

## Court of Appeal New South Wales

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Case Title: Alliance Engineering Pty Ltd & Anor v  
Yarraburn Nominees Pty Ltd & Ors

Medium Neutral Citation: [2011] NSWCA 301

Hearing Date(s): 1 September 2011

Decision Date: 21 September 2011

Jurisdiction:

Before: Macfarlan JA at 1, Whealy JA at 2, Sackville  
AJA at 3

Decision: 1. Appeal dismissed.  
2. Appellants pay the costs of the First and  
Second Respondents of the appeal.  
*[Note: The Uniform Civil Procedure Rules  
2005 provide (Rule 36.11) that unless the  
Court otherwise orders, a judgment or order  
is taken to be entered when it is recorded in  
the Court's computerised court record  
system. Setting aside and variation of  
judgments or orders is dealt with by Rules  
36.15, 36.16, 36.17 and 36.18. Parties  
should in particular note the time limit of  
fourteen days in Rule 36.16.]*

Catchwords: LEASE - hotel lease - construction of term  
prohibiting removal of a licence - whether  
assignee of lease entitled to transfer poker  
machine entitlement to third party without  
lessor's consent

HOTELS AND GAMING - authorisation to  
keep and operate poker machines - whether  
poker machine entitlements a license for the  
purposes of lease - Gaming Machines Act  
2001, ss 15, 56

Legislation Cited: Gaming Machines Act 2001  
Liquor Act 1982  
Liquor Act 2007  
Miscellaneous Acts (Casino, Liquor and Gaming) Amendment Act 2007

Cases Cited: Boreland v Docker [2007] NSWCA 94  
Jabetin Pty Ltd v Liquor Administration Board [2005] NSWCA 602; 63 NSWLR 602  
Lagudi Holdings Pty Ltd v Horizon Pty Ltd [2009] NSWSC 240  
Mercantile Credits Ltd v Shell Co of Australia Ltd [1976] HCA 9; 136 CLR 326  
Perpetual Trustees Victoria Ltd v English [2010] NSWCA 32  
Pt Ltd v Maradona Pty Ltd (1992) 25 NSWLR 643  
Westfield Management Ltd v Perpetual Trustee Co Ltd [2007] HCA 45; 233 CLR 528  
Wonall Pty Ltd v Clarence Property Corporation Ltd [2003] NSWSC 497; 58 NSWLR 23

Texts Cited:

Category: Principal judgment

Parties: Alliance Engineering Pty Limited (First Appellant)  
Stephen John Lawler (Second Appellant)

Yarraburn Nominees Pty Limited (First Respondent)  
Peter Douglas Ryan (Second Respondent)  
Denise Perry (Third Respondent submitting appearance)  
NSW Casino & Gaming Control Authority (Fourth Respondent submitting appearance)

Representation

- Counsel: MK Meek SC with C Wilson (Appellants)  
P Bolder (First and Second Respondents)

- Solicitors: Friedlieb Byrne Solicitors (Appellants)

File number(s): 2010/89611  
Decision Under Appeal  
- Court / Tribunal:  
- Before: Ball J  
- Date of Decision: 23 September 2010  
- Citation: [2010] NSWSC 1081  
- Court File Number(s) 2010/89611  
Publication Restriction: No

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## Judgment

- 1 **MACFARLAN JA:** I agree with Sackville AJA.
- 2 **WHEALY JA:** I agree with Sackville AJA.
- 3 **SACKVILLE AJA :** The issue in this case is whether on the true construction of the lease of a hotel, the assignee of the lease was entitled, shortly before termination of the lease, to transfer a poker machine entitlement (" *PME* ") to a third party without the consent of the lessor. The primary Judge (Ball J) concluded that the assignee was not entitled to transfer the *PME*. His Honour made orders setting aside the transfer to the third party and directing that party to transfer the *PME* to the lessor;  
*Yarraburn Nominees v Alliance Engineering Pty Ltd* [2010] NSWSC 1081.

