SUPREME COURT OF VICTORIA

COURT OF APPEAL

No. 2034 of 2004

AUSTRALIA PACIFIC AIRPORTS (MELBOURNE) PTY. LTD. — Appellant

v.

THE NUANCE GROUP (AUSTRALIA) PTY. LTD. — Respondent

JUDGES:	CALLAWAY and NETTLE, JJ.A. and BYRNE, A.J.A.
WHERE HELD:	MELBOURNE
DATE OF HEARING:	19 April 2005
DATE OF JUDGMENT:	26 May 2005
MEDIUM NEUTRAL CITATION:	[2005] VSCA 133

Contract – Lease for eight years with complex provisions relating to rent – Review Board with power, among other things, to review requests to amend financial terms of lease – Request to alter formulae governing rent and to provide for one-off payment by lessor to lessee – Whether Review Board having power to decide on request – Provision in event of disagreement on Review Board for "joint resolution" by chief executive officers of lessor and lessee – Whether failure to achieve joint resolution a "difference … between the parties" within meaning of clause submitting differences to determination by an expert – Meaning of that clause conceded at trial – Whether Court of Appeal free to reconsider meaning notwithstanding concession – Practice Statement C.A. 1 of 1995 [1996] 1 V.R. 249.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr R.C. Macaw, Q.C. with Mr J.B. Davis	Corrs Chambers Westgarth
For the Respondent	Mr C.J. Delany, S.C. with Mr D.J. Batt	Allens Arthur Robinson

CALLAWAY, J.A.:

1 By a lease entered into on or about 16th January 2002 the appellant ("APAM") leased certain areas in the international terminal at Melbourne Airport to the respondent ("the Nuance Group"). The term of the lease was eight years beginning on 1st November 2002. The Nuance Group uses the leased premises to conduct a retail duty free business under the style "Downtown Duty Free". The rent is calculated by reference to complex formulae. The Nuance Group is obliged to pay a "base rent" plus a further amount if its "percentage of sales" exceeds the base rent. In the first two years of the lease the rent was in excess of $30 million per annum.

2 Clause 19 of the lease provides for the functions and constitution of a "Review Board". Clause 19 reads:

"19 REVIEW BOARD

19.1 Functions of Review Board

The Review Board is to be responsible for the following:

(a) the review and approval of the Tenant's business plan prepared by the Tenant;

(b) the review of sales performance;

(c) the review of financial performance against the Tenant's business plan;

(d) the review of any requests to amend the Tenant's business plan and/or financial terms of this lease;

(e) the review and implementation of any marketing initiatives;

(f) the review of forecast trading conditions;

(g) the review of significant changes that may affect achievement of the Tenant's business plan;

(h) the review of capital expenditure requests;

(i) the review of significant developments and merchandising proposals; and

(j) any other relevant matter which the Review Board decides should be reviewed by it.

19.2 Constitution of Review Board

(a) The Review Board must, unless agreed otherwise, meet quarterly and such meetings must be called at no less than 10 Business Days notice.

(b) A quorum for the Review Board consists of four members, at least two of which [sic] are appointed on behalf of APAM and at least two of which [sic] are appointed on behalf of the Tenant.

(c) APAM must nominate three members to the Review Board and must notify the Tenant in writing of its nominees.

(d) The Tenant must nominate three members to the Review Board and must notify APAM in writing of its nominees.

(e) Members of the Review Board may be replaced at any time upon written notice by the party nominating such member.

(f) Members of the Review Board may appoint alternates.

(g) The Review Board must appoint a secretary who will be responsible for issuing notices and agendas of the Review Board meetings and minutes.

(h) The Review Board will have a chairman with a fixed term of six months. During odd numbered terms, the chairman will be appointed by APAM from one of its representative members and during even numbered terms, the chairman will be appointed by the Tenant from one of its representative members.

(i) Each member of the Review Board will be entitled to one vote. In the event of there being an equality of votes, the Review Board must refer the matter to the chief executive officers of APAM and the Tenant for joint resolution by the chief executive officers. The chairman does not have a second or casting vote.

(j) All decisions of the Review Board are to be by simple majority.

(k) Decisions of the Review Board are to be binding on APAM and the Tenant."

I have included the headings for convenience, but clause 30.1 provides that the headings in the lease "must be ignored for interpretation purposes".

3 The other clause with which this case is principally concerned is clause 27.15,

which reads:

> **"27.15 Dispute Resolution**
>
> (a) If a difference arises between the parties the issue is to be determined by an expert nominated by the senior office-bearer in Victoria of the Australian Property Institute on the application of either party.
>
> (b) The expert nominated must be a member of that institute of at least 5 years' standing and acts as an expert and not an arbitrator.
>
> (c) The expert's determination is final and binding and the costs of the nomination and determination are to be borne equally.
>
> (d) Each party is entitled to make a submission to the expert."

4 On 23rd March 2004 the Nuance Group notified APAM of its desire to amend the terms of the lease that provide for the calculation of rent. The Nuance Group said that it was in an unsustainable position at Melbourne Airport because of increasing passenger numbers and declining passenger expenditure. It requested the Review Board to meet urgently to review a request by the Nuance Group to amend the financial terms of the lease. That request, which was said to fall within the purview of clause 19.1(d), was embodied in a resolution. In essence the resolution provided for amendment of the lease to alter the way in which rent is calculated and to provide for a one off payment by APAM to the Nuance Group of $12,400,000. The Review Board met on 22nd July 2004. After some dispute as to whether the resolution was within the purview of clause 19.1(d), a vote took place. The result was a deadlock of three to three, the members of the Board having voted according to whether they were nominated by APAM or the Nuance Group. The APAM members voted under cover of an objection that the resolution was beyond the power of the Board.

5 On 13th July 2004 APAM filed a writ in the Commercial List of the Supreme Court, seeking a declaration that, on the proper construction of clause 19.1(d), the Review Board was not empowered to grant a request by the Nuance Group to alter the way in which the rent is to be calculated, to vary the terms of the lease, to reduce the rent payable by the Nuance Group or to seek a payment of money by APAM. On 19th

November 2004 Hansen, J. refused that declaration but, on a counterclaim by the Nuance Group, his Honour granted a declaration that, on the proper construction of clause 19.1(d), the Board was empowered "to make a decision upon [the Nuance Group's] request to amend the financial terms of the lease constituted by [the resolution], which decision binds the parties as provided in clause 19.2(k)".[1]

6 APAM appeals against his Honour's decisions, leave to do so having been granted, to the extent it may be needed, by an order made by the Court of Appeal on 10th December 2004. The Court on that occasion was constituted by Gillard, A.J.A. and me. It appeared from Hansen, J.'s reasons and from the submissions on the leave application that it had been common ground between the parties that, if the chief executive officers of APAM and the Nuance Group failed to achieve a "joint resolution" within the meaning of clause 19.2(i), the deadlock could be resolved by an expert pursuant to clause 27.15. We questioned whether that was so, expressing ourselves with caution, because at that stage our familiarity with the lease and the case was much less than that of the parties and their advisers. The suggestion was nevertheless taken up and grounds of appeal were added reopening the question, which had indeed been common ground at trial, whether clause 27.15 was applicable to a failure by the chief executive officers to achieve a joint resolution.

7 The appeal was set down for hearing on 19th April 2005. Both sides filed what they described as an "outline of submissions". (The Nuance Group also filed a notice objecting to APAM's grounds relating to clause 27.15 and other grounds. It was said that they raised new points on appeal and that, in the case of the grounds touching clause 27.15, the appellant was attempting to resile from a concession.) Neither outline complied with paragraph 9 of Practice Statement C.A.1 of 1995[2], which expressly provides that outlines of submissions should not take the form of a written argument or be of inordinate length. Their purpose is to identify and summarize the points, not to argue them fully on paper. They should contain a succinct statement of each major

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1 This is the language of the authenticated order: compare schedule 1, para.10.

2 [1996] 1 V.R. 249 at 250.

contention of fact or law together with the relevant references to pages of the appeal book, authorities and legislation. The outlines amounted to written submissions without leave. That can occasion unfairness if only one party disregards the instructions in the Practice Statement, but here there was no such unfairness and the appeal proceeded on the understanding that oral argument would be abridged to reflect the fact that the arguments had largely been reduced to writing.

8 Gillard, A.J.A. and I also made an order for expedition. Rather than repeat the parties' arguments, I have set out in the schedules their respective "outlines".[3] If they are read in conjunction with Hansen, J.'s reasons for judgment[4], the reader will obtain a more than adequate grasp of the character of the lease and the parties' contentions.[5] It is important to understand that the lease is no ordinary lease. It is more like a joint venture between the parties, with APAM very much the senior partner. The terms of the lease give it extensive control over the way in which the Nuance Group conducts its business.

9 APAM seeks an order that the appeal be allowed, there be a declaration in the form sought by it at trial and that the Nuance Group's counterclaim be dismissed.

10 I turn first to the question whether the Court may consider whether clause 27.15 is applicable to a failure by the chief executive officers to achieve a joint resolution or is bound by APAM's concession below. I express the question that way because, as will appear later in these reasons, I would not grant APAM any relief if clause 27.15 is inapplicable. I would simply dismiss the appeal because that provides a powerful reason for upholding the judge's decision.

11 Had the question been raised below, the answer would not have turned on any

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3 Schedules 1 and 2 follow the judgments of the other members of the Court, because the page and footnote numbering begins again for each schedule.

4 *Australia Pacific Airports (Melbourne) Pty. Ltd. v. The Nuance Group (Australia) Pty. Ltd.* [2004] VSC 446.

5 Normally it is better to summarize counsel's arguments, but this is an unusual case where there are advantages (patent and latent) in setting out the submissions in full.

new evidence. It would have been purely a matter of construction.[6] The criterion to be applied is whether it is in the interests of justice that the Court should consider the question now. In my opinion, it is in the interests of justice, because clause 19 cannot sensibly be construed without first deciding whether clause 27.15 is applicable to a failure by the chief executive officers to achieve a joint resolution. This is not a case where a party has belatedly discovered an argument based on a collateral matter, for the meaning of clause 27.15 is part and parcel of the meaning of clause 19. To construe the latter divorced from the former would be to construe something radically different from the parties' contract and to enforce a bargain that they did not make. If authority is required for the course I propose, it may be found in numerous cases, including *Chalmers Leask Underwriting Agencies v. Mayne Nickless Ltd*.[7], where a respondent was permitted to rely on a new point for the first time, not in an intermediate appellate court, but in the High Court, and *Commissioner of Taxation v. Linter Textiles Australia Ltd. (In Liq.)*[8], where an appellant was permitted to rely on a new point for the first time in the High Court.[9]

12 The principal point to which Gillard, A.J.A. and I drew attention was that clause 27.15 was "predicated on a difference *between the parties* rather than a difference on the Review Board or between the chief executive officers as part of the Review Board procedure".[10] To my mind that is still the key to understanding why clause 27.15 does not apply. It is not a matter of words but of substance. It does not turn on the location of clause 27.15 in the lease. The reason the clause does not apply is that clause 19.2(i) contemplates that the *last* step in the review procedure will be "joint resolution by the chief executive officers". ("Resolution" in clause 19.2(i) means a determination, not a motion.) There is no suggestion that the matter may go further either in the language or structure of clause 19 or in the words of clause 27.15. A failure by the chief executive officers, as such and as part of the Review Board procedure, to achieve a joint resolution

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6 Schedule 2, para.99.

7 (1983) 155 C.L.R. 279 at 282-283 and 285.

8 [2005] HCA 20 at [78]-[80], [141]-[143] and [191]-[204].

9 See also *Masters v. McCubbery* [1996] 1 V.R. 635 at 658 and *Fry v. Oddy* [1999] 1 V.R. 557 at 582 and the cases there cited.

10 Transcript, 10th December 2004, at [16].

may be a difference between them but it is not a difference between the parties. It would be astonishing if it were so, having regard to the anomalous and uncommercial consequences that would then flow, not least the ability of an expert nominated by the senior office bearer in Victoria of the Australian Property Institute to change the terms of the lease.

13 My conclusion that clause 27.15 is not applicable to a failure by the chief executive officers to achieve a joint resolution pursuant to clause 19.1(i) does not mean that clause 27.15 could never be invoked. I agree with Byrne, A.J.A. that clause 27.15 may be invoked if, independently of clause 19, there is a "difference … between the parties" within the meaning of that clause.[11]

14 If clause 27.15 is not applicable to a failure by the chief executive officers to achieve a joint resolution (and, in my respectful opinion, that is clearly the case), the arguments from anomaly fall away. There are no significant anomalies. On the contrary, it made good commercial sense for the parties to confer wide powers on a review board on which they were equally represented and to give that board authority to make binding decisions. Clause 19.2(k) shows that the function of the Board is much more than simply to consider issues and report to the parties. Wherever the nature of a topic referred to in clause 19.1 lends itself to a decision, a binding decision may be made. By way of example: the topic in clause 19.1(f) would rarely, if ever, lend itself to a decision, but the topic in clause 19.1(c) would lend itself at least to a decision whether financial performance was measuring up against the tenant's business plan. Clause 19.1(d) lends itself to a decision on a request to amend the business plan, the financial terms of the lease or both. I do not accept APAM's contention that the presence of what the parties conveniently but inaccurately called "a second verb" in clause 19.1(a) and (e) means that clause 19.2(k) refers only to clause 19.1(a), (e) and (j).

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11 I agree with the respondent that we should concentrate on construing clause 19, rather than clause 27.15. Having regard to the nature of the proceeding, we should have regard to the latter only to the extent that that is necessary to construe the former. It may nevertheless be observed that clause 27.15 is a comparatively jejune example of the kind of clause that is often found submitting disputes to an expert rather than to an arbitrator. That makes it even less likely that it was intended to apply in conjunction with clause 19.2(i).

15 I have said nothing else about clause 19.1(j) because, whatever its true construction, it deals with a disparate topic. In homely language, the tail should not be permitted to wag the dog. The other textual considerations to which APAM refers cannot be allowed to distort the evident structure and meaning of clause 19 in a lease of this character. It is also unnecessary and inappropriate to consider the specific criticisms that were made of the judge's reasons. His Honour was disadvantaged by the position that APAM adopted, at least by implication, in relation to clause 27.15. His conclusion was right and much of his reasoning has even greater force once the arguments from anomaly disappear.

16 I would therefore dismiss the appeal. It was faintly contended that, if we considered that clause 27.15 did not apply, we should grant a declaration to that effect. I do not think that that is appropriate. The amended notices of appeal[12] do not ask for such relief. Mr Macaw canvassed an amendment but did not press it if the Court's reasons made it clear that clause 27.15 does not apply to a failure by the chief executive officers to achieve a joint resolution pursuant to clause 19.2(i).[13]

NETTLE, J.A.:

17 By lease dated 16 January 2002 ("the Lease") Australia Pacific Airports (Melbourne) Pty Ltd ("APAM") leased to The Nuance Group (Australia) Pty Ltd ("The Nuance Group") certain areas in the International Terminal of the Melbourne Airport to be used for the purpose of the retail sale of tax and duty free merchandise, for a term of eight years commencing on 1 November 2002, at rent to be calculated in accordance with the provisions of clauses 3, 4 and 5 of the Lease.

18 Clause 3 provides for the calculation of "Base Rent" in each month of a year of the lease by multiplying "the GIPP" (which is to say the guaranteed income per passenger

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12 There are two of them. One relates to Hansen, J.'s refusal of the relief sought by APAM and the other to his Honour's grant of the relief sought by the Nuance Group by way of counterclaim.

13 It may be doubted whether an amendment would in any event have been allowed, for the reasons advanced by the Nuance Group in schedule 2, para.99, sub-para.(d), second sub-sub-paragraph.

for the year) by "the Estimated TIP" (which is to say the estimated total number of international passengers for the month); the payment of the Base Rent for the month in advance on the first Business Day of the month; and the adjustment of the Base Rent within three Business Days after the end of the month, upwards or downwards according to whether "the AIP" (which is to say the actual number of international passengers) is greater or less than 85% of the Estimated TIP.

19 Clause 4 provides for the payment within five Business Days after the end of each month of any amount by which the Percentage of Sales for that month (which is to say the "Relevant Percentage" of total Sales of the corresponding Merchandise Categories for the relevant period) exceeds the Base Rent paid or payable for the corresponding month or period.

