (in liq)* (2011) 81 NSWLR 690 at [17].

32 *Segelov v Ernst & Young Services Pty Ltd* (2015) 89 NSWLR 431 at [87]. But see, *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 135 [121] per Bell and Gageler JJ.

33 The second term contracts to which the Court was referred did not include a provision to the effect of cl 3.3 of the appellant's Service Agreement such as might have entitled doctors to require any consequential adjustment of **their** second term agreements.

a new agreement under cl 3.2(a) to secure second term employment of doctors by extensions under cl 3.2(b). The respondent could offer more favourable terms to renewing doctors within the exclusions from the operation of cl 3.3. That would preserve the terms of the initial Service Agreement, including the restraint of trade provisions, and preclude any engagement of cls 9.1 and 3.3 even if an extension of less than five years was agreed. If the doctor was not prepared to continue to operate "at the same or higher level of performance" as required by cl 3.2(b), a new agreement might instead be struck under cl 3.2(a), but the respondents then would voluntarily assume the "equalisation risk' under cl 3.3. The appellant argued that this was not shown to be an unintended, inconvenient, uncommercial or otherwise inappropriate consequence such as to justify departure from what the appellant contended was the ordinary meaning of cl 3.3.

[23] The respondents adopted the trial judge's reasons. In addition, the respondents advanced the following arguments. In light of concessions at the trial and again on appeal that cl 3.3 was ambiguous, so much of the appellant's argument that relied upon a contention that the trial judge's construction departed from the ordinary meaning of the contractual text could not be sustained. The commercial interdependence of the Service Agreement and the Share Purchase Agreement, upon which the trial judge relied as relevant context was evidenced by the terms of both agreements. The appellant did not challenge the trial judge's finding that the surrounding circumstances included the circumstance that "the Vision model as explained to [the appellant] … distinguish between a Salaried Doctor Partner who is serving his or her initial five year period after the acquisition of his or her practice, and a doctor who enters a contract after that five year period had been served, where there is no practice to acquire".[34] The purpose of cl 3.3, particularly having regard to the very broad exclusions from its operation, is to ensure that any doctor in the position of the appellant is bound by the same terms which bind other doctors in the same position, in so far as they regulate the employment relationship. The respondents argued that it was in the interests of the first respondent and the appellant for the shares supplied to the appellant by way of consideration for the purchase of his practice to maintain their value; each party had an interest in ensuring that doctors who sold their practices and entered into Service Agreements were not free to cease employment earlier than the end of the Initial Term of five years. This supported the trial judge's construction of cl 3.3, under which a doctor in the appellant's position was not entitled to insist that the Initial Term be shortened to maintain parity with a second term agreement.

Consideration

[24] The literal meaning of the words of the definition of "Salaried Doctor Partner" is capable of comprehending a doctor described in each of the five categories in [7] of these reasons, including a doctor who has entered into a second term agreement. As the appellant acknowledged, however, the trial judge correctly construed the definition of "Salaried Doctor Partner" as excluding associate doctors who did not sell their practice (category 3 in [7] of these reasons).[35] Unlike the appellant's Service Agreement, the second term agreements which are in issue in this appeal were also not associated with a sale of a doctor's practice. That distinction is significant. The clauses in the appellant's Service Agreement and Share Purchase Agreement which related each agreement to the other (see [2] of these reasons) evidenced the commercial interrelationship of those agreements, which was clearly apparent in any case. So too did the trial

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34 [2014] QSC 260 at [154].

35 Transcript 15 February 2016 at 1-12

judge's unchallenged findings that the appellant's remuneration for the Initial Term of five years under the Service Agreement substantially undervalued the appellant's work and the first respondent incurred more than five times EBIT to acquire the appellant's and other doctors' practices. A substantial part of that consideration was in the form of shares in the first respondent. The appellant, like other doctors in the Initial Term of a Service Agreement, was not obliged to renew his employment at the expiry of that term. The fact that the Service Agreement undervalued his work suggested that he and other doctors might not renew otherwise than on more favourable terms. Clause 3.2(b) entitled him and other doctors in the same position to insist upon an extension for a term shorter than five years. In some cases the age of a doctor would require a shorter term.

[25] Upon the trial judge's unchallenged findings, each of those facts must have been apparent to the appellant and the respondents. Taken together, those facts justified the trial judge's conclusion that a shared commercial object of these arrangements was a return on the second respondent's investment during the five year Initial Term under the Service Agreement. The trial judge used various expressions to describe that object, but the differences in expression are not significant. It was appropriate for the trial judge to take those contextual matters into account in construing the admittedly ambiguous provisions of cl 3.3. The trial judge's summary of the relevant principles of contractual construction was accurate. The trial judge did not misconstrue or overemphasise the commercial context, or adopt only the viewpoint of the respondents. Nor is the significance of the commercial context decreased by the possibility that the first respondent could seek to induce doctors to enter into second term agreements by improving the salary or other conditions excepted from the operation of cl 3.3. That does not meet the point that, upon the expiry of an Initial Term, a doctor would be entitled to insist upon terms no less favourable than those applying at the expiry of the Initial Term together with a renewal for a period of less than five years, thereby (upon the appellant's construction) entitling every other doctor in the position of the appellant to insist upon his or her Initial Term being shortened accordingly. That would cut across the commercial object identified by the trial judge. From an objective viewpoint, it seems most unlikely to reflect the parties' contractual intention.