- 4 A PME is a statutory entitlement created by s 15 of the *Gaming Machines Act 2001* (" *Gaming Machines Act* "). On the commencement of the legislation in 2002, one PME was allocated for each poker machine authorised to be kept in a hotel on 19 April 2001 (s 15(1)(a), (3)(a)).
- 5 The present proceedings were instituted by the respondents. The first respondent (" *Yarraburn* ") was the owner of the Tuppall Hotel in Murray Street, Finley (" *the Hotel* "). Yarraburn entered into a lease of the Hotel in April 2000 (" *the Lease* ") with P & B Duffy Pty Ltd (" *Duffy* "), as lessee. The second respondent (" *Mr Ryan* ") became the licensee of the Hotel after the Lease was terminated on 12 April 2010.
- 6 The first appellant (" *Alliance* ") was the assignee of the Lease, acquiring its interest in October 2003. The second appellant (" *Mr Lawler* ") was the licensee of the Hotel from that time until termination of the Lease. The appellants transferred the PME to the third respondent (" *Ms Perry* ") on or about 8 April 2010, a few days before termination of the Lease.
- 7 The fourth respondent (" *the Authority* ") is the regulatory authority whose consent to the disposal of the PME was required under the Gaming Machines Act. No order is now sought against the Authority and it has filed a submitting appearance. Ms Perry has also filed a submitting appearance.
- 8 The appellants challenge the primary Judge's construction of the Lease and ask the Court to set aside his Honour's orders relating to the PME. However, if their challenge fails, the appellants make no complaint about the form of the orders made by the primary Judge.
- 9 The Gaming Machines Act did not come into force until some two years after the Lease commenced. The question of construction has therefore arisen in relation to events that the parties to the Lease could not be expected to have foreseen.

## **BACKGROUND FACTS**

- 10 The following account is based on the primary Judge's findings. However, it includes some additional matters not in dispute.
- 11 The Lease between Yarraburn, as lessor, and Duffy, as lessee, commenced on 13 April 2000. The term was five years and the lessee had an option to renew the Lease for a further five year term. The Lease was registered under the *Real Property Act* 1900 on or about 8 May 2000 as Lease No 6946633E.
- 12 At the time the Lease was executed, a hotelier's licence (No 114273) was in force in respect of the Hotel. The licence authorised the licensee to sell and dispose of liquor for consumption in accordance with the *Liquor Act* 1982 (" *Liquor Act* "). It is common ground that at the date of commencement of the Lease four poker machines were kept and were in operation at the Hotel.
- 13 In May 2000, Duffy assigned the Lease to Mr and Mrs Jackson and sold the Hotel business to them.
- 14 On 2 April 2002, the Gaming Machines Act came into force. In general terms, the effect of the Gaming Machines Act was to freeze the number of approved poker machines for any particular hotel to the number kept at the hotel on 19 April 2001. The legislation allocated one PME for each poker machine " *in respect of the hotelier's licence* ". The legislation created a mechanism for transferring PMEs, subject to authorisation by the Authority.
- 15 On 3 October 2003, the Jacksons sold the business and assigned the Lease of the Hotel to Alliance. On completion of the sale, Mr Lawler became the licensee of the Hotel. The Transfer of Lease was registered on 6 November 2003 as Transfer No AA228245U. It appears to have been common ground that at the time the Lease was assigned, the PMEs allocated in respect of the hotelier's licence were transferred to Alliance.

- 16 It seems that by 2007 three PME's were in existence in respect of the hotelier's licence for the Hotel. In that year, in circumstances that his Honour said were unclear, one of the three PME's was transferred for \$170,000. The proceeds of sale were used to renovate the Hotel and to purchase new equipment. Two PME's remained.
- 17 On 12 April 2010, as I have noted, the Lease of the Hotel was terminated by agreement. According to the primary Judge, it was not clear whether Alliance had previously exercised the option to extend the term of the Lease for five years or whether it had remained in possession of the Hotel as a monthly tenant following expiration of the original terms of the Lease. In any event, it was common ground that the terms of the original Lease governed the relationship between Yarraburn, as lessor, and Alliance, as assignee of the Lease.
- 18 On 8 April 2010, shortly before termination of the Lease, Alliance and Mr Lawler executed a deed whereby Mr Lawler transferred a single PME to Ms Perry. The transfer was for no consideration, but under the deed Ms Perry was to hold the PME in trust for Alliance and Mr Lawler. Ms Perry's agreement to hold the PME as trustee no doubt explains why she has filed a submitting appearance in these proceedings.
- 19 On 9 April 2010, Alliance and Mr Lawler lodged with the Authority a transfer form transferring a single PME to Ms Perry, to be attached to a licence held by her. It appears that this transfer was processed by the Authority and it recorded that the PME had been transferred to Ms Perry.
- 20 On the same day, Alliance and Mr Lawler applied to the Authority for an authorisation under s 56 of the Gaming Machines Act to dispose of a single poker machine attached to the Hotel licence. This authorisation was duly granted.

- 21 Yarraburn and Mr Ryan commenced proceedings against Alliance, Mr Lawler and other parties on 12 April 2010. By an amended statement of claim filed on 30 August 2010, they sought orders, *inter alia*, setting aside the transfer of the PME and requiring Alliance and Mr Lawler to direct Ms Perry to transfer the PME to Mr Ryan.