20 Clause 5 provides for annual adjustments to be made within 35 Business Days after the end of each Lease Year to ensure that the Nuance Group pays the greater of the Percentage of Sales and the Base Rent for the year.

21 Clause 11 imposes a number of "Operational Obligations" on the Nuance Group. They include:

- Under clause 11.1(o), to support and participate in all marketing initiatives by APAM promoting the Airport and its facilities;
- Under clause 11.1(u), to use its reasonable endeavours to maximise Sales from the Premises.

22 Clause 18.3 obliges the Nuance Group to submit an annual business plan to APAM for the ensuing Lease Year, including details of the current market position, marketing and financial strategies, product promotional schemes, in-shop point of sale displays, staff training, proposed advertising and promotion, product range and innovation, capital investment, projected trading and profit and loss accounts and cash flow projections, and the ways in which strategies are to be developed and the business plan monitored, reviewed and adjusted as appropriate.

23 Clause 19.1 provides that:

"19 REVIEW BOARD

19.1 Functions of Review Board

The Review Board is to be responsible for the following:

(a) the review and approval of the Tenant's business plan prepared by the Tenant;

(b) the review of sales performance;

(c) the review of financial performance against the Tenant's business plan;

(d) the review of any requests to amend the Tenant's business plan and/or financial terms of this lease;

(e) the review and implementation of any marketing initiatives;

(f) the review of forecast trading conditions;

(g) the review of significant changes that may affect achievement of the Tenant's business plan;

(h) the review of capital expenditure requests;

(i) the review of significant developments and merchandising proposals; and

(j) any other relevant matter which the Review Board decides should be reviewed by it.

24 Clause 19. 2 provides:

"**19.2 Constitution of Review Board**

(a) The Review Board must, unless agreed otherwise, meet quarterly and such meetings must be called at no less than 10 Business Days notice.

(b) A quorum for the Review Board consists of four members, at least two of which are appointed on behalf of APAM and at least two of which are appointed on behalf of the Tenant.

(c) APAM must nominate three members to the Review Board and must notify the Tenant in writing of its nominees.

(d) The Tenant must nominate three members to the Review Board and must notify APAM in writing of its nominees.

(e) Members of the Review Board may be replaced at any time upon written notice by the party nominating such member.

(f) Members of the Review Board may appoint alternates.

(g) The Review Board must appoint a secretary who will be responsible for issuing notices and agendas of the Review Board meetings and minutes.

(h) The Review Board will have a chairman with a fixed term of six months. During odd numbered terms, the chairman will be appointed by APAM from one of its representative members and during even numbered terms, the chairman will be appointed by the Tenant from one of its representative members.

(i) Each member of the Review Board will be entitled to one vote. In the event of there being an equality of votes, the Review Board must refer the matter to the chief executive officers of APAM and the Tenant for joint resolution by the chief executive officers. The chairman does not have a second or casting vote.

(j) All decisions of the Review Board are to be by simple majority.

(k) Decisions of the Review Board are to be binding on APAM and the Tenant."

25 Clause 27.15 provides:

"27.15 Dispute Resolution

(a) If a difference arises between the parties the issue is to be determined by an expert nominated by the senior office-bearer in Victoria of the Australian Property Institute on the application of either party.

(b) The expert nominated must be a member of that institute of at least 5 years' standing and acts as an expert and not an arbitrator.

(c) The expert's determination is final and binding and the costs of the nomination and determination are to be borne equally.

(d) Each party is entitled to make a submission to the expert."

26 In March 2004 the Nuance Group informed APAM that it wished to have the rent varied because of what it said was an unsustainable financial position and it asked that the Review Board meet on an urgent basis to review its request in accordance with clause 19.1(d) of the Lease. APAM responded that clause 19.1(d) did not empower the Review Board to entertain a request for variation of the rent or make a determination

about variation of the rent and that, even if it did, any failure of chief executive officers to agree on a variation pursuant to clause 19.2(i) would not be susceptible to expert determination under clause 27.15.

27 On 13 July 2004 APAM instituted proceedings in the Commercial and Equity Division for a declaration that upon the proper construction of clause 19.1(d) the Review Board was not empowered to entertain or grant a request by the Nuance Group to alter the manner in which the amount of rent payable by it under the Lease was to be calculated. The Nuance Group counterclaimed inter alia for declarations that the Review Board was empowered and obliged by clause 19.1(d) to review the Nuance Group's request to amend the financial terms of the Lease and in the event of an equality of votes to refer the matter to the chief executive officers for joint resolution, and that if the chief executive officers did not achieve a joint resolution of the matter that there would exist a difference between the parties constituting or giving rise to an issue within the meaning of clause 27.15 and susceptible to determination by an expert appointed in accordance with that clause.

28 The matter came on for trial on 12 October 2004 and after a hearing which was completed within the day the judge reserved his decision. On 19 November 2004 his Honour made a declaration in favour of the Nuance Group that on the proper construction of clause 19.1(d) of the Lease the Review Board was empowered to make a decision upon The Nuance Group's request that the rent be varied. The judge did not make a declaration or other order concerning clause 27.15, but his Honour did say in his reasons that failure by the chief executive officers to reach a joint resolution would constitute a "difference" for the purpose of clause 27.15.

Clause 19.1(d)

29 APAM now appeals from the judge's order. APAM contends that clauses 3, 4 and 5 of the Lease are not "financial terms of the lease" within the meaning of clause 19.1(d) and in any event that the Review Board does not have power under clause 19.1(d) to make a decision which is binding on the parties. It submits that the power

given under clause 19.1(d) is limited to formulating recommendations for consideration by the chief executive officers of the parties.

30 The first argument made in support of that contention is textual. APAM says that whereas clause 19.1(a) expressly confers a power of decision with respect to the business plan and that clause 19.1(e), by referring to "implementation", implicitly confers decision making power with respect to marketing initiatives, none of the other paragraphs of clause 19.1 mentions or connotes the possibility of the Review Board deciding to accept or reject a proposal as opposed to considering the proposal. That difference it is said is deliberate.

31 The submission is not persuasive. *Expressio unius est exclusio alterius* and kindred syntactical presumptions are problematic at the best of times,[14] and particularly when construing commercial agreements,[15] and it is evident that the Lease is a commercial agreement in which very little thought has been given to consistency in drafting. In such circumstances it is unreal to infer that because "consider" has been used in one paragraph of clause 19.1 in a sense that appears to be different to "approve" it must have been used in that sense in each of the other paragraphs of the clause. It is preferable to approach the construction of the Lease on the basis that expressions and particularly elliptical expressions are to be read in no narrow spirit of construction but rather as the court would suppose honest business people would understand the words they have actually used with reference to their subject matter and the surrounding circumstances.[16] So approached, it appears to me more likely that the verb "consider" and the notion of considering a proposal are used in clause 19.1(d) and in a number of other paragraphs of clause 19.1 in the commercial sense of a process which may include approval or

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14 *Anthony Horden and Sons Ltd v. The Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 C.L.R. 1 at 7; *R. v. Wallis; Ex parte H.V. Mackay Massey Harris Pty. Ltd.* (1949) 78 C.L.R. 529 at 550; *Ainsworth v. Criminal Justice Commission* (1992) 175 C.L.R. 564 at 575; *PMT Partners Pty. Ltd. (In Liq) v. Australian National Parks and Wildlife Service* (1995) 184 C.L.R. 301 at 311-312; *Ousley v. The Queen* (1997) 192 C.L.R. 69 at 111.

15 *Schenker & Co. v. Maplass Equipment* [1990] V.R. 834 at 839-840.

16 *Cohen and Co. v. Ockerby and Co. Ltd.* (1917) 24 C.L.R. 288, at 300; *Di Dio Nominees Pty. Ltd. v. Brian Mark Real Estate Pty. Ltd.* [1992] 2 V.R. 732 at 741-2; *MLW Technology Pty. Ltd. v. May* [2005] VSCA 29 at [76].

disapproval. That impression is confirmed by the elaborate provisions of clause 19.2 which, because of their content and context, present as intended to apply generally to all of the paragraphs of clause 19.1. The structure implies that each of the matters mentioned in clause 19.1 may be the subject not only of consideration but also of a decision of a simple majority which when made will bind the parties.

32 The second argument advanced in support of APAM's construction of clause 19.1(d) is that if clause 19.1(d) did include decision making power it would mean that the Review Board had broad ranging power to vary fundamental terms of the Lease and thus produce rights and obligations inconsistent with the Lease as drafted. According to APAM it cannot be supposed that the parties intended to annihilate the specific and detailed financial terms of the Lease by giving the Review Board power in effect to rewrite the contract.

33 There is some force in that submission although it is not as great as first appears. Standing alone it may seem odd that parties should agree to elaborate provisions for the calculation, adjustment and payment of rent and yet at the same time give a Review Board power to alter those provisions upon the request of only one party.[17] But when it is considered that the Review Board is comprised of an equal number of representatives of each party, with an equality of votes, that it is governed by the formal procedures laid down in clause 19.2, and that clause 19.2(i) provides for referral to the chief executive officers in the event that the Review Board cannot agree, the process may well be seen as a sensible means of considering and negotiating amendments to the financial provisions of the Lease as the need arises throughout the term. Looking outside the square, it is not unusual to find provisions for the renegotiation of prices payable and as to the performance of other financial obligations in long term commercial contracts, especially where prices, costs and returns are susceptible to changing market and economic conditions. Long term sales contracts provide a ready example, and as will be seen there is reason to think that the same applies here.

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17 *Rhodes v. Forwood* (1876) 1 App. Cas. 256 at 265.

34 The third thing which is said in support of APAM's construction of clause 19.1(d) is that the Lease does not specify criteria or provide any other form of guidance as to the matters which the Review Board should take into account when considering a proposal to amend. APAM submits that it cannot be supposed that the parties intended to give the Review Board *carte blanche* to vary, and hence it must follow, it is said, that the parties did not give the Review Board any power to vary.

35 I think that there are two answers to that submission. The first is to repeat the observation already made that clause 19.2 provides for an equality of votes and in the event of a deadlock for the matter to be referred to the chief executive officers of the parties to be resolved by joint resolution. Other things being equal, there cannot be a decision to amend unless the parties are agreed. The second answer, which was given by the judge below, is that the Review Board might be expected to consider the merits of a request placed before it in light of information provided and their knowledge of each party's position and that the chief executive officers should similarly decide.

Clause 27.15

36 Although the judge did not make a declaration concerning clause 27.15 it is clear that his Honour took it into account before making a declaration about the effect of clause 19.1(d). Similarly, I do not consider that it would be appropriate for this court to make an declaration about the effect of clause 19.1(d) without considering the effect of clause 27.15. There is not much point in determining that clause 19.1(d) is capable of applying to a request to amend the rent without also deciding what is to happen if the Review Board become deadlocked and the chief executive officers fail to resolve the matter by joint resolution.

37 I have had the advantage of reading in draft the reasons for judgment of the other members of the court and with respect I recognise the force of their reasoning and their conclusions that a failure of the chief executive officers to reach a joint resolution pursuant to clause 19(2)(i) is not a difference between the parties for the purpose of clause 27.15. But I have come to a conclusion that is different in part. Whatever else

may or may not be within clause 27.15, I consider that a failure of the chief executive officers to achieve a joint resolution under clause 19.2(i) upon a request under clause 19.1(d) to change the rent payable under the Lease would be a difference between the parties within the meaning of clause 27.15.

38 Interestingly, APAM conceded below that a failure by the chief executives to resolve a matter by joint resolution would be a "difference… between the parties" for the purposes of clause 27.15, and APAM encouraged the judge to approach the construction of clause 19.1(d) on that basis. APAM contended then that since a failure of the chief executive officers to achieve a joint resolution under clause 19.2(i) was bound to go to expert determination under clause 27.15, it could not have been intended that a request to amend the rent was susceptible to consideration under clause 19.1(d).

39 APAM now puts it the other way. It submits that if clause 19.1(d) does apply to a request to amend the rent, any failure on the part of the chief executive officers to achieve a joint resolution concerning the request would not be a difference between the parties for the purposes of clause 27.15. It says that the expression "difference… between the parties" should be construed as limited to differences concerning existing rights and obligations and thus as excluding differences as to whether existing rights and obligations should be amended. APAM argues that unless clause 27.15 is so confined any request to amend the financial terms of the Lease could lead to an expert determination, and if that were so there would be no purpose in having financial terms. The financial terms of the Lease would be in a state of perpetual uncertainty and possibly a constant state of flux. Furthermore, because clause 19.1(j) allows the Review Board to consider "any other matter that it decides should be reviewed", it is conceivable that there could be disagreement at Review Board level about proposed amendments to any or all of the terms of the Lease and, if the failure of the chief executive officers to achieve a joint resolution about those matters were susceptible to expert determination, the expert would have an unguided mandate to vary any and all of the provisions of the Lease, including even the term of the Lease. According to APAM, these are things which the parties cannot possibly have intended and so the only

logical conclusion is that the parties did not intend clause 27.15 to apply.

40 I do not find the argument persuasive. I see little justification and not a little difficulty in construing the expression "difference… between the parties" as limited to differences concerning existing rights and obligations and, as it seems to me, the suggestion that the parties may be plunged into a state of constant contractual flux and disorder considerably overstates what is likely to occur in reality. It may be that a failure of the Review Board to reach agreement or of the chief executive officers to achieve a joint resolution about some of the matters dealt with under clause 19.1(j) would not be susceptible to expert determination. The apparently broad scope of clause 19.1(j) makes that a real possibility. But it does not follow that failure to achieve agreement or a joint resolution about a request for a change in the rent would be beyond the ambit of expert determination or of clause 27.15.

41 APAM submits that the opening words of clause 27.15(a) were plainly modelled on the terms of an arbitration clause and that the expression "difference… between the parties" should be construed accordingly as confined to a difference concerning existing rights and obligations. APAM also submits that the probability of that construction is supported by the reference in clause 27.15 to "the issue"; it being said it is axiomatic that there cannot be an "issue" unless there is a difference or dispute about existing rights and obligations. It follows, it is said, that a request to change the rent payable under the Lease is necessarily beyond the range of the clause.

42 I do not think that is so. Even if clause 27.15 is modelled on an arbitration clause and should be construed accordingly, it is clear enough that arbitration as opposed to civil litigation need not be confined to disputes and differences about existing rights and obligations and, depending on the context, "issue" may mean no more than a point in question.

43 It is true that in order to constitute a submission to arbitration there must be a difference between the parties and that the difference must be something which arises

under and is to be determined by reference to an existing agreement.[18] It is also necessary to bear in mind the sometimes difficult distinction between arbitration *stricto sensu*, wherein an arbitrator must determine a difference between the parties to an agreement, and an appraisal or valuation, wherein an expert is left at large to determine an objective fact or to legislate rights and obligations.[19] The essence of arbitration is the resolution of a dispute or difference by a process in the nature of an inquiry in which the arbitrator is bound to resolve the dispute on the basis of competing submissions. The essence of valuation or appraisal is that the expert is left at large to overcome or perhaps avoid a dispute by applying his or her own knowledge and skill to the resolution of the matter in issue. Hence it has been said that arbitration is a process of decision making which is limited by the extent and area of the dispute, whereas appraisal or valuation is a process of decision making to which the only relevance of the dispute is as the condition precedent of the reference.[20]

44 But to my way of thinking a difference about a request for a change in the rent pursuant to clause 19.1(d) of the Lease is something which arises under and is to be determined by reference to the Lease and I see no reason in principle why such a difference could not be resolved by arbitration.

45 APAM's argument finds some support in a statement in the fourth edition of *Halsbury's Laws of England*[21]: that for the purposes of arbitration a dispute or difference must relate to a matter capable of being decided in civil proceedings between the parties and being compromised by accord and satisfaction. *Bacon's Abridgment* is cited in support of the statement. *Halsbury's Laws of Australia* puts the matter in much the same way, although in the terms which were used in the third edition of *Halsbury's Laws of England*: the dispute or difference must consist of a justiciable issue triable civilly and

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18 *AMP Society v. OTC* [1972] 2 N.S.W.L.R. 806 at 817, citing *Russell on Arbitration* 16th Ed. at 28.