[26] That, unlike the Service Agreement, the second term agreements contemplated by cl 3.2 are not contractually or commercially related with sales of practices in the same way in which the appellant's Service Agreement and Share Purchase Agreement are contractually and commercially interrelated, is of itself a significant contextual justification for excluding a second term doctor from the general words of the definition of "Salaried Doctor Partner" and for excluding a second term agreement from the expression "New Doctor Agreement" in cl 3.3. In this context, it would seem a very surprising construction that cl 3.3 entitles the appellant to have his Initial Term reduced below five years merely because the second respondent agreed to employ a doctor under a second term agreement for a shorter term. The surprising character of such a construction is hardly ameliorated by the circumstance that, at the time when the Service Agreement was made, the parties could not have been certain that the appellant would act in his own commercial interests by insisting upon the Initial Term being shortened.

[27] The text of cl 3.3 does not require the construction advocated by the appellant. The comparison required by cl 3.3 of the appellant's Service Agreement is between **the terms** of that Service Agreement and **terms** offered under a service or employment agreement to another "Salaried Doctor Partner". In that exercise, no warrant appears

for disregarding cl 2.2 of the Service Agreement (see [5] of these reasons). At the very least, it is a reasonably open construction that cl 2.2 must be taken into account. It is a term which bears upon the effect of every other term that imposes an obligation upon a party. That the condition in cl 2.2 was satisfied long before any of the second term agreements were concluded does not compel disregard of that condition in the required comparison of the contractual terms. Upon that view, cl 3.3 would require a comparison between a provision or provisions of the appellant's Service Agreement by which he bound himself to an Initial Term of employment for five years conditionally upon completion of the Share Purchase Agreement and a provision or provisions of a second term agreement by which a second term doctor became unconditionally bound to that agreement for a shorter term. The ambiguous provisions of cl 3.3 of the Service Agreement should not be construed in a way which would produce the objectively unlikely consequence that the parties intended such a complex comparison to be required on each occasion when a doctor entered into a second term agreement.

[28] Furthermore, cl 3.2 is inconsistent with the contractual object of cl 3.3 being to ensure uniformity of the length of the terms of employment of doctors who have sold practices. As I have indicated, the expression in cl 3.2(b) "not exceeding five years" reveals the parties' contemplation that doctors who had sold their practices before the Effective Date under the appellant's Service Agreement could insist upon an extension of the Initial Term for any period less than five years nominated by a doctor, and the concluding words of that paragraph reveal that the length of the extended term under that provision for a doctor older than 58 at the commencement of the extended term would be arbitrarily dictated by the doctor's age. An extension under cl 3.2(b) must be upon terms which are at least as favourable to the doctor as the original terms. That implies that under that provision the parties might agree upon terms which are even more favourable to the doctor. Yet, as the appellant acknowledged in argument, an extension in a second term agreement made pursuant to cl 3.2(b) would not engage cl 3.3 because the period of extension would form part of the Term (as defined) which was "offered" by the second term doctor's Service Agreement itself, rather than "after the Effective Date" of the appellant's Service Agreement. That is consistent with common sense; reasonable contracting parties would not have intended the length of the appellant's Initial Term to depend upon whether a different doctor did or did not renew his Service Agreement.

[29] For these reasons, which generally reflect the trial judge's reasons, I would dismiss the appeal.

[30] I would add that the appellant's argument that its construction was supported by cl 3.2 incorrectly assumed that, unlike an extension under cl 3.2(b), an extension under cl 3.2(a) could not form part of the "Term". That is not what the Service Agreement provides. The provision in cl 3.1 that the Initial Term continues (unless terminated earlier) until the fifth anniversary of the Effective Date is expressed to be subject to cl 3.2, rather than only to cl 3.2(b). Similarly, "Term" is defined to include "**any** extension … under clause 3" (emphasis added). Nor does the introductory text of cl 3.2 provide that an extension of the term of the Service Agreement may occur only under paragraph (b) or that a new agreement may occur only under paragraph (a). Clause 3.2(b) contemplates not only a "forced" extension of the Initial Term upon no less favourable terms, but also an extension effected by a new agreement which contains terms which may be more favourable than those in the original Service Agreement. Taking all of these provisions into account, it appears that a "new employment contract" may be made under either paragraph, just as "The Ophthalmologist and the

Company" may "extend this Agreement" under either paragraph. The distinction between cl 3.2(a) and cl 3.2(b) is not that an extension of the term may occur under the latter and not the former, but that the doctor is only entitled to insist upon an extension upon terms expressed in the latter, whereas an extension under the former depends entirely upon mutual agreement. The appellant referred to the fact that the parties would have been free to contract even if cl 3.2(a) were not in the Service Agreement, but that does not support the appellant's argument about the effect of that provision; cl 3.2(a) might have been included for the very purpose of making it clear that the definition of "Term" comprehended an extension made by mutual agreement rather than only one required by a doctor under cl 3.2(b). Thus an extension of the term agreed under cl 3.2(a) is not caught by cl 3.3 for the same reason that an extension of the term required under cl 3.2(b) is not caught by cl 3.3.

Proposed orders

[31] I would dismiss the appeal and order that the parties have leave to make submissions about costs in accordance with the Practice Direction.

[32] **DAUBNEY J:** I agree with Fraser JA.