## **THE LEGISLATIVE SCHEME**

- 22 The legislative regimes in force before and after the enactment of the Gaming Machines Act were analysed in detail by Campbell J in *Wonall Pty Ltd v Clarence Property Corporation Ltd* [2003] NSWSC 497; 58 NSWLR 23; see also *Jabetin Pty Ltd v Liquor Administration Board* [2005] NSWCA 92; 63 NSWLR 602 at 605-613 [8]-[14], per Mason P (with whom Sheller and Hodgson JJA agreed). It is not necessary to repeat the analysis here. However, it is convenient to provide a brief overview.

### **The Liquor Act Regime**

- 23 At the time the Lease was entered into in 2000, the Liquor Act governed the sale and consumption of liquor at hotel premises. The Liquor Act also governed the operation of " *approved gaming devices* ", including poker machines, on the premises.
- 24 The Licensing Court was empowered to grant a licence to a licensee to sell liquor on premises specified in the licence (s 18(1)). In particular, the Licensing Court could grant a hotelier's licence, which authorised the licensee to sell liquor by retail on hotel premises, subject to the conditions of the licence (s 18(2)(a)).
- 25 A hotelier's licence was subject to such conditions as might be imposed by the Licensing Act, the Licensing Court or the Liquor Administration Board (s 20(2)). A licence was subject to " *any conditions imposed under this Act in relation to an approved gaming device ...* " (s 20(2)(c1)). It was lawful to

keep, use and operate an approved gaming device in a hotel, subject to the conditions of the hotelier's licence (s 160).

- 26 The Liquor Administration Board was empowered, on the application of a hotelier, to impose a condition on the hotelier's licence authorising the licensee to acquire, keep and permit the use of not more than 30 approved gambling devices (s 161(1)). A hotelier's licence was subject to a statutory condition that not more than 15 poker machines could be kept, used and operated, unless the licensee held a permit from the Minister for additional machines (s 182C(1)).

### **The Gaming Machines Act Regime**

- 27 Prior to the enactment of the Gaming Machines Act, a "freeze" was imposed by regulation and, later, by legislation on the number and location of poker machines in the State. The Gaming Machines Act was designed to maintain the freeze and, as the Minister explained in his Second Reading Speech, to ensure that in the future hotels would only be able to acquire additional machines by purchasing the right to keep the machines from other premises: see *Wonall*, at 27-31 [17], [18].
- 28 The Gaming Machines Act repeals the key provisions of the Liquor Act relating to gaming devices and poker machines. In their place, it establishes a tradeable PME scheme in respect of poker machines in hotels and registered clubs. The scheme operates within the framework of an overall State cap on the number of poker machines (s 14(1)).
- 29 The initial allocation of PMEs is governed by s 15 of the Gaming Machine Act, which provides as follows:

"(1) On the commencement of this section, one poker machine entitlement is to be allocated by the Board:

(a) for each approved poker machine that comprises the frozen number of approved poker machines for a hotel, and

(b) ...

(2) The poker machine entitlements are to be allocated:

(a) in the case of a hotel - in respect of the hotelier's licence, or

(b) ...

and are to be allocated in accordance with such arrangements as may be approved by the Director-General.

(3) For the purposes of subsection (1) (a), the ' **frozen number** ' of approved poker machines for a hotel is the number that is determined by the Board after taking into account:

(a) the number of poker machines authorised to be kept in the hotel under the *Liquor Act 1982* as at 19 April 2001, and

(b) ...." (Emphasis in original.)

30 A PME allocated in respect of a hotel licence is transferable (s 19(1)), but the transfer does not have effect until approved by the Authority (s 19(2)). An application for approval of a transfer of a PME must demonstrate, among other things, that the proposed transfer is supported by all those with a financial interest in the hotel licence (s 19(3)(c)). However, the owner of a hotel is not, as such, a person who has a financial interest in the licence (s 19(6)). PMEs allocated in respect of a hotel licence may be transferred only to another hotel licence (s 20(1)).

31 Part 5 of the Gaming Machines Act imposes controls in respect of gaming machines. A hotelier must not keep or dispose of an approved gaming machine unless the keeping or disposal of the machine is authorised by the Authority (s 56(1)(a)). The total number of machines that the Authority may authorise to be kept in a hotel from time to time consists of:

"the number of approved poker machines that corresponds to the number of [PMEs] allocated for the time being in accordance with this Act in respect of the hotel licence." (s 56(4)(a)).

32 Part 2 of Sch 1 to the Gaming Machines Act is headed " *Provisions consequent on enactment of this Act*". Clause 8 provides as follows:

**" 8 Protection of existing contractual arrangements (hotel lessees)**

(1) In this clause:

*hotel owner* means a person who owns the business conducted under the authority of the hotelier's licence concerned.

*lessee* means a person who exercises the authority conferred by a hotelier's licence under a lease, as in force at the commencement of this clause, with the hotel owner.