19 *Re Carus-Wilson & Greene* (1887) 18 Q.B.D. 7 at 9; *Isca Construction Co. Pty. Ltd. v. Grafton City Council* (1962) 8 L.G.R.A. 87 at 92; *Arenson v. Casson Beckman Rutley & Co.* [1977] A.C. 405 at 423-4; *Thomas Cook Pty. Ltd. v. CBA* (1986) 4 B.P.R. 9185; *Arenson v. Casson Beckman Rutley & Co.* ibid.; *Hammond v. Wolt* [1975] V.R. 108 at 112; *Halsbury's Laws of England*, 3rd Ed. Vol 2- Arbitration at [8].

20 *Ajzner v. Cartonlux* [1972] V.R. 919 at 923.

21 *Halsbury's Laws of England* 4th Ed., Vol. 2, Reference to Arbitration at [602].

that a fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction, and if it cannot, then the dispute is not arbitrable.[22] But neither formulation is complete, as indeed is pointed out in a footnote to *Halsbury's Laws of Australia*. It refers to observations of Jones, J. in *Goldflax Pty. Ltd. v. Reefield Pty. Ltd.*[23] and, as his Honour there noted, the fourth edition of *Halsbury's Laws of England* omits a number of important points made in earlier editions. One of those which is important for present purposes is that while an agreement to refer a price to a valuer is an agreement for valuation or appraisement, and so not an agreement for arbitration, matters of valuation and appraisement may be the subject of arbitration where it is clear that the arbitrator is intended to proceed judicially on the basis of the evidence and submissions put forward by the parties.[24] Parties may agree that the consideration payable under an agreement is to be determined by agreement and failing agreement that the difference between them as to the amount payable shall be referred to arbitration. It was so stated in *Collins v. Collins*[25] almost 150 years ago:

> "If two persons enter into an agreement for the sale of property, and try to settle the terms, but cannot agree, and after dispute and discussion respecting the price, say we will refer the question of price to A.B., he shall settle it, and they agree that the matter shall be referred to his arbitration, that would appear to be 'arbitration' in the proper sense of the term within the meaning of the act; but if they agree to a price to be fixed by another, that does not appear to be arbitration".

46 There is of course a distinction between the arbitration of a difference concerning existing rights and obligations and an arbitration which is directed to a difference about the content of rights and obligations yet to be agreed. The latter is sometimes called a

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22 *Halsbury's Laws of Australia*, Arbitration at [25-20]; cf. *Halsbury's Laws of England*, 3rd Ed. Vol. 2, Arbitration, at [10].

23 Supreme Court of Queensland, unreported 6 September 1999, BC9905652 at [22]. His Honour notes that some of the cases cited in the current editions of *Halsbury* demonstrate points made more explicitly in earlier editions of *Halsbury*.

24 *Re Hopper* (1867) L.R. 2 QB 367 at 374 and 376; *Isca Construction Co. Pty. Ltd. v. Grafton City Council* (1962) 8 L.G.R.A. 87 at 92; *Halsbury's Laws of England*, 3rd Ed. Vol. 2, Arbitration, at [9].

25 (1858) 26 Beav. 306 at 312, 28 LJ (Ch) 184 at 187; 122 RR 127 at 130, per Lord Romilly, M.R.; see also *Bos v. Helsham* (1866) LR 2 Exch 72 at 78, per Kelly, C.B.

quasi-arbitration in order to distinguish it from the former[26]. But what is thus described as quasi-arbitration is nonetheless arbitration so long as the arbitrator is appointed to act as an arbitrator. The point was explained in the judgment of Rich, J. in *Jacka v. Lewis*[27] as follows:

> "The character of an arbitrator depends upon the nature of the duties which he is appointed to perform. If he is appointed to determine as between contesting parties a dispute or question as to the nature or extent of their already existing legal rights or duties *inter se*, not only is he subject to a legal duty to act judicially, but he is to perform what is essentially the function of a court of justice. If he is appointed to determine as between contesting parties not a dispute as to their existing legal rights but a difference as to the conditions which are to prevail between them if they enter into legal relations with one another, then, although he is still subject to a legal duty to act judicially, he is to perform or implement an act which is arbitral in the sense of legislative, and is not one of the functions of a court in the proper sense of the term."

47 Over the last 25 years the same point has been reiterated on several occasions in a succession of cases involving long term sales contracts. For present purposes the first and possibly most important of those is *The Queensland Electricity Generating Board v. New Hope Collieries Pty. Ltd.*[28]. That case concerned a long term coal sales contract. It contained a scale of base prices and "escalation" or "price variation" provisions for adjusting the base prices for changes in the colliery Company's costs during the first five years of the contract. For purchases after the first five years the general terms of agreement were to continue but the base price and the variation provisions were to be agreed. It was further provided as one of the general terms of the agreement that the variation provisions were to be reviewed in certain circumstances upon request of either party and that in any event such reviews should take place at not more than five yearly intervals. The agreement contained an arbitration clause which provided that:

> "13.1 If at any time any questions, dispute or difference whatsoever shall arise between the Generating Board and the Company upon, or in relation to, or in connection with the agreement, which cannot be

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26 *Alliance Petroleum Australia NL v. The Australian Gas Light Company Co. Ltd.* (1983) 34 S.A.S.R. 215 at 244-245, per Zelling, J. *in diss.*

27 (1944) 68 C.L.R. 455 at 460 – 461.

28 [1989] 1 Lloyd's Rep. 205 at 207.

> resolved by the contracting parties within a period of three months either party may as soon as reasonably practicable thereafter by notice in writing to the other party specify the nature of such question, dispute or difference, and call for the point or points at issue to be referred to arbitration.
>
> 13.2 Arbitration shall be effected:-(i) By an arbitrator agreed upon between the parties, or failing agreement upon such an arbitrator; (ii) By an arbitrator appointed by the committee of the Southern Queensland Branch for the time of The Australasian Institute of Mining and Metallurgy, provided always that in any case where in the question, dispute or difference involves a matter of law, the person to be appointed by the said committee shall be a barrister at law practising in Brisbane…"

On 14 July 1982, the Company gave the Board written notice requesting a review of the variation provisions dating back to the commencement of the agreement four years before and when the requested review did not take place, the Company gave written notice calling for an arbitration on whether there should be alterations in the price variation provisions in respect of all or any part of the period of the agreement until 31 December 1982. The Board issued a writ seeking a declaration that the Company was not entitled pursuant to such a review to any increase in the liability of the Board to make payments for coal delivered prior to 14 July 1982. The Board argued that the agreement was so uncertain as to the period after the first five years that it was nothing more than an agreement to agree and therefore was not legally enforceable and in the alternative that if it were enforceable it did not contemplate retrospective reviews. The Company won on all issues at first instance and also before the Full Court. On appeal to the Privy Council it was held that the agreement did not provide for retrospective reviews but that it was otherwise enforceable. Sir Robin Cooke, who delivered the judgment of the Judicial Committee, said:

> "It is of course competent for the parties in the exercise of their ordinary freedom of contract, to agree specifically on a retrospective price change. ...The issue, however, is whether a total re-writing of the price formula, resulting in changed prices for several years before a review has been sought, may be imposed by arbitration.
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> *If worded with appropriate clarity, an arbitration clause could have that drastic scope.* But clear wording would be required, since such an unstable agreement is at least rare. From the outset nothing concerning price could be relied on as fixed. The possibilities for revision would be almost

endless…" [29]

48 The second case is *Santos Ltd. v. Pipelines Authority of South Australia*[30]. It involved a long term gas sales contract. The term of the contract was divided into "pricing periods" and clause 11.3 of the contract provided that the producers or the purchaser might give notice requiring that there be a price review for the purposes of determining the price to operate from the beginning of the next pricing period. Upon such a notice being given the producers and the purchaser were required to endeavour to negotiate and agree the new price and if they were unable to agree on a price within a prescribed time they had then forthwith to proceed to have the price determined by arbitration under the *Commercial Arbitration Act* 1986. It was argued that there could be no arbitration unless there were a dispute and that the notion of a dispute did not extend to failure to agree upon future rights and obligations. The arbitrator it was said was simply being asked to legislate to complete an incomplete agreement. Alternatively, it was contended that even if the arbitrator could properly be said to be resolving a dispute, the process was not one of arbitration properly so called. The South Australian Full Court, comprised of Debelle, Cox and Prior, JJ., rejected each of those arguments. They held that there was a dispute within the meaning of the *Arbitration Act*, that the arbitrators were not being asked to complete the contract, and that it was an arbitration properly so called.

49 The third case is *Apache Northwest Pty. Ltd. v. Western Power Corporation*[31] in which the Western Australian Full Court comprised of Kennedy, Pidgeon and Franklyn, JJ. was also faced with a long term gas sales contract and a question of whether provisions for redetermination by arbitration of the prices payable constituted an enforceable arbitration agreement. After analysing the relevant authorities, including *Alliance Petroleum of Australia NL v. The Australian Gas Light Company Ltd.*, *The Queensland Electricity Generating Board v. New Hope Collieries Pty. Ltd.* and *Santos Ltd. v. Pipelines Authority of South Australia*, the court held that such provisions may constitute an

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29 [1989] 1 Lloyds Rep. at 208, emphasis added.

30 (1996) 66 S.A.S.R. 38.

31 (1998) 19 W.A.R. 350.

enforceable arbitration agreement. Kennedy, J., who delivered the judgment of the court, put it as follows: [32]

> "That the concept of an arbitration should not be confined as the appellants contend is confirmed, in our view, by s 22 of the Act. Subs (1) of that section provides that, unless otherwise agreed in writing by the parties to an arbitration agreement, any question that arises for determination in the course of proceedings under the agreement shall be determined according to law. It is implicit in that subsection that the parties to an arbitration agreement may agree in writing that 'any question that arises for determination in the course of proceedings under the agreement' need not be 'determined according to law'. The extent of the power of an arbitrator, if so authorised pursuant to subs (2), to determine any question in the course of proceedings under the agreement as amiable compositeur or ex aequo et bono is not altogether clear see Mustill and Boyd (op cit) 74-86 and Jacobs, *Commercial Arbitration Law and Practice*, ch 21. However, it certainly does not suggest that the meaning of 'arbitration' should be narrowly defined.
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> In our view, the judgment of Debelle J in the *Santos* case (supra) accords with the weight of modern authority. In the present case, as in that case, the arbitrator is not required to complete the contract between the parties or to 'legislate' for them. His powers are not at large. Relevantly, the present arbitrator's task is to determine whether the effect of the provisions of cl.14 is to produce a Prevailing Contract Price which, having regard to the Pricing Principles, fails to reflect the price of competitive energy forms in the South West and, if he so finds, to determine a revised price giving effect to those principles and ensuring that they are satisfied. It will be the responsibility of the arbitrator to determine a price which gives effect to the agreement, having, as required by cl.15.2(g) ensured that the principles agreed between the respondent and each seller and recorded in cl.15.1 are satisfied."

50 It may be that the provisions of the Lease in this case would not provide an expert with the same degree of guidance in a dispute about a change in the rent as the Pricing Principles afforded the arbitrator in *Apache Northwest* in a dispute about a change in the sale price. For that reason it is arguable perhaps that a failure of chief executive officers to reach a joint resolution pursuant to clause 19.2(i) about a change in the rent payable would not be susceptible to arbitration. But I doubt that would be so. As Rich, J. said in *Jacka v. Lewis* the character of an arbitrator depends upon the nature of the duties which he or she is appointed to perform. So an arbitrator may be appointed to perform or

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[32] ibid. at 367-368.

implement an act which is arbitral in the sense of legislative. It is implicit in a commercial agreement that the terms to be imposed by arbitration should fair and reasonable between the parties.[33] Consequently, even in the absence of specific guidance, an arbitrator appointed to resolve a difference about what is to be agreed has a base from which to work. And despite such uncertainty as that may create, these days arguments about uncertainty rendering commercial agreements unenforceable tend to be given the short shrift which they usually deserve. In the words of Sir Robin Cooke in *The Queensland Electricity Generating Board v. New Hope Collieries Pty. Ltd.*[34]*:*

> "At the present day, in cases where the parties have agree on an arbitration or valuation clause in wide enough terms, the Courts accord full weight to their manifest intention to create continuing legal relations. Arguments invoking alleged uncertainty, or alleged inadequacy in the machinery available to the Courts for making contractual rights effective, exert minimal attraction. *Sudbrook*[35] is now the leading English case in the field. The same tendency has been apparent elsewhere in the Commonwealth, as illustrated by *Calvan Consolidated Oil and Gas Co. Ltd. v. Manning;*[36] *Attorney-General v. Barker Bros. Ltd;*[37] and *Booker Industries Pty. Ltd. v. Wilson Parking (Qld) Pty. Ltd.*[38]"

51 But even if the failure of chief executive officers to achieve a joint resolution under clause 19.2(i) about a change in the rent payable were not susceptible to arbitration as such, I would not see that as reason to exclude it from the ambit of expert determination under clause 27.15. The clause refers to any "difference". It is not qualified by indications such as that the difference must be "as to the construction of the contract" [39]. It follows in my opinion that it should at least be taken to include any difference arising under or out of the contract, and I consider that a difference about a request for a change in the rent pursuant to clause 19.1(d) of the Lease is something

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33 *Booker Industries Pty. Ltd. v. Wilson Paring (Qld) Pty. Ltd.* (1982) 149 C.L.R. 600 at 616; *QEGB v. New Hope* [1989] 1 Lloyd's Rep. 205 at 210.

34 [1989] 1 Lloyd's Rep. 205 at 210.

35 *Sudbrook Trading Estate Ltd. v. Eggleton*, [1983] A.C. 444 esp. at 476.

36 [1959] SCR 253.

37 [1976] 2 N.Z.L.R. 495.

38 (1982) 149 C.L.R. 600 esp. at 614-617, per Brennan, J.

39 cf. *Dowell Australia Ltd. v. Triden Contractors Pty. Ltd.* [1982] 1 N.S.W.L.R. 508; *Drennan v. Pickett* [1983] 1 Qd. R. 445.

which arises under and is to be determined by reference to the Lease. Given then that clause 19.1(d) provides for requests to amend the Lease, and that clause 19.2(i) anticipates the possibility of a difference as to whether such an amendment should be allowed, and given too that clause 27.15 provides a ready means of resolving any difference which may arise under or out of the agreement, it is I think more likely that the parties intended that such a difference be resolved under clause 27.15 than that it be left unresolved and festering for the remainder of the term.

52 The judge below said that:

> "49. I have considered APAM's submission as to a lack of sufficient guidelines or criteria by which the Review Board, and subsequently the chief executive officers and the expert, could determine a request to amend the financial terms. The answer, in my view, is that the Review Board would consider the merits of a request placed before it in light of information provided and their knowledge of each party's position. The chief executive officers would similarly decide. If the matter were to reach the expert, the expert would be guided by the nature of the request for amendment, any resolution of the chief executive officers, the submissions of the parties and the terms of the Lease.

With respect I agree with his Honour. Contrary to the appellant's submissions, the expert would not be without guidance as to how he or she should go about the task of deciding the difference. The criterion or standard would be what is fair and reasonable as between the parties;[40] and what is fair and reasonable would have to be assessed by reference to the original terms of the Lease. In effect the Lease itself lays down in broad terms the sorts of considerations which are to be borne in mind in determining how to decide the difference. To that may be added any evidence of circumstances and assumptions applicable at the time of and on the basis of which the Lease was entered into; and what has happened since and whatever may now be the facts and circumstances of each party; and of course the submissions of the parties.

53 It is true that those things may still leave a good deal of scope for an expert to move, and so it is possible that an expert could reach a decision which imposes

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40 *Booker Industries Pty. Ltd. v. Wilson Paring (Qld) Pty. Ltd.* (1982) 149 C.L.R. 600 at 616; *QEGB v. New Hope* [1989] 1 Lloyd's Rep. 205 at 210.

significant change. But that does not strike me as particularly surprising. The parties have chosen to have their differences resolved by expert determination[41], and because the Lease is a commercial agreement I assume that they did so because they wanted the sort of flexibility that expert determination may afford.[42] In that respect their choice seems to me to be little different to and no more remarkable than the choice of parties to a lease to leave to expert determination the rent which may be payable on a renewal or extension of the term[43] or the choice of parties to a long term gas or coal sales contract to leave to expert determination what is henceforth to be paid or even what may be taken into account in determining future adjustments.[44] Furthermore, in a number of respects the terms of the Lease more closely resemble the terms of an adventure in trade than of a landlord and tenant relationship. Some terms look a lot like a retail sales partnership or a franchise arrangement and the financial terms of the Lease are evidently geared to projected and expected sales performance in an apparently challenging retail market. Conditions of that kind are notoriously variable and productive of change in estimates and expectations over time. If the Lease is considered fairly and reasonably against that sort of background it is even less remarkable that the parties should have conceived of the need for changes in the financial terms of the lease over time and to have provided for it by means of the Review Board and chief executive officers' procedure in clause 19 and, failing agreement, by means of expert determination in accordance with clause 27.15.