(2) If:

(a) poker machine entitlements are allocated in respect of a hotelier's licence, and

(b) a lessee is exercising the authority conferred by the licence,

the poker machine entitlements are, for the purposes of this Act, taken to be allocated in respect of the lessee and the lessee is, for the duration of the lease, authorised (subject to this Act) to keep approved gaming machines in accordance with any such poker machine entitlements.

(3) If the lessee assigns the lease to another person in accordance with the terms of the lease, the lessee may, in accordance with this Act, transfer any poker machine entitlements held by the lessee to the other person as part of the assignment.

(4) For the purposes of subclause (2), the duration of the contractual arrangements includes any extension of those arrangements that is legally enforceable (such as an option for renewal)." (Emphasis in original.)

None of the parties appearing on the appeal referred the Court to this provision.

**Hotelier's Licence**

33 As has been seen, s 15(2) of the Gaming Machines Act provides that, in the case of a hotel, PME's are allocated " *in respect of the hotelier's licence* ". As originally enacted, the Gaming Machines Act stated (s 4(1)) that " *hotelier* " and " *hotelier's licence* " had the same meaning as in the Liquor Act 1982. Those meanings were as follows (s 4):

" **hotelier** means the holder of a hotelier's licence.

**hotelier's licence** means a licence that, subject to this Act and the conditions of the licence, authorises the licensee to sell liquor by retail on the licensed premises, whether or not for consumption on those premises, being a licence that is granted as a hotelier's licence."

34 The Liquor Act 1982 was repealed by the *Liquor Act 2007* as from 1 July 2008. The *Miscellaneous Acts (Casino, Liquor and Gaming) Amendment Act 2007*, Sch 3, omits the definition of " *hotel* ", " *hotelier* " and " *hotelier's licence* " in the Gaming Machine Act and substitutes new definitions as follows:

" **hotel** means the premises to which a hotel licence relates.

**hotelier** means the holder of a hotel licence under this Act."

35 Section 14(1) of the Liquor Act 2007 provides as follows:

"A hotel licence authorises the licensee to sell liquor by retail on the licensed premises for consumption on or away from the licensed premises."

36 The transitional provisions of the Liquor Act 2007 provide that an existing licence is taken to be a licence of the corresponding kind. A reference in any Act, instrument or document to an existing liquor licence of any kind is to be read as a reference to a licence of the corresponding kind. The corresponding licence for an existing hotelier's licence is a hotel licence: Sch 1, Div 2, cll 3(1), (5), 4(1).

## The Lease

37 Clause 4 of the Lease contained covenants by the lessee as follows:

"4.1 ... the lessee will not use the premises otherwise than as an hotel;

4.2 and also shall and will annually cause application to be made and use his best endeavours to obtain all such licences at his own expense as are or may be necessary for keeping open the said premises as an hotel duly licensed for the sale and consumption thereof of spirituous and fermented liquors by retail;

4.3 and shall not do or suffer any act, matter or thing in or about the said premises during the said term whereby the said licence may be or become liable to be forfeited or the removal thereof refused;

...

4.10 and shall and will at the expiration of the term hereby [g]ranted or sooner determination thereof transfer and assign and do all acts necessary for transferring and assigning unto the lessor or to such other persons as the lessors may appoint for that purpose the hotelier's licence **and any other licences of the said premises for the then current year** .

4.11 And that the Lessee will not without the previous consent of the Lessor duly obtained in writing **make any application for removal of the license or licenses of the of the said Hotel** ."  
(Emphasis added.)

## PRIMARY JUDGMENT

38 The primary Judge identified the issue before him (at [23]) as whether Alliance was prevented by the Lease from transferring PME's to a third party without Yarraburn's consent. His Honour noted (at [27]) that the parties accepted that Yarraburn, although not having a financial interest in the PME's, could enforce contractual obligations not to deal with the PME's, provided that the obligations were not inconsistent with the statutory regime.

39 The primary Judge referred to several authorities but observed (at [33]) that those authorities could not resolve the question of construction, which turned on the particular provisions of the Lease. However, he drew two conclusions from the authorities:

"First, depending on the context, the word 'licence' may be sufficiently broad to catch PME's. Secondly, the word 'licence' will, in an appropriate case, be interpreted as being ambulatory - that is, as catching species of licence that were not in existence at the time the Lease was entered into."

40 His Honour considered neither of these conclusions to be surprising. He pointed out that under the Gaming Machines Act, PME's remain " *in a sense* " attached to hotelier licences, although they can be transferred between licences and are considered to be a species of property. In these circumstances (at [33]):

"it seems logical to treat parties who place restrictions in respect of licences relating to the hotel as they existed before the *Gaming Machines Act* came into force as intending those restrictions to apply to PME's - again, of course, in the absence of some contrary indication in the contract."

41 Alliance had emphasised in argument before the primary Judge that cll 4.1 and 4.2 of the Lease limited the permitted use of the premises to the operation of a hotel which was licensed for the sale and consumption of alcohol. However, in his Honour's view little weight could be given to these provisions. At the time the Lease was entered into, poker machines were operating on the premises. The parties could not have intended to have prohibited the continued use of the machines.

42 The primary Judge continued (at [35]) as follows:

"One way of approaching the interpretation of clauses 4.10 and 4.11 is to ask what the position would have been before the *Gaming Machines Act* came into force. Would those clauses have prevented the lessee from varying the hotelier's licence so as to remove the condition permitting the licensee to keep in the hotel a specified number of approved gaming devices? In my opinion, the answer to that question is that they would have. Although cl 4.10

does not expressly say that the licensee may not seek to vary the licence, I think that an obligation of that type is implicit in the clause taken together with cl 4.11. The condition permitting the use of poker machines seems to me to fall within the description 'any other licences' in cl 4.10; and cl 4.11 prevents the removal of such a licence without the Lessor's prior written consent. The commercial purpose of the clauses is to ensure that licences that are important to the value of the hotel as a hotel are returned to the Yarraburn at the end of the Lease. An interpretation of cls 4.10 and 4.11 which would permit the lessee to undermine seriously the value of those licences before they are transferred to Yarraburn would undermine that commercial purpose. It seems to me that cls 4.10 and 4.11 operate in the same way in relation to PME's. As I have said, courts have been prepared to interpret the word 'licence' to cover PME's; and there is no reason why that word should not be interpreted in that way in this case. Clause 4.11 does not expressly prohibit the assignment of the licences with which it is concerned. However, in the context, in my opinion, an application to transfer a licence falls within the description 'any application for removal of the license or licenses of the said Hotel', since it is an application that has the effect of removing the PME from the hotelier's licence associated with hotel which is the subject of the Lease."

- 43 For these reasons his Honour made the orders the appellants now challenge.

## **SUBMISSIONS**

### **Appellants' Submissions**

- 44 The appellants submitted that the primary Judge erred in giving too much weight to what he thought was the "*commercial purpose*" of cll 4.10 and 4.11. According to Mr Meek SC, who appeared with Mr Wilson for the appellants, the relevant enquiry was not whether a term should be implied in the Lease in order to give it business efficacy. Rather, the inquiry was whether the express terms of the Lease justified an implication that Alliance was not permitted to transfer the PME during the currency of the Lease.
- 45 Mr Meek contended that cll 4.2 and 4.10 of the Lease had to be read together. The obligation imposed on the lessee by cl 4.2, so Mr Meek argued, was limited to applying for any licence required for the sale and

consumption of alcohol, not for a licence that might be required to keep or operate poker machines at the Hotel. Clause 4.10 was clearly drafted with cl 4.2 in mind and its requirements should be read as limited to licences necessary for the sale and consumption of alcohol.

46 Mr Meek submitted that the primary Judge also erred by asking whether cll 4.10 and 4.11 would have prevented the lessee from varying the hotelier's licence so as to remove the condition permitting the licensee to keep a specified number of approved gambling devices. This was not a relevant enquiry. The primary Judge should have considered only whether the language of cll 4.2 and 4.10 could fairly be read as applying to a PME, bearing in mind that this was a species of property that did not exist at the time the Lease was entered into. In the absence of an expanded definition of " *licence* ", the provisions simply could not apply to a PME.

47 Although Mr Meek accepted that a PME, depending on the context, might be capable of being described as a licence, he contended that the PME in this case could not be described as " *any other licence of the said premises for the current year* ", within cl 4.10 of the Lease. In the absence of a definition of " *licence* " in the Lease, the word " *licence* " was not apt to describe the PME that was the subject of the transfer. He relied on Brereton J's observation in *Lagudi Holdings Pty Ltd v Horizon Pty Ltd* [2009] NSWSC 240, at [19], that the source of permission to keep a poker machine at a hotel is not a PME, but the authorisation granted by the Authority under s 56 of the Gaming Machines Act. According to Mr Meek, the two are separate.

### **Respondents' Submissions**

48 The respondents adopted the analysis and reasoning of the primary Judge. Mr Bolster, who appeared on their behalf, submitted that the expression " *any other licences* " in cl 4.11 was of wide import. It was apt to require the lessee for the time being to transfer back to the lessor any licences associated with the premises, whether or not authorising the sale

or consumption of liquor. There was no basis for confining cll 4.10 and 4.11 of the Lease to licences relating to the sale or consumption of liquor.