54 APAM makes much of the existing detailed provisions for the adjustment of rent. It says that it would be illogical for parties to take the trouble of formulating such an elaborate and refined adjustment mechanism if they had really conceived that the whole thing could be altered by the device of a request for amendment and the imposition by expert determination of whatever is said to be reasonable. It contends that it is surely

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41 Rather than by arbitration or some other more rigid process.

42 cf. *Sudbrook Trading Ltd. v. Eggleton* [1983] A.C. at 476; *QEGB v. New Hope* [1989] 1 Lloyd's Rep. at 210.

43 *Booker Industries Pty. Ltd. v. Wilson Parking (Qld) Pty. Ltd.* (1982) 149 C.L.R. 600.

44 *The Queensland Electricity Generating Board v. New Hope Collieries Pty. Ltd.* [1989]1 Lloyd's Rep. 205; *Apache Northwest Pty. Ltd. v. Western Power* (1998) 19 W.A.R. 350.

more likely that, whatever was conceived to fall within the ambit of clause 27.15, a difference about the rent was not. I do not think that takes the matter any further. The existing provisions for the adjustment of rent are not liable to be set at nought by recognising that a difference about a request for amendment may be resolved by expert determination. On the contrary, and for the reasons already expressed, those provisions will do much to inform any determination of whether a requested amendment is fair and reasonable having regard to circumstances which have occurred and are foreseen as likely to occur. They form part of the guiding principles by reference to which any expert determination should be made.

55 APAM also contends that it makes no sense to assume that the parties would wish to have the question of proposed amendments to rent payable removed from the area of negotiation and left to expert determination, particularly an expert nominated by the senior office bearer of the Australian Property Institute rather than a lawyer. But that idea seems to me to represent a significant misconception of the effect of clauses 19.1(d) and 27.15. Clause 19.1(d) does not remove requests for amendment from the area of negotiation. To the contrary, it goes a very long way to ensuring that requests for amendment will be negotiated within the formal structure of the Review Board, by representatives of each side with an equality of bargaining power, and, ultimately, if needs be, by the chief executive officers facing off one to one. Clause 27.15 does not remove requests for amendment from the area of negotiation. It does not begin to operate until and unless the process of negotiation has run its course and failed to produce a result. It operates then as a last resort to overcome a deadlock which negotiation has failed to resolve. Consequently, it is only if the parties to the Lease do not fulfil their express and implied contractual obligations to attempt to resolve differences through the process of the Review Board and, in the event of deadlock, by negotiation between the chief executive officers, that a reference to expert determination may come to exclude negotiation. Since the difference is about rent an expert nominated by the Australian Property Institute makes obvious sense.

56 APAM argues that if that is so there is nothing which prohibits APAM requesting

an amendment to the financial terms of the Lease in its favour, as and when circumstances warrant, and in having that determined by expert arbitration pursuant to clause 27.15 in the event of a deadlock. I agree. The provisions of clause 19.1(d) in terms inure to the benefit of each party equally, and logically it is to be expected that the parties intended it to be so. For the same reasons as it may be supposed that the parties foresaw the need to adjust rent and other obligations in favour of The Nuance Group, it may be assumed that the parties intended adjustments to be made in favour of APAM when and if circumstances warrant. As I say, the Lease is a commercial agreement set in the context of a changing commercial environment and intended to last for a period over which such changes may well prove very significant.

57 Finally, APAM argues that whatever power there may be in the Review Board and thus the expert to consider a proposal to amend the financial terms of the Lease under clause 19.1(d), the power should not be construed as extending to a proposal for retrospective change. I also agree with that. As has been seen in the judgment of Sir Robin Cooke in *The Queensland Electricity Generating Board v. New Hope Collieries Pty. Ltd.*, although it is competent for parties to agree on the imposition of retrospective changes by way of expert determination, it is not lightly to be concluded that they intended that sort of result. It would mean that nothing could be relied on as fixed and the possibilities for revision would be almost endless. In the scheme of things it is unlikely that business people would wish to impose such a state of affairs upon themselves and so, unless they have provided for it in very clear terms, it will be assumed that they did not intend to impose it on themselves. The interpretation which is to be preferred is one which serves best the general purpose of the agreement and is fair to both parties.

58 The position here seems to me to be much as it was in *The Queensland Electricity Generating Board v. New Hope Collieries Pty. Ltd.* Since a request for review of the financial terms of the lease would put the other party on notice that those terms are in question, and because the other party is likely to delay the process under clauses 19.2 and 27.15, it is in accordance with the apparent purpose of clause 19.1(d) and it is fair that any decision of the Review Board resulting from such a request date back as far as the date

of the request. But there is no indication that the parties intended the sort of uncertainty which might result from the possibility of retrospective change. Hence it would be contrary to the intendment of clause 19.1(d) and it would be unfair to conclude that the Review Board had power to back date a change further than the date of request. It follows too that if the Review Board failed to agree upon the request, and if the chief executive officers were unable to reach a joint resolution about it, any decision of the expert appointed under clause 27.15 to resolve the difference should not date back beyond the date of the request.

Conclusion

59 In the result, I would dismiss the appeal.

BYRNE, A.J.A.:

60 I agree with the analysis by my brother Nettle as to the meaning of cl. 19 of the Lease and with his conclusion that it is competent for the Review Board to decide to grant a request to amend the financial terms of the Lease. And if the Board be deadlocked on the matter, it may be referred to the chief executive officers of APAM and The Nuance Group respectively for them to achieve a joint resolution if they can. If the matter is decided at Review Board level, the decision binds the parties;[45] if the chief executive officers so resolve, their decision, too, will presumably bind the parties.[46] This is sufficient for the purposes of determining this appeal, for it must follow that the decision of the trial judge was correct.

61 Much, however, has been said in the course of the appeal upon the question of the meaning and effect of cl. 27.15 and, since my views may not precisely accord with those of either of my brethren on this matter, I will state them shortly, at least insofar as the dispute resolution procedure established by that clause concerns a matter which has been previously raised before the Review Board.

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45 Clause 19.2(k).

46 I assume that they have the necessary authority to bind their employers.

62 Let it be supposed that the Review Board is deadlocked upon a matter properly raised for its decision under cl. 19.1. Let it be supposed that the matter is referred to the chief executive officers and that they, too, are unable to achieve a joint resolution of the matter. What was then debated in the argument before the Court as to the construction of cl. 19, was the question whether the matter by reason of that fact passes to or might be referred for resolution by the expert appointed under cl. 27.15.

63 The significance of this debate, as Callaway, J.A. observes,[47] lies in the anomaly which counsel for APAM said would or might arise from an affirmative answer to this question. If the matter referred to the Review Board which was not decided by the Board or finally resolved by the chief executive officers then passed directly or by the reference of one party to the expert, then it is likely that the range of matters which are capable of decision by the Review Board would be affected by the ambit of the matters which might be determined by the expert. The debate then shifted to a discussion of the limitations upon the matters which might be determined by an expert. To my mind, this question does not arise.

64 Clause 27.15 is expressed in wide, perhaps alarmingly wide, terms. All that is required in order for the clause to be enlivened is that "a difference arises between the parties". Notwithstanding the width of this expression, there is in the Lease at least one specific matter which may be referred to the expert under this clause. I refer to cl. 17.5 which refers a dispute as to the value of The Nuance Group's property upon APAM exercising its option to purchase. Clause 26.1 which deals with the resolution of a dispute as to the reduction of moneys payable by The Nuance Group under the Lease in the event that the premises are destroyed or damaged, provides an example of a similar but not identical forum for dispute resolution.

65 In my view, the power of the parties to refer a difference between them to an expert under cl. 27.15 and the power of the expert to determine the issue are independent of the decision-making procedures created under cl. 19.1. When a decision

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47 At para [14].

is made under cl. 19 that is the end of the matter; the parties are bound. Where no decision is made, one of the parties may refer the unagreed matter to an expert under cl. 27.15 only where the matter is "a difference between the parties". Likewise, where the matter has not been the subject of the cl. 19 processes, a party may refer it to the expert provided it is such a difference. Put another way, it is not a pre-condition to the operation of cl. 27.15 that the subject matter of the difference has been through the cl. 19 processes; nor is a matter which has been through those processes *ipso facto* an appropriate matter for the expert under cl. 27.15.

66 I do not see that this follows from the fact that the difference is one between the chief executive officers and not between the parties. If a matter which is properly described as a difference between the parties, within the meaning of cl. 27.15, is referred to the Review Board and then to the chief executive officers without result, it remains nonetheless a difference between the parties. If it is not properly so described, then the want of a decision on the part of the Review Board or of a joint resolution on the part of the chief executive officers does not render it a difference between the parties.

67 In paragraph 8(b) of its defence and counterclaim The Nuance Group contended that the expert under cl. 27.15 had the power to entertain and grant its request to amend the financial terms of the Lease and it sought a declaration to that effect. Before the trial judge the existence of this power was common ground between the parties and his Honour was content to proceed on that basis. His Honour, however, expressed himself this way:

> "Failure by the executive officers to reach a joint resolution would constitute a 'difference' for the purposes of cl. 27.15. However, it is important to note that cl. 27.15 is an overarching clause which applies to any difference between the parties, howsoever arising."[48]

68 Before this Court counsel for APAM sought to present an alternative argument which depended upon their client's withdrawal of this concession. They submitted that a failure by the executive officers to achieve joint resolution was a difference between

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[48] Judgment para [43]

those persons; it did not amount to a difference between the parties to the Lease. In these circumstances, the expert could not deal with the question whether the financial terms of the lease might be amended because cl. 27.15 should be confined to dealing with difference between the parties with respect to existing rights and obligations under the Lease.[49] Counsel for The Nuance Group protested that these points were not argued before the primary judge and that this Court should not entertain them. As appears from the judgment of Callaway J.A.,[50] the Court did entertain submissions upon the question as part of the argument as to the construction of cl. 19.

69 The different question, whether the request of The Nuance Group which it here seeks to place before the Review Board would, if it were not decided by the Board and were not the subject of joint resolution by the chief executive officers under cl. 19, and if APAM maintained its refusal to agree to this request, is in fact a difference between the parties may be one of great difficulty, and one which I would not seek to determine, particularly in the abstract. My tentative view, however, is that the expression, "a difference between the parties", must be subjected to some limitation. I would suppose, for example, that a difference between the parties which is entirely unrelated to the Lease or its subject-matter would not be referable to the expert under this clause,[51] and it may well be that the clause cannot apply to disputes falling within the dispute resolution procedures established by cl. 26.1. If these, or indeed any limitation, are to be read into cl. 27.15 the question which then arises is, what are the terms of the limitation? It may be that, notwithstanding that the reference is to an expert rather than to an arbitrator, the process is limited to the determination of the rights of the parties, so that the expert is to resolve a dispute or difference as to these rights rather than to re-write the contract or legislate fresh rights for some situation which is not dealt with under the contract. If this were so, then, the unagreed request of The Nuance Group for an amendment of the financial terms of the Lease would arguably be not be capable of determination by the expert. To the extent that Nettle, J.A. is of opinion that such a

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49 Para 40 of the APAM outline which is set out as schedule 1 to the judgment of Callaway J.A.

50 At para [11].

51 See *Piercy v. Young* (1879) 14 Ch. D. 200 at 205, per Jessel M.R.

matter might be determined by the expert,[52] I would prefer to withhold my concurrence. In any event, the question does not here arise.

70 It is sufficient that I conclude, as I do, that the suggested inter-relationship between cl. 19 and cl. 27.15 does not exist so that any limitations which may be imposed upon or arise from cl. 27.15 do not point to a more restricted construction of cl. 19.1.

71 I agree, however, with the other members of the Court that the appeal should be dismissed.

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[52] At para [50].

SCHEDULE 1

OUTLINE OF SUBMISSIONS

FILED BY APAM

Background

1. By a lease entered into between the Appellant ("APAM") and the Respondent ("the Nuance Group") on or about 16 January 2002, APAM leased to the Nuance Group certain areas in the international terminal at Melbourne Airport ("the Lease")[1]. The term of the Lease is 8 years commencing on 1 November 2002[2].

2. On the leased premises the Nuance Group conducts a retail duty free business under the name or style "Downtown Duty Free".

3. The rent payable by the Nuance Group to APAM under the Lease was to be calculated by reference to detailed formulae[3]. The Nuance Group was obliged to pay to APAM Base Rent calculated in accordance with the detailed formula prescribed in clause 3 of the Lease. Further, to the extent that the amount of its Percentage of Sales, which was also calculated by reference to a detailed formula[4], exceeded the Base Rent, the Nuance Group was obliged to pay that amount to APAM as rent. In the first two years of the Lease the rent has been in excess of $30,000,000.00[5].

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1 Paragraph 1 of the judgment. The Lease is *AB*(C10-89).

2 Items 9, 10 and 11 of the reference schedule.

3 Paragraph 6 of the judgment. Rent is defined in clauses 1 of the Lease as "the Base Rent", Percentage of Sales and other payments calculated and payable in accordance with clauses 3 and 4 as varied from time to time.

4 Item 15 in the reference schedule provides that the amount of the Percentage of Sales is "calculated by applying the Relevant Percentage to the total Sales of the corresponding Merchandise Categories for the relevant period." In turn, the Relevant Percentage, Sales and Merchandise Categories are defined in clause 1 of the Lease.

5 See the documentation provided by The Nuance Group in support of its proposed resolution *AB*(C111-136).

4. Clause 19.2 of the Lease provides for the constitution of a "Review Board". The functions of the Review Board are prescribed by clause 19.1. The power of the Review Board under clause 19.1 is at the heart of the dispute between the parties in the instant proceeding. In particular, the question for determination is whether the Learned Trial Judge erred in finding that on a proper construction of clause 19.1(d) of the Lease the Review Board was empowered to make a decision on the Defendant's request to amend the financial terms of the Lease constituted by its proposed resolutions dated 12 July 2004 ("the Proposed Resolutions") and that such decision of the Review Board is binding on the parties as provided in clause 19.2(k)[6].

5. Clause 19 of the Lease provides for the functions and constitution of the Review Board.

6. The Review Board was to be constituted by three nominees of APAM and three nominees of the Nuance Group[7]. A quorum for the Review Board consisted of four members, at least two of which were to be appointed on behalf of each of the parties[8]. Each member of the Review Board was entitled to one vote. If there was an equality of votes, the Review Board was to refer the matter to the chief executive officers of each of the respective parties for joint resolution by them. The chairman did not have a second or casting vote[9]. All decisions of the Review Board were to be by simple majority[10]. Decisions of the Review Board were to be binding on the parties[11].

7. On 12 July 2004, after months of correspondence between the parties effectively debating the power of the Review Board pursuant to clause

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6 The Proposed Resolutions are at *AB* (C113-114).

7 Clause 19.2(c) and (d).

8 Clause 19.2(b).

9 Clause 19.2(i)

10 Clause 19.2(j)

11 Clause 19.2(k)

19.1(d) of the Lease[12], the Nuance Group circulated to members of the Review Board the Proposed Resolutions. In summary, the Proposed Resolutions were to the effect that:

(a) the definition of the GIPP, which was a fundamental variable in the formula for the determination of the Base Rent,[13] be deleted and replaced with an alternative definition which altered the means by which that variable was calculated;

(b) a payment be made by APAM, to the Nuance Group of $12,400,000 on the first day of the Third Lease Year (being 1 November 2004);

(c) clause 3.6 of the Lease, which relates to the adjustment of Base Rent, be deleted and replaced with a clause that provides for a different formula for the adjustment of Base Rent.