- 49 Mr Bolster further contended that the mere fact that the legal character of a lessee's ability to keep and operate poker machines had changed from a condition of a hotelier's licence to a statutory entitlement did not affect obligations under the Lease. A " *reasonable commercial person* " would construe the Lease so as to require the lessee for the time being to transfer the PME's to the lessor on termination of the Lease.
- 50 Mr Bolster submitted that cl 4.11 prevented the lessor for the time being from taking any action to remove the benefit of PME's from the Hotel during the currency of the Lease. Alliance contravened cl 4.11 by seeking authorisation under s 56 of the Gaming Machines Act for the disposal of the PME. Mr Bolster was given leave to file a notice of contention to ensure that he was entitled to raise this argument in opposition to the appeal.
- 51 The respondents did not refer to and placed no reliance on cl 8 of Sch 1 to the Gaming Machines Act.

## **REASONING**

### **Permitted Use**

- 52 In their written submissions, the appellants contended that cl 4.1 of the Lease, on its true construction, permitted use of the Hotel only for the purpose identified in cl 4.2: that is, for the retail sale and consumption of alcohol. In oral submissions, Mr Meek accepted that the permitted use of the premises " *as a hotel* " included the operating poker machines on the premises. In doing so, Mr Meek may have been influenced by the approach taken in *Boreland v Docker* [2007] NSWCA 94, where Beazley JA said (at [128]) that a clause permitting use only as a hotel had to be construed having regard to the operations of the hotel at the time the lease

commenced. Her Honour took into account that at the commencement of the lease (which in that case post-dated the enactment of the Gaming Machines Act), 17 PME's had been allocated to the hotelier's licence for the hotel.

53 *Boreland v Docker* was decided very shortly before *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45; 233 CLR 528. In *Westfield*, the High Court emphasised (at 539 [37]), the importance under the Torrens system of maintaining a publicly accessible register containing the terms of registered dealings. Their Honours stated (at 539 [39]) that a third party who inspects the register cannot be expected, consistently with the scheme of the Torrens legislation, to look to extrinsic materials such as facts in existence at the time of the grant in order to interpret the registered instrument.

54 *Westfield* involved the construction of a registered easement. The principle stated by the High Court does not necessarily apply to all provisions in registered instruments such as leases or mortgages. The reason is that "indefeasibility" attaches only to those covenants or provisions that are so intimately connected with the estate or interest created by the registered instrument that they are to be regarded as part of that estate or interest: *Mercantile Credits Ltd v Shell Co of Australia Ltd* [1976] HCA 9; 136 CLR 326, at 343, per Gibbs J; *Pt Ltd v Maradona Pty Ltd* (1992) 25 NSWLR 643, at 679, per Giles J; *Perpetual Trustees Victoria Ltd v English* [2010] NSWCA 32, at [68], [92]-[98], per Sackville AJA (with whom Allsop P and Campbell JA agreed). Extrinsic circumstances might therefore play a part in the construction of provisions in a registered instrument that cannot be regarded as part of the estate or interest in land created by the instrument.

55 As the point was not argued, it is neither necessary nor appropriate to consider whether the principle in *Westfield* applies to a permitted use provision in a lease such as cl 4.1 of the present Lease. Even if the principle does apply, however, the provisions of the Liquor Act in force at the commencement of the Lease justify Mr Meek's concession that cl 4.1

permitted the use of the Hotel not only for the sale and consumption of liquor, but also for the operation of poker machines. The statutory scheme in force in 2000 attached a condition to the hotelier's licence that made it lawful for the licensee of the Hotel to keep, use and operate poker machines in the Hotel. The statutory conditions imposed limits on the number of machines and required them to be operated in conformity with the statutory requirements. In construing cl 4.1 of the Lease it is necessary to take into account that the legislative framework in force when the Lease commenced provided for the operation of poker machines in the Hotel in accordance with statutory conditions attached to the hotelier's licence. When these matters are considered, the permitted use under cl 4.1 " as a *hotel* " included the lawful operation of poker machines on the premises.

#### **Construction of cll 4.10 and 4.11**

- 56 Mr Meek also did not dispute, at least at a general level, the primary Judge's observation (at [33]) that the word " *licence* " may be sufficiently broad, depending on the context, to embrace a PME. His Honour's observation reflected the approach taken by Beazley JA in *Boreland v Docker* to a provision in the lease (cl 7.2) requiring the lessee, upon termination of the lease, to transfer to the lessor each licence required for the " *Permitted Use* ". Her Honour held (at [130]) that a provision in this form obliged the lessee to transfer to the hotelier's licence, with whatever conditions applied at the commencement of the lease and with " *whatever incidents were attached to it* ". Since the hotelier's licence had 17 PMEs allocated to it at the commencement of the lease, the lessee had to transfer back the hotelier's licence together with the same 17 allocated PMEs.
- 57 Mr Meek correctly submitted that the decision in *Boreland v Docker* is not determinative of the outcome in the present case. In *Boreland v Docker* , the lease commenced **after** the Gaming Machines Act had come into force and the relevant provision in the lease required the lessee to transfer all " *licences and permits and registrations required for the Permitted Use* ". In

the present case, the legislation creating PME's had not been enacted when the Lease commenced and the language of cl 4.10 is different from that of the provision considered in *Boreland v Docker* . Since the PME's did not come into existence until after the Lease commenced, they were not incidents that attached to the hotelier's licence at the date of commencement of the Lease.