In essence, by the Proposed Resolutions the Nuance Group sought a re-writing of fundamental terms of the Lease relating to the manner in which rent was to be calculated and therefore the amount of rent which was to be paid. In addition, by the Proposed Resolutions the Nuance Group sought payment by APAM to it of $12,400,000.00.

8. A meeting of the Review Board took place on 22 July 2004. The Learned Trial Judge found that at that meeting, after "some argument as to the whether the resolution was beyond the power of the Review Board, a vote took place with a resulting deadlock of 3-3, the Board members having voted along party lines"[14].

9. The trial took place on 12 October 2004 before Hansen J. The relief sought by APAM was a declaration that:

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12 Paragraphs 9 – 14 of the judgment. *AB* (D p5 and 6)

13 GIPP is defined in clause 1 of the lease and applied in the formula for the determination of Base Rent articulated in clauses 3.2 – 3.6.

14 Paragraph 16 of the judgment. *AB* (D p7).

On the proper construction of cl 19.1(d) of the Lease the Review Board is not empowered to grant a request by the defendant to:

(a) alter the manner in which the amount of rent specified under the Lease is to be calculated;

(b) vary the terms of the Lease;

(c) reduce the rent payable to it by APAM under the Lease; or

(d) seek a payment of money by APAM to it under the Lease.

His Honour dismissed APAM's claim.

10. On the Nuance Group's counterclaim His Honour granted a declaration that:

> "On the proper construction of clause 19.1(d) of the Lease the Review Board was empowered to make a decision on the Defendant's request to amend the financial terms of the Lease constituted by its resolutions dated 12 July 2004 and that such decision of the Review Board is binding on the parties as provided in clause 12.2(k)."

It appears from the reasons of the Learned Trial Judge that the power of the Review Board to *decide* on the Respondent's request articulated in the declaration comprehends the power to approve it[15]. It also appears from the reasons that by the declaration His Honour intended the financial terms of the Lease to include rent[16].

11. APAM seeks an order that the appeal be allowed, there be a declaration in the form sought by it at trial and that the Nuance Group's counterclaim be dismissed.

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15 See paragraphs 45 and 46 of the reasons for judgment *AB* (D p17).

16 Paragraph 46 of the reasons for judgment *AB* (D p17).

Construction of clause 19.1(d) of the Lease

12. The Lease should be construed in the context of the rent payable under the Lease being in excess of $30,000,000.00 annually and the fact that the business conducted by the tenant has an annual turnover of in the vicinity of $90,000,000.00 annually[17].

13. By the declaration made on the counterclaim, in effect His Honour found that clause 19.1(d), accommodated a mechanism for rent review and provided a mechanism for varying the terms of the Lease. On a proper construction it does neither.

14. The construction of clause 19.1(d) for which the Nuance Group contends is disharmonious with the plain language of the Lease. The word review is capable of a variety of different meanings[18]. The most apposite definition of review for present purposes is:

> "Consideration, inspection or re-examination of a subject or thing." [19]

The fact that the word "review" in the context of appeals from or challenges to the decision of inferior courts or tribunals or decisions of a decision making body can suggest the power of a superior court or tribunal to alter the earlier result or decision is of no assistance in the present case. The context in the instant case is not one of a challenge to an order of an inferior court or tribunal or the decision of a decision making body. Rather, it is the context of re-examining or reconsidering the subject plans, proposals, requests, performance and events.

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17 The supporting documentation circulated with the Proposed Resolutions indicates the amount of rent payable by the Nuance Group under the Lease and its trading figures *AB* (C111-136).

18 See the Macquarie Dictionary, third edition at p 1820, the New Shorter Oxford English Dictionary on Historical Principles, 1993, Clarendon Press, Oxford at p 2582 and Black's Law Dictionary, Eighth Edition at p 1345.

19 Black's Law Dictionary ibid.

15. The word, review, plainly should be construed uniformly within the same clause of the same instrument[20].

16. The language of clause 19.1(d) shows the limited power conferred. It speaks of the review of *requests* to amend the financial terms of the Lease rather than conferring power to approve such requests, or otherwise to amend the financial terms of the Lease.

17. Where it is intended that the Review Board has power to do more than consider or re-examine matters another verb is used in conjunction with the term, review. This is so only in the cases of clauses 19(a), 19(e) and 19(j).

18. Clause 19.1(a) provides that the Review Board is to be responsible for:

> "the review and *approval* of the Tenant's business plan prepared by the Tenant" (Our emphasis).

Hence where in clause 19 it is intended that the power to "*review*" comprehends the power to "*approve*" this is expressly provided for. This is consistent with the construction of the term review in clause 19 to the effect that it means the consideration or re-examination of the subject in question.

19. Clause 19.1(e) of the Lease provides that the Review Board is to be responsible for:

> "the review and *implementation* of any marketing initiatives". (Our emphasis).

Clause 19.1(j) provides that the Review Board is to be responsible for:

> "any other relevant matter which the Review Board *decides* should be reviewed by it". (Our emphasis).

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20 *Australian Rice Holdings Pty Ltd v Commissioner of State Revenue* [2004] VSCA 17.

20. Clause 19.1(d) confers a bare power to review. It should be inferred from the fact that a second verb conferring power on the Review Board to do more than consider or re-examine is expressly provided by some sub-clauses of clause 19.1 that the intention of the parties to the Lease is that no such additional power exists where such second verb is absent as in clause 19.1(d).

21. Assuming that for the purposes of clause 19.1(d) clauses relating to rent are financial terms of the Lease a myriad of other clauses must also fall into this category. Such clauses are quite specific in their purport. If clause 19.1(d) were construed so as to allow the Review Board to approve a request to vary the financial terms of the Lease then the general power conferred upon the Review Board by that clause would derogate from the specific rights and obligations of the parties allocated under the various financial terms of the Lease. On such a construction the Review Board could create rights and obligations under the Lease which are inconsistent with its specific and detailed financial terms. Put another way, under clause 19.1(d) the Review Board would have the power effectively to re-write the Lease at the request of either party.

22. Clause 26.1 is an example of a financial term of the Lease which could be re-written by the Review Board. That clause provides that the Nuance Group is not entitled to compensation from APAM nor to terminate the Lease if the whole or a substantial part of the premises are destroyed. On the construction of clause 19.1(d) for which the Nuance Group contends, despite an express clause curtailing the Nuance Group's rights to compensation from APAM in the specified circumstances, the Review Board would have the power to compel such a payment in those circumstances.

23. Other examples of financial terms of the Lease whose effect could be overturned by the power of the Review Board on the construction of

clause 19.1(d) for which the Nuance Group contends include 4.2[21], 5.1 – 5.7[22], 7(a)[23], 7(b)[24], 8(a) - 8(c)[25], 10.1 and 10.2[26], 11.1(a)[27], 11.1(d)[28], 11.1(e)[29], 11.1(g)[30], 11.1(j)[31], 12.1(d)[32], 15[33], 16.4(a)[34], 16.7[35], 18.1(c)[36], 18.4(a)[37], 18.11[38], 18.12(e)[39], 20.2[40] and 23.3[41]. These examples show the extent to which carefully formulated financial terms of the Lease

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21 The time for payment of rental.

22 Provisions relating to payments which must be made by the Nuance Group to APAM.

23 The obligation of the Nuance Group to pay a share of rates.

24 he obligation of the Nuance Group to pay the Utilities.

25 The obligation of the Nuance Group to pay certain reasonable costs incurred by APAM.

26 The obligation of the Nuance Group to maintain and repair at its cost.

27 The obligation of the Nuance Group to ensure that the premises are open for trade during certain trading hours.

28 The obligation of the Nuance Group to accept foreign currencies.

29 The obligation of the Nuance Group to accept foreign currencies at particular rates.

30 `The obligation of the Nuance Group to abide by the Pricing Policy.

31 The obligation of the Nuance Group to reduce the price of or remove items for sale as directed by APAM.

32 The obligation of the Nuance Group to pay costs of security identification cards and security checks.

33 The obligation of the Nuance Group to carry out Fit Out Works at its cost.

34 The obligation of the Nuance Group to pay for tenant's works.

35 The obligation of the Nuance Group to pay for any alterations to the terminal as a result of tenant's works.

36 The obligation of the Nuance Group to pay for costs of damage to public areas.

37 The obligation of the Nuance Group to pay advertising and promotional fees of at least the amount set out in the business plan. It is noteworthy that this clause provides that any funds which remain unexpended at the conclusion of a year may be carried forward into the following year *subject to APAM's written consent*. If the Review Board had power to vary this requirement, the obligation for such consent to be obtained would become hollow.

38 The obligation of the Nuance Group to purchase insurance.

39 The obligation of the Nuance Group to monitor the environment at its expense.

40 The obligation of the Nuance Group to indemnify APAM for any liability or loss.

41 The obligation of the Nuance Group to pay APAM's costs of performing tenant's obligations.

negotiated by the parties could be set at naught by a request to the Review Board if clause 19.1(d) were construed in the manner for which the Nuance Group contends. The parties could not have intended this result.

24. Further, clause 19.1(j) provides that the Review Board is to be responsible for:

> "Any other relevant matter which the Review Board decides should be *reviewed* by it." (Our emphasis).

If "review" carries the power to approve a change this clause would confer upon the Review Board the power to rewrite the whole of the Lease, not just its financial terms.

25. Clause 18.8 provides:

> "Significant changes to the industry
>
> If the total Sales of the Premises decreases due to any actual or anticipated change in any Law relating to the Premises, the Permitted Use, the Airport or the Terminal, APAM agrees to meet with the Tenant to negotiate in good faith a decrease in the moneys payable by the Tenant under this lease."

By this clause, the parties have expressly provided for the possibility of a rent review. The provision is quite specific. It is triggered by significant changes in the industry. The triggering of the clause only obliges APAM to "meet the Tenant and negotiate in good faith". Given a specific provision which obliges APAM to negotiate a review of the rent in good faith with the Nuance Group in certain circumstances it could not have been intended that a general provision relating to the Review Board would compel APAM (through the Review Board and ultimately perhaps APAM's CEO) to vote on a proposal made by the Tenant for rent review in any circumstances of the Tenant's choosing.

26. Clause 27.2 provides:

> "A provision of or a right created under this lease may not be waived or varied except in writing signed by the parties".

If clause 19.1(d) were construed in the manner for which the Nuance Group contends then it would be inconsistent with clause 27.2. This is so because pursuant to clause 19.1(d) the Review Board would be able to vary the financial terms of the Lease without the achievement of the requirements of clause 27.2.

27. Unlike, for example, clauses 18.8 or 26.1, clause 19.1(d) does not even mention the word rent. Rather, the Nuance Group would have it that the notion of rent was submerged within the phrase "the financial terms of the Lease". If the parties wished for clause 19.1 to deal with rent, they would have done so expressly.

28. The Nuance Group's most significant obligation under the Lease is the requirement to pay rent. It is an essential term. If the parties had intended that the Review Board have power to approve a request to change the rent, clause 19.1(d) would not only have expressly referred to the rent, it would also have expressly provided for a mechanism for its review. This is particularly so in the context of a lease which has such detailed and precise mechanisms for the calculation and adjustment of rent.

Clause 27.15 points up why clause 19.1(d) does not confer power on the Review Board to vary the rent

29. Some of the following paragraphs contain an analysis which proceeds on the assumption that the Nuance Group is correct in contending that if the Review Board has power to grant the Proposed Resolutions under clause 19.1(d) the consequence of a deadlock at Review Board level is that the matter is referred to the CEO's for joint resolution pursuant to clause 19.2(i). Failing the achievement of a joint resolution by the chief executive officers the matter is to be referred for expert

determination under clause 27.15. The assumption demonstrates that clause 19.1(d) ought not be construed in such a way as to confer power on the Review Board to vote upon the Proposed Resolutions. This is in part because the putative expert is not provided with any guidance in the Lease as to whether and if so on what basis such a determination is to be made.

30. Clause 27.15 provides:

> "**27.15 Dispute Resolution**
>
> (a) If a difference arises between the parties the issue is to be determined by an expert nominated by the senior office-bearer in Victoria of the Australian Property Institute on the application of either party.
>
> (b) The expert nominated must be a member of that institute of at least 5 years' standing and acts as an expert and not an arbitrator.
>
> (c) The expert's determination is final and binding and the costs of the nomination and determination are to be borne equally.
>
> (d) Each party is entitled to make a submission to the expert."

31. If clause 19.1(d) had been intended to operate as a rent review clause detailed guidance would have been provided as to how and by reference to what matters the review would take place. Guidance would be necessary, for example, as to whether the review was to be to market, in accordance with the CPI or by reference to some other yardstick. Clause 19.1(d) provides no such guidance. It is no answer to say that if, at the level of the Review Board and then the chief executives, the parties are disagreed as to whether or how the rent is to be reviewed the matter can be resolved by an expert appointed under clause 27.15 because again no guidance is provided to the expert.

Accordingly, in the event that the parties are disagreed as to whether there should be a rent review and if so on what basis there is no prospect of an expert appointed under clause 27.15 sensibly determining the outcome of this disagreement. In those circumstances it would be impossible to determine whether or not the expert had properly completed his or her task. Those matters decisively militate against any construction of clause 19.1(d) that would allow such a clause to operate as a de facto rent review provision. It may be noted that the Lease makes specific provisions for reference to an expert where an appropriate adjustment to rent is in dispute under clause 26 and objective criteria for the determination by him are in identified.

32. At paragraph 49 of the judgment His Honour found that if "the matter were to reach the expert, the expert would be guided by the request for amendment, any resolution of the chief executive officers, the submissions of the parties and the terms of the Lease". However, the request for amendment, any resolution of the chief executive officers, the submissions of the parties and the terms of the Lease would only provide *information* to the expert. That information does not provide any guidance as to *how such information is to be treated*. Accordingly, such information does not assist the expert in determining whether and if so how any request by the Nuance Group for the review of rent or the terms as to rent should be treated.

33. The Lease contains detailed and extensive mechanisms for the calculation of rent[42]. Indeed, the Lease provides detailed and extensive mechanisms for adjustment of Base Rent[43] and for the annual adjustment of rent[44]. This militates heavily against a construction of clause 19.1(d) so as to facilitate a rent review. First, clause 19.1(d), which is general in its purport, should not derogate from clauses which

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42 See clauses 3 and 4 of the Lease.

43 Clauses 3.5 and 3.6.

44 Clause 5.8.

specifically provide for how rental is to be adjusted. One of the Proposed Resolutions is to substitute the existing clause 3.6, which deals with the adjustment of Base Rent. Secondly, given that the Lease provides sophisticated mechanisms not only for the calculation of rent but for the adjustment of Base Rent and annual rent the parties cannot have intended to leave entirely at large and in the unguided discretion of an expert nominated by the Australian Property Institute the question of whether and if so on what terms there should be a rent review.

34. If clause 19.1(d) of the Lease could be construed to comprehend the review of rent, the rent payable under the Lease could be in a perpetual state of flux. This is so because pursuant to clause 19.2(a) the Review Board was required to meet quarterly unless otherwise agreed. On the construction of clause 19.1(d) for which the Nuance Group contends, at each such meeting *either or both* parties could seek an "amendment" of the rent. In default of agreement at Review Board and then executive level, a nominee appointed by the Australian Property Institute under clause 27.15 would have to determine whether and if so to what extent the rent or the mechanism for calculating it should be amended under the Lease. This could theoretically lead to the following situation. A request may be made by the tenant at a Review Board meeting in the first quarter of a calendar year to reduce the rent with the consequence that the parties were in dispute as to whether that request ought be granted. Ultimately, while a nominee appointed by the Australian Property Institute was considering (in the absence of any guidance from the Lease), whether and if so to what extent the rent ought be adjusted, the landlord, at a subsequent Review Board meeting may seek an upwards variation in the rent. This could lead to the dispute resolution procedures again being invoked. If the construction of clause 19.1(d) for which the Nuance Group contends were to be accepted, the process of what is effectively disputation between the parties as to the level of the rent and the manner in which it is to be

calculated could be a perpetual one throughout the 8 year term of the Lease and beyond. This could not possibly be what the parties intended.