58 It is necessary to consider the specific language of cll 4.10 and 4.11 of the Lease, rather than to reason from the construction given to different provisions in other cases. In this respect, it will be recalled that Mr Meek's first submission was that cl 4.10 should be construed by reference to cl 4.2. On this basis, so he argued, the expression " *any other licences* " in cl 4.10 is confined to any other licences permitting the sale and consumption of alcohol by retail and does not include any licences that may be required for other permitted activities at the Hotel. Accordingly, the prohibition in cl 4.11 did not prevent Alliance seeking approval for the transfer of the PME.

59 A number of factors point against the appellants' construction of cl 4.10. First, as Mr Meek accepted, cl 4.1 permitted the Hotel to be used for purposes other than the sale or consumption of liquor, including the operation of poker machines. Secondly, cl 4.2 is concerned only with the lessee's obligation to keep current all licences that may be required to keep the premises open as a hotel licensed for the sale and consumption of liquor. The fact that it may be the lessor's responsibility to renew licences that are required for other permitted activities does not determine the construction of cl 4.10. That provision addresses a different question, namely the obligation of the lessee to transfer licences to the lessor at the termination of the Lease.

60 Thirdly, cl 4.10 imposes an obligation on the lessee to transfer the hotelier's licence " *and any other licences of the said premises for the current year* ". It is not confined, as is cl 4.2, to licences for the sale and consumption of liquor on the premises. Moreover, at the commencement of the Lease (and, for that matter, throughout the Lease), the only licence

required for the sale and consumption of liquor at the Hotel was a hotelier's licence (subsequently renamed a hotel licence). In these circumstances, the reference to " *any other licences* " cannot have been intended to be confined to licences for the sale and consumption of liquor at the Hotel.

61 It follows from what has been said that the obligations created by cll 4.10 and 4.11 of the Lease are not confined to licences for the sale or consumption of liquor. However, that conclusion does not necessarily mean that the lessee's obligation under cl 4.10 to transfer " *all other licences of the said premises for the then current year* " encompassed PME's allocated in respect of the hotelier's licence for the Hotel. Nor does it necessarily mean that cl 4.11 prevented the lessee (including Alliance) from seeking approval from the Authority to the transfer of a PME. Whether cll 4.10 and 4.11 produce these consequences depends upon the correctness of Mr Meek's submission that a PME is not a " *licence* " for the purposes of these provisions.

62 I accept that Mr Meek's criticisms of aspects of the primary Judge's reasoning on this issue have force. In particular, the proper construction of cll 4.10 and 4.11 is not determined by asking how those provisions would have operated had the Gaming Machines Act not been enacted. It may well be correct that cll 4.10 and 4.11 would have prevented the lessee, prior to the enactment of the Gaming Machines Act, from consenting to a removal of a licence condition that permitted poker machines to be kept at the Hotel. It may also be true, as the primary Judge suggested, that permitting the lessee or assignee to retain the benefit of PME's would reduce the value of the hotelier's licence. But those matters cannot dictate the proper construction of cll 4.10 and 4.11 in the events which have occurred since the Lease commenced.

63 Nonetheless, in my opinion cll 4.10 and 4.11, on their proper construction, prevented Alliance from transferring the PME to Ms Perry and seeking authorisation from the Authority for the transfer. They also obliged Alliance

to take such measures as might be required to transfer the PME to Yarraburn on termination of the Lease.

- 64 The PME transferred by Alliance to Ms Perry was one of four originally allocated " *in respect of*" the hotelier's licence by force of s 15(1) and (2) of the Gaming Machines Act. The allocation, as the legislation provided, was on the basis of one PME for each approved poker machine authorised to be kept at the Hotel on 19 April 2001. Two PMEs remained allocated in respect of the hotelier's licence on 8 April 2010, when the transfer of the PME the subject of the present proceedings took place.
- 65 The statutory allocation of the PMEs in April 2002 did not, of itself, permit the licensee of the Hotel to keep poker machines at the Hotel. Under the Gaming Machines Act, the hotelier was not permitted to do so without an authorisation from the Authority (s 56(1)(a)). The total number of gaming machines that the Authority could authorise corresponded to the number of PMEs allocated for the time being in respect of the hotel licence (s 56(4)(a)). The Authority duly granted authorisations to keep poker machines in accordance with the legislative requirements. Immediately before the transfer of the PME on 8 April 2010, two PMEs remained allocated in respect of the licence and two authorisations from the Authority were in force in relation to two poker machines.
- 66 Under the legislative scheme, the allocation of a PME in respect of a licence was a prerequisite to the grant of an authorisation by the Authority to keep a poker machine on hotel premises. That was because the total number of approved gaming machines that the Authority could authorise to be kept in a hotel from time to time had to correspond to the number of PMEs allocated for the time being in respect of the hotelier's licence. In other words, the number of poker machines kept at a hotel could not exceed the PMEs in force from time to time in respect of the hotelier's licence.