35. Furthermore, the Proposed Resolutions seek a rewriting of certain terms of the Lease that pertain to the calculation and payment of rent. It is even less likely that the parties intended an expert to determine such an issue than that they intended the expert to determine the quantum of rent. The question of drafting is legal in character. It would be surprising if such parties intended the question not only to be removed from the area of negotiation between them and left to an expert, but to be left to an expert who had to be a member of the Australian Property Institute, nominated at the apparently unfettered discretion of the senior office-bearer in Victoria of that institute[45]. Why, in such a circumstance, is the expert not required to be a lawyer?

36. The parties can not possibly have intended the whole of the financial terms of the Lease to be open to be rewritten by a nominee of the Australian Property Institute. Nor could they possibly have intended that this nominee make a determination in terms such as one of the amendments to the Lease sought by the Nuance Group in the Proposed Resolutions, namely:

> "… and that a new clause 3.7 be added to the Lease which reads:
>
> 3.7 On the first day of the Third Lease Year (commencing on 1 November 2004), APAM will pay to the Tenant $12,400,000"[46].

If the construction of clause 19.1(d) preferred by His Honour remains undisturbed, the Nuance Group may in the future request the Review Board to amend the financial terms of the Lease to the effect that APAM is obliged to pay a very much greater sum than $12,400,000.00.

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45 These are the requirements of clause 27.15.

46 *AB* (C 113).

There is no apparent limit on the amount which the Nuance Group may seek from APAM.

Alternatively, the failure of the CEO's to achieve a joint resolution under clause 19.1(d) does not constitute a difference between the parties under clause 27.15

37. Paragraphs 29 - 36 above demonstrate the absurdity of the dispute resolution procedures of clause 27.15 being triggered by a deadlock on the relevant question at the level of the Review Board and then a failure to achieve joint resolution at a meeting between the chief executives pursuant to clause 19.2(i). That absurdity is avoided by construing clause 19.1(d) in the manner suggested by APAM.

38. An alternative means of avoiding that absurdity is to conclude that a failure by the CEO's to reach a joint resolution under clause 19.2(i) does not constitute a difference between the parties for the purposes of clause 27.15. In other words clause 27.15 is not brought into play by a failure to agree at chief executive level under clause 19.2(i).

39. Clause 27.15 is in a very different part of the Lease from clause 19. Construing clause 19 as being a self contained code also allows matters to be ventilated at Review Board level and if there is to be a deadlock at that level on a particular matter it is treated with sufficient importance to be ventilated at chief executive level. If no joint resolution is achieved by the CEO's then the matter has run its course. A useful purpose will nonetheless have been served. The matter will have been considered at CEO level at each of the parties whereas absent the provisions of clause 19 a party may have chosen not to consider the issue at senior management level at all.

40. Clause 27.15 should be confined to deal with differences between the parties with respect to *existing rights and obligations* under the Lease rather than a difference between them as to the question of whether its terms ought be varied. Accordingly, a deadlock between the CEOs as to whether the financial terms of the Lease should be varied in the

manner contemplated by the Proposed Resolutions is not a matter which could proceed to the dispute resolution procedures under clause 27.15.

41. If clause 27.15 were not confined to deal with existing rights and obligations under the Lease then any difference between the parties as to whether the financial terms of the Lease should be rewritten at the instance of one of them would trigger an expert determination on that question. To the extent that he made such a finding the Learned Trial Judge erred. The consequences of such a finding would be that there would be no purpose in having a lease at all. The financial terms of the Lease would be in a state of perpetual uncertainty and might be in a state of perpetual flux.

42. On no view could clause 27.15 be engaged by a request made outside of the context of the Review Board to vary the financial terms of the Lease[47]. Otherwise, there would be little or no point in having the Lease at all. Either party could at the time of its choosing urge the other party to rewrite the financial terms of the Lease. There is no better reason why a request directed to the Review Board should produce this consequence.

43. The fact that the failure of the CEOs to reach a joint resolution under clause 19.2(i) should not lead to the dispute resolution procedures under clause 27.15 is confirmed by the language of clause 19.1(j). Clause 19.1(j) confers upon the Review Board the responsibility for any "other relevant matter" which it decides should be "reviewed" by it. It is therefore conceivable that there could be a disagreement at Review Board level about the rewriting of *any* or *all* of the terms of the Lease. Assuming that such disputes were to be differences between the parties for the purposes of clause 27.15, a putative expert, without any guidance whatsoever from the terms of the Lease would have a

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47 This point was certainly not conceded at trial.

mandate to determine whether and if so how all clauses which are the subject of such disputes should be varied.

44. The Review Board members and then the CEOs may be deadlocked as to whether the duration of the Lease should be extended. If the failure of the CEOs to reach a joint resolution on this issue were a difference between the parties for the purposes of clause 27.15 then the matter would have to be resolved by the putative exert in the absence of guidance. The parties cannot possibly have intended the question of the duration of the Lease to be determined by a putative expert nominated by the Australian Property Institute.

Retrospectivity

45. It cannot have been intended that clause 19.1(d) conferred upon the Review Board the power retrospectively to vary the financial terms of the Lease. By the Proposed Resolutions the Nuance Group seeks to require APAM to pay to the Nuance Group $12,400,000 which effectively comprises a repayment of part of the rent paid by the Nuance Group to APAM in past years. Effectively this is a retrospective amendment to the amount of rent payable in previous rent years. If the Review Board had the power to make retrospective variations to the financial terms of the Lease (particularly assuming that rent is one such term) great uncertainty would ensue. The parties' financial position may become unworkable. The retrospective variation of the financial terms of the Lease would alter the financial positions of one or both of the parties in previous financial and business years with widespread consequences.

The functions of the Review Board

46. The construction of "review" as meaning consideration or re-examination of the matter to be reviewed provides a sensible function for the Review Board. The Review Board becomes a forum for the

discussion of matters relating to the Lease. The parties are entitled to be equally represented in that forum[48]. The forum is to convene on a regular basis, being at least quarterly unless otherwise agreed[49]. In that forum the parties can air their views as to what ought to be done in relation to various matters relating to the Lease.

47. If the parties are agreed that the terms of the Lease or the way in which those terms are implemented ought be altered then they can, with the benefit of discussion at Review Board level, endeavour to renegotiate those matters at executive level. That does not mean that clause 19.1 of the Lease confers upon the Review Board *itself* the power to implement any of the matters "reviewed" in that forum with the exception of the matters which are the subject of clauses 19.1(a) and (d) which are extracted above. Rather it means that each party's board, informed by useful discussion at the Review Board, *may* resolve to vary the Lease. Agreement may then be reached between the parties to that effect. Having regard to the significance of the Proposed Resolutions, the parties cannot have intended that the authority to approve them rested with the Review Board rather than APAM's board of directors.

48. Examples of the useful function of the Review Board with the term "review" being defined in the manner set out above can be found in the matters referred to in the minutes of the Review Board meeting for 22 July 2004 which do not relate to the chairmanship issue or the Proposed Resolutions. For example, item 3 of the minutes is headed "*Review* of Headline Sales & Financial Performance" (our emphasis)[50]. Item 4 deals with contract administration[51]. In item 6, which is headed

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48 Again see clause 19.2(c) and (d) which requires each party to nominate three members to the Review Board. Again see also clause 19.2(b) which provides that for there to be a quorum there must be at lease two members who are appointed on behalf of APAM and at lease two members appointed on behalf of the Nuance Group.

49 Again see clause 19.2(a).

50 *AB* (C211; C220).

51 *AB* (C213; C222).

"Other Business", it is recorded that Gary Brown raised the matter of "Concourse Store Layout *Review*" (our emphasis)[52].

The findings of the Learned Trial Judge

49. In paragraph 46 of the judgment Hansen J found:

> "A request to amend the calculation of rent falls naturally within the description of a request to amend the financial terms of the Lease, and, given that the rent payable by the defendant depends largely upon the number of international passengers and their expenditure, the link in cl 19.1(d) between the defendant's business plan and the financial terms of the Lease is logical. Consequently I reject APAM's submission that the parties would have provided for a specific "rent review" clause had they intended rent to be reviewable. If the Review Board is empowered to approve the defendant's annual business plan, it would seem logical and consistent to empower it to consider and approve or reject any amendments. Moreover, this conclusion is understandable in the commercial context. Since cl 19.1(d) contemplates that a request could involve amendments to both the business plan and the financial terms of the Lease through the use of "and/or", it necessarily follows that the Review Board has a similar power in relation to the latter as well as to the former. There is no evident reason why the contrary should be the case or cl 19.1(d) should otherwise be read in a narrow way."

50. His Honour's reasoning in this regard rests on the assumptions that:

(a) given that the Review Board is empowered to approve The Nuance Group's annual business plan it has the power to approve or reject any amendments to it;

(b) if the Review Board can approve or reject amendments to the business plan then it can approve or reject amendments to the financial terms of the Lease which includes terms as to rent;

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52 *AB* (C215; C224).

(c) there is no evident reason why the propositions in (a) or (b) are incorrect or that clause 19.1(d) of the Lease should be read in a narrow way.

With respect, none of these propositions is correct.

51. As to the assumption referred to in paragraph 50(a), it does not follow from the fact that the Review Board has the power to approve the Nuance Group's business plan annually that it can approve or reject a request for its amendment by either or both of the parties at every quarterly meeting of the Review Board[53]. In fact, it is plainly not so empowered. This is so for the following reasons. The powers of the Review Board are prescribed by clause 19.1[54]. Clause 19.1(a) expressly provides that the Review Board is responsible for the review *and approval* of the Tennant's business plan. The process is annual[55]. However, there is no provision in clause 19.1 which expressly provides that the Review Board is empowered to approve or reject a request by either party to amend that business plan. Accordingly, if such power were to be conferred on the Review Board it would need to be implicit in a paragraph of clause 19.1. His Honour found that the power of the Review Board to approve or reject a request to amend the business plan was implicit in clause 19.1(d). However, it is respectfully submitted that a construction of clause 19.1(d) to the effect that the Review Board has power at each quarterly meeting to approve or reject a request made by either or both parties to amend the annual business plan makes no commercial sense whereas the construction of that

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53 Clause 18.3 of the Lease makes clear that the Nuance Group has an obligation to provide APAM with an *annual* business plan. It is plainly this plan to which clause 19.1(a) refers.

54 Clause 19.1 of the Lease and the definition of Review Board in clause 1.

55 Again clause 18.3 of the Lease makes clear that the Nuance Group has an obligation to provide APAM with an *annual* business plan. Again it is plainly this plan to which clause 19.1(a) refers.

clause to the effect that the Review Board has no such power makes complete sense in a commercial context.

52. On a construction of clause 19.1(d) to the effect that the Review Board has power at each quarterly meeting to approve or reject a request made by either party to amend the Nuance Group's annual business plan the terms of that business plan may be in a constant state of uncertainty and flux. This is so because failing agreement at the level of the Review Board or the chief executive officers the dispute resolution procedures under clause 27.15 may be invoked thereby leaving the question to be determined by an expert appointed under clause 27.15. The upshot of this is that the Nuance Group's "annual" business plan could be in a perpetual state of amendment throughout each year of the eight year term of the Lease.

53. The preferable construction is that the business plan is set annually and that if there is a request to amend it during the year that *request* can be reviewed by the Review Board in the sense that the Review Board can engage in a consideration, inspection or re-examination of that request. If any amendment to the business plan is to take place this would need to occur by way of a variation agreed by the parties at executive or board level and outside the framework of the Review Board. The Review Board would have no power to determine the fate of a request that such variation be made. However, a decision in respect of such variation made at executive or Board level might be informed by discussion at Review Board level.

54. The language of clause 19.1(d) itself also militates against a construction of that clause to the effect that it accommodates amendments to the business plan. This is so because clause 19.1(d) speaks of the review of *requests* to amend the financial business plan rather than the amendment of the business plan itself.

55. Furthermore, the restricted language of clause 19.1(d) suggests that it does not confer power to amend the business plan. Where it is

intended that the Review Board have power to carry a matter which is the subject of "review" under clause 19 into effect, another verb is used in conjunction with the term, review. This is so only in the cases of clauses 19(a), 19(e) and 19(j).

56. The proposition referred to in paragraph 50(b) is contingent upon the soundness of the assumption in paragraph 50(a). For reasons submitted above the assumption in paragraph 50(a) is unsound.

57. The proposition referred to in paragraph 50(c) is that there is no evident reason why the assumptions referred to in paragraph 50(a) or 50(b) are incorrect or that clause 19.1(d) should be read in a narrow way. The numerous reasons to the contrary have already been mentioned.

58. The Learned Trial Judge found that the word "review" should not be construed uniformly within clause 19.1 of the Lease[56]. His Honour cites *Cream Holdings Ltd v Bannerjee*[57] as authority supporting such an approach. It is respectfully submitted that *Cream Holdings* does not support the approach taken by His Honour. Furthermore, the decision of this Court of Appeal in *Australian Rice Holdings Pty Ltd v Commissioner of State Revenue*[58] is authority strongly in support of the proposition that the word "review" should be construed uniformly throughout clause 19.1. A uniform construction of the word "review" as meaning "consideration, inspection or re-examination of a subject or thing" promotes a construction of clause 19.1(d) which avoids the extraordinary commercial consequences produced by the construction of that word preferred by His Honour in the context of clause 19.1(d)[59]. It is noteworthy that His Honour accepted that the word "review" in at

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56 Paragraphs 40 and 41 of the judgment. *AB* (D pp15 and 16)

57 [2004] 3WLR 918.

58 2004 VSCA 17.

59 See footnote 27

least some paragraphs of clause 19 means a "discussion and analysis with no necessary outcome being determined or implemented"[60].

59. His Honour says in paragraph 48 of the judgment that he did not "overlook the consensual nature of the review mechanism under clause 19". Plainly the mechanism under clause 19 only produces consensus if the parties agree. Assuming they do not, it is submitted that "the consensual nature of the review mechanism" does not provide a reason for his Honour's construction.

60. The Learned Trial Judge found that on 22 July 2004, when the Nuance Group put forward the Proposed Resolutions to the Review Board "After some argument as to whether the resolution was beyond the power of the Review Board, a vote took place with a resulting deadlock of 3-3 the Board members having voted along party lines"[61]. The Review Board does not have the power to entertain or grant a request by the Nuance Group to alter the manner or terms by which the amount of rent payable by it under the Lease is to be calculated. A vote of a member of the Review Board for the purposes of clause 19.2(i) of the Lease must be a vote in respect of a matter which is within its power. Given that the Proposed Resolutions seek to have the Review Board do something which is beyond its power, a putative vote in favour of those resolutions is in fact not a vote for the purposes of clause 19.2(i). Accordingly, any putative votes which took place at the Review Board meeting on 22 July 2004 with respect to the Proposed Resolutions are of no effect.

The Nuance Group's notice of 22 March 2005

61. By a notice filed on 22 March 2005 the Nuance Group asserts that APAM is not entitled to contend that a failure of the CEOs to agree under clause 19.2(i) is not a difference between the parties under clause

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60 Paragraph 41 of the judgment. *AB* (D p16)

61 Paragraph 16 of the judgment. *AB* (D p7)

27.15. This is put on the basis that the point was conceded for the purposes of the argument below. The same is said of the point raised by APAM with respect to the incapacity of the Review Board to grant the Proposed Resolutions to the extent that they are retrospective.

62. However, these matters exclusively concern the construction of a written instrument. Accordingly, an Appellate Court is in the same position as the Court at first instance to adjudicate on the relevant question[62]. No prejudice will be suffered by the Nuance Group as a result of the argument being run at Appellate level. The issues raised could not have been the subject of further evidence at trial. If the Nuance Group successfully defends the appeal on this ground it will have the benefit of the same relief which it obtained at trial. If does not it was never entitled to that relief. In all the circumstances the justice of the matter requires the arguments to be ventilated on appeal[63].

63. There are exceptional circumstances why APAM's argument that the failure of the CEOs to reach a joint resolution under clause 19.2(i) with respect to Proposed Resolutions is not a difference between the parties under clause 27.15 ought be permitted. It offers an alternative legal conclusion as a means of avoiding the absurd consequences, urged by APAM at the trial, of the construction for which Nuance contended.

64. It was never conceded below that the Review Board had the power to make retrospective resolutions. On the contrary, the position of APAM below was always that the Review Board had no power to grant the Proposed Resolutions. The issue with respect to retrospectivity is not

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62 The only non documentary evidence below was by way of witness statement unchallenged by cross-examination. It is not sought to disturb any findings made with respect to such evidence.