- 67 It follows that at any given time the Hotel could keep only that number of poker machines for which the licensee had PME's and authorisation from the Authority. Once the Authority granted authorisation for a poker machine (or a particular number of poker machines) to be kept at the Hotel, the lessee had the necessary ongoing permission to keep and operate the machine on the premises, provided that it did so in accordance with the statutory requirements.
- 68 Alliance, immediately before the transfer of the PME, had permission to keep two poker machines at the Hotel. That permission comprised two statutory elements, both of which were essential for the permission to be operative: two PME's allocated in respect of the hotelier's licence and authorisation from the Authority, based on the two PME's, to keep two poker machines on the Hotel premises. It is true that the allocation of a PME in respect of a licence and the grant of an authorisation by the Authority to keep a machine on the premises were two separate acts and came about under different provisions of the Gaming Machines Act. But Alliance could not keep (or operate) two poker machines at the Hotel unless it had two PME's allocated to the hotelier's licence and authorisation from the Authority to keep both machines on the premises.
- 69 It is a conventional use of language to describe Alliance as having a licence to keep and operate two poker machines at the Hotel. It is equally a conventional use of language to describe Alliance's ongoing permission to keep and operate two poker machines at the Hotel as a "*licence of the ... premises for the current year*" within the meaning of cl 4.10 of the Lease. If that is correct, the ongoing permission is a "*license [sic] ... of the ... Hotel*" within the meaning of cl 4.11 of the Lease.
- 70 Alliance's actions in transferring the PME to Ms Perry and then applying to the Authority to approve the transfer constituted an application "*for removal of the license*" and therefore contravened cl 4.11 of the Lease. That is because their actions amounted to an application to remove the licence to keep and operate a poker machine at the Hotel. The application,

if successful (as it was) removed from the Hotel the licence to keep and operate a poker machine. Thereafter, neither the lessee nor the lessor (after termination of the Lease) had the necessary permission to keep and operate a second poker machine at the Hotel.

71 Had Alliance not wrongfully transferred the PME and applied to the Authority for approval of the transfer, it would have held a licence to keep two poker machines at the Hotel. This could properly be described as a licence of the Hotel for the then current year. Accordingly, on termination of the Lease, Alliance would have been obliged by cl 4.10 to do all acts necessary to transfer to Yarraburn, as lessor, the licence to keep and operate two poker machines at the Hotel. This would have required Alliance to transfer all components of the licence to the lessor, including the PME.

72 For these reasons, the primary Judge was correct to conclude that Alliance contravened cll 4.10 and 4.11 of the Lease. As there is no challenge to the form of orders made by his Honour in relation to the PME, those orders will stand.

### **An Alternative Approach**

73 I have addressed the question of construction of the Lease without reference to cl 8 of Sch 1 to the Gaming Machines Act. I have taken this course because neither party drew the Court's attention to the provision and of course no reliance was placed upon it in argument.

74 Clause 8(2) provides that where PMEs are allocated in respect of a hotelier's licence and a lessee is exercising the authority conferred by the licence, the PMEs are taken to be allocated in respect of the lessee. Furthermore, the lessee is, for the duration of the lease, authorised to keep approved gaming machines in accordance with any such PMEs. Clause 8(3) permits a lessee who assigns a lease in accordance with the terms of

the lease, to transfer any PME's held by the lessee to the other person as part of the assignment.

75 Upon the Gaming Machines Act coming into force, the effect of cl 8(2) and (3) was that the lessee of the Hotel was authorised by virtue of the statutory allocation of PME's to keep gaming machines " *in accordance with any such entitlements* ". Upon assignment of the Lease to Alliance and the transfer of PME's to it, Alliance was authorised by virtue of the transfer of the PME's to keep the appropriate number of gaming machines at the Hotel.

76 It seems clear enough that cl 8 was intended to authorise a lessee (or an assignee of a lease) to whom PME's were allocated (or transferred) to keep approved gaming machines at the premises, subject to the restrictions imposed by the Act or the Authority. It is difficult to see how the authorisation so conferred by the legislation could be regarded as anything other than a " *licence of the ... premises* " for the purposes of cll 4.10 and 4.11.

77 If this analysis is correct, it would provide an independent and more direct route to upholding the decision of the primary Judge.

## **CONCLUSION**

78 The appeal must be dismissed. The appellants must pay the costs of Yarraburn and Mr Ryan of the appeal.

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