63 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319; *Coulton v Holcombe* (1986) 162 CLR 1; *Geelong Building Society v Encel* [1996] 1 VR 594 at 604 – 609; *Water Board v Moustakas* (1988) 62 ALJR 209; *Banque Commerciale S.A. En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 284; *Elliot v Australian Securities and Investment Commission* 2004 VSCA 54 at pp18 and 19 and *Whisprun Pty Ltd v Dixon* 200 ALR 461.

in fact a new construction point. It is simply an additional reason why the construction for which APAM contended below should prevail.

SCHEDULE 2

OUTLINE OF SUBMISSIONS

FILED BY THE NUANCE GROUP

Introduction

1. There is no dispute that the resolutions put forward by the Nuance Group at the meeting of the Review Board on 22 July 2004 were a request to amend the financial terms of the Lease[1] within the meaning of clause 19.1(d) of the Lease.

2. The only issue at trial was whether, upon a request to the Review Board to amend the financial terms of the Lease, clause 19.1(d) of the Lease empowered the Review Board to make a decision upon that request.

3. His Honour held that clause 19.1(d) did so empower the Review Board. This conclusion led to the dismissal of APAM's proceeding and the declaration on the Nuance Group's counterclaim.

4. The issue on APAM's appeal is whether his Honour was correct in that conclusion.

5. The Nuance Group submits that his Honour was correct, for the reasons set out below, and that accordingly the appeal should be dismissed.

6. In the appeal APAM also seeks to raise further issues, not raised by it at trial and not in issue at trial. These are the matters set out in grounds 3, 10 and 11 of APAM's amended notices of appeal.

7. The Nuance Group submits that APAM should not now be permitted to raise these issues. In particular, ground 11 does not raise a new issue within the scope of the original proceeding. Rather, it seeks to

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[1] The Lease is at AB C10-89. Terms defined in APAM's outline of submissions have the same meaning when used herein.

raise a wholly new and additional matter, in effect enlarging the proceeding by adding another claim to it, not included within APAM's pleading or prayer for relief. As a result, if the ground were to be entertained, APAM's pleading and prayer for relief would require amendment, now, and, importantly, if the ground were upheld, it would not identify any error in the decision of the trial Judge nor affect his disposition of the proceeding or the orders which he made on the proceeding and counterclaim. In the circumstances, APAM ought not be permitted to raise on appeal the matter the subject of ground 11.

8. If, contrary to that position, the Court permits APAM to raise these further issues in the appeal, the Nuance Group submits that in any event each of the grounds of appeal raising the further issues is without basis.

9. In particular, the Nuance Group submits that clause 27.15 of the Lease is applicable where the chief executive officers ("**CEOs**") of the parties differ in their positions upon a matter referred to them under clause 19.2(i) of the Lease such that they cannot jointly resolve it under that clause.

The lease as a whole, and its nature and object

10. On its proper construction, clause 19.1(d) of the Lease, read in the context of the Lease as a whole and having regard to the nature and object of the Lease, empowered the Review Board to make a decision upon a request to amend the financial terms of the Lease, and hence upon the resolutions proposed by the Nuance Group.

11. Resolving competing contentions as to the construction of clause 19 required a consideration of the Lease as a whole, its nature and

object,[2] a process in which his Honour engaged.[3] Clauses 19.1 and 19.2, and in particular clause 19.1(d), must be read in context.

12. As his Honour correctly accepted,[4] the relationship between the parties as constituted by the Lease and its terms is in the nature of a business relationship rather than a traditional landlord and tenant relationship.

13. The Lease does not simply provide for the mere demise of premises with quiet enjoyment in exchange for the payment of rent expressed or calculated on some traditional or customary basis, with normal ancillary covenants. It unarguably provides for much more.

14. The Lease permits and indeed requires a retail use, namely the retail sale of tax and duty free merchandise.[5] It has parallels with retail tenancies leases[6]. However, whilst it shares much in common with such leases, and particularly those relating to retail premises in shopping centres, it is, even in comparison with them, a most unusual lease. That is so because of the manner in which and extent to which its terms vest in APAM involvement in and control over the duty free business conducted by the Nuance Group at Melbourne Airport in the leased premises.

15. One indicator of the level of APAM's involvement in and control over the conduct of the Nuance Group's business at Melbourne Airport is found in clause 11.1(g) of the Lease.[7] That clause provides that the

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2 See, for example, *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 at 510.

3 See, for example, reasons for judgment, paras 5-8, 39 and 46-47.

4 Reasons for judgment, paras 5-8.

5 See clauses 11.1(a) and (x) of the Lease and item 8 of the reference schedule near the start of the Lease (respectively at AB C46-47 and C15).

6 Because the area demised by the Lease exceeds 1,000 square metres it was not caught by the legislation that governed retail tenancies leases at the time of its execution, the *Retail Tenancies Reform Act* 1998 (Vic) (replaced in 2003 by the *Retail Leases Act* 2003).

7 At AB C46.

Nuance Group must "ensure that prices charged for all Merchandise comply with the Pricing Policy". The "Pricing Policy" is defined as:

> "APAM's pricing policy set out in Annexure D as varied from time to time."[8]

Annexure D provides:

> "The Pricing Policy is not negotiable and must be accepted by the tenant in its current form as varied from time to time by APAM in its absolute discretion." [9]

16. The ability of APAM to intervene in the Nuance Group's business conducted upon the demised premises is not confined to the Pricing Policy. Once a year over the eight year term of the Lease, the Nuance Group's business plan must be approved by APAM.[10] Importantly in the present context, the financial return to APAM from "rent" under the Lease is linked to and dependent upon the financial performance of the Nuance Group's business as conducted in accordance with such approved business plans.[11] "Rent" under the Lease is not expressed or determined in traditional or customary terms nor by reference to traditional or customary measures.[12] It is not fixed, nor adjusted by reference to, the area of the demised premises or variables that are fixed or external to the business conducted at the premises.[13]

17. "Rent" under the Lease comprises "Base Rent" and "Percentage of Sales Rent".[14] "Base Rent" is affected by the number of international

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8 See page 4 of the Lease at AB C36.

9 AB C71.

10 Clause 18.3 (AB C51). Note the level of detail required.

11 See particularly clauses 3 and 4 of the Lease (AB C40-41) and the relevant definitions in clause 1 and the reference schedule (AB C14).

12 As to which, see *Commissioner of State Revenue v Price Brent Services Pty Ltd* [1995] 2 VR 582 at 585-586; reasons for judgment, para 5.

13 Indicatively, the Nuance Group refers to its total Rent obligations not as "rent" but as the "concession fee" in the resolutions and accompanying papers which it circulated to members of the Review Board on 12 July 2004. See AB C112ff (at, for example, C120).

14 And adjusting payments that are irrelevant for present purposes. See the definition of "Rent" in clause 1 of the Lease (AB C37).

passengers passing through the Airport and, in years after the first year of the Lease, is varied in a manner that in effect depends upon the performance of the Nuance Group's business in previous years and in particular the sales achieved per international passenger.[15] To the extent that it exceeds the amount of Base Rent, a further amount, labelled "Percentage of Sales", is to be paid by way of "Rent", although it is rent in name only.[16]

18. In the result, "Rent" under the Lease is tied by fixed formulae to the performance of the Nuance Group's business conducted at the premises in an inherently volatile industry for the lengthy period of 8 years. Importantly, under the formulae Base Rent can increase but cannot decrease.

19. As noted by APAM,[17] the "Rent" paid by the Nuance Group is both an enormous amount,[18] in excess of $30 million per annum in the first 2 years of the Lease, and a remarkably high proportion (towards 40%) of the Nuance Group's gross revenues at Melbourne airport.[19] The Nuance Group agrees with APAM[20] that the Lease, and specifically clause 19.1(d), should be construed in this context. However, the Nuance Group submits that this context, taken together with the

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15 See clause 3.6 of the Lease (AB C41) and the definitions in clause 1 of the terms used in clause 3.6.

16 "Percentage of Sales" is the total of the amounts obtained by applying different prescribed percentages to the value of the sales made by the Nuance Group in various different categories of merchandise in the relevant period (see clause 4 of the Lease at AB C41 and the relevant definitions in clause 1 and the reference schedule).

17 Outline of submissions, para 12.

18 See page 9 of the papers accompanying the resolutions circulated on 12 July 2004 (AB C120), which refers to a figure of $74 million over 2 years. In paragraph 12 of its outline of submissions APAM refers to $30 million per annum, but if anything this appears an understatement given the figures here referred to.

19 See page 10 of the papers accompanying the resolutions as circulated by the Nuance Group on 12 July 2004 (AB C121). It shows revenue of $166 million over 2 years. Again, if anything, the figure in APAM's outline is an understatement.

20 APAM's outline of submissions, para 12.

matters referred to in the preceding paragraph, supports the conclusions reached by his Honour.

20. Beyond the terms relating to Pricing Policy, business plan and Rent, prime examples of the provisions of the Lease which make clear its unusual nature, and the role of APAM in the Nuance Group's business, include clause 5.1 (statement of sales), clause 6 (accounting provisions), clause 9 (performance bond, calculated by reference to sales), clause 11 (tenant's operational obligations), clause 12 (staffing obligations), clause 18.4 (promotional fees), annexure H (further information to be provided to APAM), and annexure I (list of required stock).

21. Of those terms, the following examples are particularly illustrative:

(a) clause 11.1(a) requires the Premises to be open to trade at all hours during which aircraft are scheduled to use the Terminal provided always that APAM may at any time require the Nuance Group to vary the hours of operation;

(b) clause 12.2 prohibits the Nuance Group from employing staff that APAM considers inappropriate;

(c) clause 11.1 requires inter alia that the Nuance Group accept specified credit cards and foreign currency (at rates that are prescribed), ensure all labelling and displays are to APAM's satisfaction, reduce prices as directed by APAM or remove the relevant item from sale, stock such items as APAM may request, use reasonable endeavours to maximise sales, supply adequate baskets and carry bags the design and standard of which is approved by APAM, and display marketing material directed by APAM;

(d) clause 18.4 requires that the Nuance Group spend a certain amount on promotion each year (or carry it forward or pay it to APAM in default of expenditure) and that the Nuance

Group pay a further significant amount to APAM each year for APAM to spend on promotion;

(e) clause 6.2 requires the periodic provision to APAM of independently audited statements of sales and the like; and

(f) clause 6.5(g) entitles APAM to audit the Nuance Group's sales figures at any time at the Nuance Group's cost.

22. Overall, the Lease is a contract providing for the letting of premises for a specified and required use, the payment of amounts entitled "Rent" effectively based on sales and performance, and control by the lessor over the lessee's business including as to matters such as business plan, pricing, stocking, promotional material, trading hours, employment, the payment of promotional fees, and so forth. In these circumstances, the relationship between the parties under the Lease is not at all a traditional lessor-lessee relationship.

23. The material before the Court illustrates the practical operation and impact of these business-related provisions of the Lease. The nature and range of the matters dealt with at the 22 July 2004 and 22 April 2004 Review Board meetings, as revealed by the minutes of those meetings[21] and the appendices thereto[22] emphasise the extent of APAM's involvement in, and control over, the business conducted by the Nuance Group at Melbourne Airport under the Lease, and the papers attached to the resolutions circulated by the Nuance Group on 22 July 2004 reveal the prevailing financial situation under the Lease and the effect of the rental formulae in the Lease.[23]

24. The common sense construction contended for by the Nuance Group at trial and accepted by his Honour gave clause 19 scope for appropriate and effective operation, especially viewed in the context

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21 At AB C100-106 and C218-224.

22 The appendices to the 22 July 2004 meeting only are in the Appeal Book (AB C225-320).

23 See at AB C115-136.

of the matters referred to above. The construction contended for by APAM, in particular so far as the interaction between clause 19.1(d) and 19.2 is concerned, fails to recognise or to give effect to the true role to be fulfilled by clause 19 considered in the light of the Lease as a whole.

The Review Board

25. The term "Review Board" is defined in clause 1 of the Lease as "A body of 6 members constituted under clause 19.2 to perform the functions set out in clause 19.1".

26. Clause 19 entitled "Review Board"[24] contains sub-clauses 19.1 and 19.2, which are respectively entitled "Functions of Review Board" and "Constitution of the Review Board".

27. Clause 19.1 confers power and responsibility upon the Review Board for each of the matters set out in sub-clauses (a)-(j). Clause 19.1(d) is pivotal. Read with the opening words of sub-clause 19.1, it provides:

> "The Review Board is to be responsible for the following … (d) the review of any requests to amend [the Nuance Group's] Business Plan and/or financial terms of this Lease".

28. As stated, the functions of the Review Board conferred on it under sub-clause 19.1, including by paragraph (d), must be read and the paragraphs construed in the context of the Lease and the relationship between the parties to the Lease as governed by its provisions as a whole.

29. So far as clause 19.1(d) is concerned, there are two limbs to the clause. Both concern the obligation on the part of the Board to review a "request to amend". The first limb is concerned with requests to amend the Nuance Group's "business plan". The second is concerned with requests to amend the "financial terms" of the Lease. Whilst

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[24] Referred to for completeness, as of themselves the headings cannot be used to interpret the Lease: see clause 30.1(a) at AB C65.

there are two limbs, the clause clearly contemplates[25] that there might be one request in which the business plan and the financial terms are the subject of one, understandably linked, request to amend.

30. Clause 19.2 deals with the constitution of the Review Board, its meetings, its voting procedures, and the like. It is discussed in more detail below.

Construction of clause 19.1(D)

Ordinary and natural meaning of clause 19.1(d)

31. On the ordinary and natural meaning of the words of clause 19.1(d), read in a common sense fashion and in the context of the Lease as a whole, the Review Board has power, upon reviewing a request made to it to amend the financial terms of the Lease, to decide that the terms be amended. If the position were otherwise, the function provided for under clause 19.1(d) would be of no utility or content, and there would be no satisfactory purpose in clause 19.1(d).

32. As his Honour found, plainly what is contemplated is that the Review Board, a representative body comprising delegates from each party, is to perform the role of determining requests by either party to amend the business plan and/or the financial terms of the Lease, upon the occurrence of which its decision is attributed to the parties and, pursuant to clause 19.2(k), binds them. Clause 19.2(i) then deals with deadlock arising upon an equality of votes. If there is no deadlock then there is no mechanism to refer the subject matter of the request to the chief executive officers.

33. There is no logical or sensible reason why clause 19.1(d) should be construed in a manner so as to preclude such a reference in the present case, as APAM's submissions seek to achieve. That is, by construing the Board's function in relation to clause 19.1(d) as excluding any determinative role on the requests made to it. Nor is

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[25] Including by virtue of the words "and/or" in the clause.

there any reason to exclude the chief executive officers from a consideration of such requests in the manner contemplated pursuant to the mechanism provided in clause 19.2(i).

34. It is important to appreciate that clause 19 does not empower or provide for the Review Board to make "recommendations" or provide advice or analysis to the chief executive officers of the parties or otherwise. The Review Board is not set up as some sort of a think tank which distils material to provide analysis to the chief executive officers so that, where a matter which is before the Review Board pursuant to sub-clause 19.1 is appropriately the subject matter of a decision, the chief executive officers themselves might make the decision.

35. Indeed, the position is expressly to the contrary. Clause 19 provides, and only provides, for referral of a Review Board matter to the chief executive officers when there is an equality of votes on the matter within the Review Board. The clause thereby presupposes that, where a matter which is before the Review Board pursuant to sub-clause 19.1 is apt to be the subject of a decision, the Review Board has itself been determining the matter by its voting processes as prescribed. Clause 19 makes provision for reference to the chief executive officers as a first step in resolving the position which arises where there happens to be an equality of votes. Unless and until there is a deadlock at the Review Board, which presupposes a vote and a decision, there can be no referral of a Review Board matter to the chief executive officers for resolution.

36. In these circumstances, it is simply not sensible to contend, as APAM continues to do, that the Review Board's function under clause 19.1(d) does not include the making of a decision on the request, whether accepting or rejecting it, with the parties thereby being bound to that decision as clause 19.2(k) expressly provides. APAM's interpretation has the effect that all requests to amend which are the subject matter

of clause 19.1(d) will be left entirely unresolved and undetermined. It is a construction which does not permit the Review Board to decide upon a request, even if all six members unanimously agree as to its disposition. Such a result cannot possibly have been intended. His Honour correctly analysed the matter.[26]

37. APAM asserts that clause 19.1(d) should not be construed as his Honour construed it because the parties must have intended that such decisions would only be taken by their boards of directors.[27] But this is no answer. Clause 19 sets up the Review Boards as the forum by which the matters specified in (inter alia) clause 19.1(d) are to be dealt with. By the Lease, the parties have chosen to agree to that process. Further, the boards can still have as much input as they desire, through the nominees on the Review Board (and, if a deadlock is referred to the CEOs, then through the CEOs). As his Honour stated (reasons, paragraph 45), the position for which APAM contends in this regard is "at odds with the relatively efficient mechanism provided for under the Lease".

38. Also in this regard, his Honour was correct to have regard to the consensual nature of the Review Board mechanism under clause 19.[28] It ensures that no party to the Lease will have a majority on the Review Board such as to be able to achieve an amendment to the financial terms of the Lease without the consent of the other party (through its nominees on the Review Board, no doubt acting as agreed internally by that party through its directors and officers). In particular, under clause 19.2, each party has an equal number of nominees, appointed by the party; the chairman for the time being has no casting vote; and where a Review Board meeting is attended by the minimum number of nominees for a quorum, namely 4 nominees, there must be 2 nominees from each party. Paragraph 59

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[26] See, for example, reasons for judgment, para 45.

[27] See, for example, APAM's outline at para 47.

[28] Reasons, para 48.

of APAM's outline misunderstands or mischaracterises what it was that his Honour was referring to and relying upon when he dealt with "the consensual nature of the review mechanism".

39. At paragraphs 21-23 of its outline, APAM asserts that clause 19.1(d) could not have the interpretation found by his Honour because, in substance, there are numerous "financial terms" of the Lease all of which, on that interpretation, could be amended by the Review Board under clause 19.1(d). The point has no substance. It is certainly true that, on his Honour's construction, the Review Board would have power to decide upon requests to amend a number of terms of the Lease. But that is not a reason militating against acceptance of that construction. It is simply a statement of its results.

40. Especially given the consensual nature of the Review Board's processes, as already referred to, the powers of the Review Board under clause 19.1(d) as construed by his Honour do not "derogate from the specific rights and obligations of the parties" in a way that is unacceptable. Nor do they mean that the Review Board has "power effectively to re-write the Lease at the request of either party". It cannot be ignored that the Review Board is comprised of an equal number of nominees from each party, with the chair having no casting vote. Further, and contrary to, for example, the final sentence of paragraph 22 of APAM's outline, the Review Board would not simply override clauses which were in and remained in the Lease. Rather, it would decide upon requests to amend specific terms of the Lease.

41. APAM contends that the construction of clause 19.1(d) accepted by his Honour could lead to the financial terms of the Lease being in a perpetual state of flux.[29] Even if the parties could legally act as hypothesised by APAM,[30] it is completely unrealistic at any practical

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29 Outline, para 34 (see also para 52).

30 Without contravening, for examples, implied obligations of good faith.

or commercial level to suggest that they would. The argument is a formalistic one seized upon as an aid to construction, without any merit in practice. The parties are two commercial entities aiming to carry on their respective businesses efficiently and profitably, without delay and disruption. It could not be contemplated that they might act in the way raised by APAM (and there is no suggestion that over the period of the Lease to date either has done so).

Construction of clause 19.1(d) in light of the Lease as a whole and its nature and object

42. The matters set out earlier in this outline concerning the nature of the relationship between the parties to the Lease are significant in the proper interpretation of clause 19.1(d). The creation and role of the Review Board, and the precise meaning of the different paragraphs of clause 19.1, including clause 19.1(d), can only be properly understood when those matters are taken into account.

43. Having regard to those matters, it is eminently understandable that, as his Honour concluded, the Review Board has power to decide for (or, of course, against) the amendment of the financial terms of the Lease. The power to decide for or against amendment includes but is not limited to the terms as to "Rent" upon the Review Board reviewing, as plainly authorised, a request made to it by one of the parties seeking such amendment. Such a position fits with and is suggested by amongst other things the following:[31]

(a) the lengthy period over which the fixed formulae governing the calculation of "Rent" operate, the changeable and unpredictable nature of the variables upon which the formulae depend, and, especially in those circumstances, the fact that under the formulae Base Rent cannot decrease;

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[31] See reasons for judgment, para 47.

(b) the fact that the Lease does not provide for a traditional lessor-lessee relationship but rather a business operation by one party hosted by the other party, who has significant involvement in it and an interest in its success;

(c) the extent of the control of APAM over the Nuance Group and its business, and hence the scope for APAM to affect the Nuance Group's financial performance and therefore the "Rent" payable by the Nuance Group to APAM; and

(d) the high proportion of revenue allocated as "Rent", the true nature of the payments made under the name "Rent", and the relatively small margin potentially remaining[32] as profit to the Nuance Group.

44. Contrary to paragraph 33 of APAM's outline, the presence in the Lease of the provisions which it contains as to annual alteration of the amount of Rent does not militate against the Nuance Group's case. The provisions for adjustment, set out in clause 3.6, operate automatically, by application of formulae to the financial figures of the Nuance Group's business. There is no provision for negotiation or discretion or the making of any decisions or submissions. Moreover, the adjustment can only be in one direction, namely upwards. In these circumstances clause 3.6 in fact militates in favour of the Nuance Group's case.

45. Moreover, and also contrary to paragraph 33 of APAM's outline, notions that general provisions should not derogate from specific provisions are not germane. Whilst clause 19.1(d) itself provides a power expressed in general terms, that power is activated by specific requests to amend specific financial terms of the Lease. If a particular request is made to amend clause 3.6, that request, and clause 3.6 itself,

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[32] As disclosed by the materials at AB C112ff (see especially at C134). Of course, as those materials disclose, at the time the Nuance Group had only made significant losses.

will be dealt with specifically. In these circumstances the submission by APAM is no answer to the interpretation of clause 19.1(d) which his Honour accepted.

Relevance of provisions as to business plan

46. The provisions of the Lease as to the Nuance Group's business plan reinforce the interpretation of clause 19.1(d) for which the Nuance Group contends. Sub-clause 18.3 requires the Nuance Group to submit an annual business plan to APAM for the ensuing Lease year, dealing with the detailed matters referred to in that sub-clause. Pursuant to sub-clause 18.3(b) APAM is required to assist the Nuance Group in the preparation of the business plan if reasonably requested to do so.

47. Both clauses 19.1(a) and 19.1(d) address the Nuance Group's business plan, as dealt with under clause 18.3, in the context of the Review Board. Pursuant to sub-clause 19.1(a) the Review Board has the function of reviewing and approving that annual business plan. Clause 19.1(d) provides for requests to amend the business plan being made to the Review Board during the year. It similarly contemplates a request to review the financial terms of the Lease by either party at any time. As his Honour accepted,[33] the linkage of the amendment of the business plan and of the financial terms in clause 19.1(d) is unsurprising given the close business relationship between the parties, the content of the business plan, and the detailed financial information available to APAM pursuant to the Lease.

48. As APAM accepts,[34] under clause 19.1(a) the Review Board has the power to put into effect the review undertaken by it pursuant to that clause. That is to say, the Review Board votes on the issue of approval of the business plan and, if the vote is affirmative, the

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33 Reasons for judgment, paras 46 and 47.

34 Outline of submissions, paras 17 and 18.

business plan is thereby approved, in a fashion that is binding on the parties.

49. Against this background, clause 19.1(d) is clearly to be read as providing for the Review Board also to be able to put into effect any amendment of the business plan, if that is its decision. Especially given the presence and the wording of clause 19.1(d), it could not be thought that the Review Board could approve the business plan but could not amend it. There is no basis to distinguish the nature of the Review Board's role in relation to the business plan pursuant to clause 19.1(a) from that under sub-clause 19.1(d).

50. Accordingly, in part clause 19.1(d) must provide for the Review Board to review requests to amend the business plan, and, depending on its view, for the business plan thereby to be amended. In this situation, the Review Board plainly must have power to act similarly in relation to financial terms of the Lease, given that clause 19.1(d) deals with both the business plan and the financial terms of the Lease in a single sentence and by common wording. By virtue of the words "and/or", clause 19.1(d) expressly contemplates that a single request could be made to amend both the business plan and financial terms of the Lease. There is simply no warrant to distinguish between the determinative function of the Review Board so far as a request to amend the tenant's business plan is concerned and so far as a request to review the financial terms of the Lease is concerned.

51. His Honour was correct to give these matters weight (see paragraphs 46 and 47 of his reasons). The submissions of APAM to the contrary at paragraphs 50-57 of its outline are not persuasive. His Honour's approach did not rest on "assumptions",[35] but consideration of the various provisions of the Lease and their implications. The position for which APAM contends as set out in paragraph 53 of its outline is not commercially sensible. Contrary to paragraph 54 of APAM's

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[35] APAM's outline, para 50.

outline, the language of clause 19.1(d) does support his Honour's interpretation on this issue.

Relevance of the words "requests to amend"

52. It is important that clause 19.1(d) relates to "the review of any requests to amend … financial terms of this Lease" (our emphasis). The clause does not provide simply for the Review Board to "review the financial terms of the Lease".

53. First, it follows that the ambit of that which falls within sub-clause 19.1(d) is confined by the content of the particular request. It is the function of the Review Board to consider and vote to determine the fate of the particular request. It is not the function of the Review Board to embark of its own volition upon a wholesale review of the financial terms of the Lease, and, despite how APAM seeks to characterise the matter, the interpretation of clause 19.1(d) for which the Nuance Group contends does not lead to that result.

54. Second, clause 19.1(d) presupposes the making of a request, by either party, for the amendment of the business plan and/or the financial terms of the Lease. It proceeds to allocate to the Review Board the function of dealing with such request. The only point of a party making a request of the relevant nature would be to obtain a determination of the request. The only point of vesting in the Review Board the function of reviewing the request to amend is to lead to such determination. On APAM's interpretation neither of these matters may occur. The whole thrust of clause 19.1(d) is affected by the fact that it provides for the Review Board to review requests to amend financial terms of the Lease, and not just to review the financial terms themselves.

55. APAM seeks to fasten on the lack of a second verb in paragraph (d) of sub-clause 19.1 to argue for a different result from the decision-making role of the Review Board which it acknowledges applies to

paragraphs (a) and (e) of sub-clause 19.1.[36] But that is simply a matter of form. In substance and on a common-sense approach paragraph (d) is in the nature of paragraphs (a) and (e). It is quite different from the other paragraphs of sub-clause 19.1,[37] where the nature of the functions to which they relate and the manner of their wording shows that the function is limited to consideration and analysis.[38]

56. The scope of clause 19.1(d) is not to be determined by some mechanical scanning of sub-clause 19.1 to identify which paragraphs of it contain two verbs and which do not. As much as the presence of any second verb, the language of clause 19.1(d), in dealing with review "of any requests to amend", shows that the Review Board is empowered to make a decision under that paragraph to the same extent that it is under paragraphs (a) and (e) of clause 19.1.

57. A related matter is APAM's contention[39] that his Honour erred in rejecting APAM's submission at trial that a singular construction of "review" should be applied uniformly to each paragraph of clause 19.1 (reasons, paragraphs 40 and 41). Contrary to that contention, his Honour was entirely correct. His task was to construe clause 19.1(d) in its entirety, as he did. APAM's submissions suffer from the vice of proceeding, incorrectly, on the basis that what fell to be interpreted was the word "review", not the whole of clause 19.1(d). As his Honour decided, the wording and subject matter of clause 19.1(d) revealed a different operation for the word "review" in that paragraph than in other paragraphs of clause 19.1. Whilst it might be expected that, absent contrary indications, the word "review" would do the same work in each paragraph of clause 19.1, here there were decisive contrary indications.

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36 See APAM's outline, paras 17-19 and 55.

37 Clause 19.1(h) can be considered similar to clause 19.1(d).

38 For this reason the examples given in para 48 of APAM's outline are not to the point, as they come under these other paragraphs, distinguishable from para (d).

39 Outline, paras 15 and 58.

58. In this context APAM seeks to rely upon *Australian Rice Holdings Pty Ltd v Commissioner of State Revenue*.[40] However, on proper analysis that decision does not assist APAM. It makes clear that there is no rule that the same word used in the same instrument is to have the same meaning.[41] Rather, whilst this may be likely, each case turns on its own circumstances, and in particular the content of the relevant instrument. The Court made plain that a view that the same word is to have the same meaning is "easily enough rebutted" in any given case.[42] Here, his Honour was correct to consider that that had occurred. Moreover, *Australian Rice* concerned the construction of a statute, in relation to which it may more readily be considered that a word is to bear the same meaning throughout. At paragraph 2 of that decision Ormiston JA three times emphasised the particular susceptibility of statutes to have this approach applied to them. Further, it was concerned with construction of the meaning of a particular word, not (as here) of an entire clause of which a particular word forms part.

59. His Honour's reference[43] to *Cream Holdings Ltd v Bannerjee*[44] was apposite, but in any event was plainly an incidental consideration, and APAM's criticism of it[45] cannot affect the correctness of his Honour's reasoning.

Emphasis on decision-making role of the Review Board

60. Sub-clause 19.2 makes explicit, and emphasises, that the Review Board is a voting body and will decide by a process of voting, as prescribed in that clause, the matters which come before it that are apt

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40 [2004] VSCA 17.

41 Per Ormiston JA at para 2 (Phillips JA concurring at para 4). See also per Callaway JA at para 14.

42 Per Ormiston JA at para 2 (Phillips JA concurring at para 4). See also per Callaway JA at paras 16 and 18.

43 Reasons, para 40.

44 [2004] 3 WLR 918.

45 Outline of submissions, para 58.

to be the subject of determination. Consistent with the intimate business relationship established and governed by the Lease, clause 19.2(a) provides that Review Board meetings are to be held quarterly unless otherwise agreed. Clause 19.2(i) and 19.2(k) strongly emphasise the decision-making role of the Review Board. The former provides that "Each member of the Review Board will be entitled to one vote". The latter provides that "Decisions of the Review Board are to be binding on APAM and [the Nuance Group]". Clause 19.2(i) also deals with the position where there is an equality of votes.

61. Other parts of clause 19.2 contain related provisions. Clause 19.2(j) provides that "All decisions" of the Review Board "are to be by simple majority". Clause 19.2(b) makes provision for a quorum; clauses 19.2(c) and (d) deal with appointment of nominees by each party; and clause 19.2(h) makes provision as to the chairman of the Review Board from time to time.

62. The provisions of sub-clause 19.2 show and emphasise the capacity and the role of the Review Board to engage in decision-making, and the determination of issues, as opposed solely to consideration and analysis. It warrants its functions provided for under sub-clause 19.1 being interpreted as of that nature, where the subject matter of the relevant paragraph of sub-clause 19.1 is appropriate to be the subject of a decision.

63. In this regard, APAM acknowledges[46] that paragraphs (a) and (e) of sub-clause 19.1 provide for the Review Board to make decisions on the matters with which they deal and to determine the outcomes on those issues in a manner binding upon the parties. Contrary to APAM's submissions there is no reason to distinguish in the interpretation of the power and function of the Board so far as paragraph (d) is concerned from the power conferred by paragraph (a). As submitted above, so much is indicated by the wording of

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[46] Outline of submissions, paras 17-19 and 55.

paragraph (d) and the nature of the function to which it relates, namely reviewing requests for amendment of the business plan and/or the financial terms of the Lease.

The function of the Review Board under clause 19.1(d) is not merely "to consider"

64. Especially when proper regard is had to the presence of the words "requests to amend" in clause 19.1(d), and the voting and decision-making role of the Review Board emphasised by sub-clause 19.2, the suggested definition of the word "review" set out in paragraph 14 of APAM's outline of submissions, should not be accepted.

65. APAM contends[47] that in clause 19.1(d) the word "review" should be read as "consideration, inspection or re-examination". However, the Review Board certainly would not "inspect" a request to amend a financial term of the Lease. Nor would it "re-examine" the request. The request would not have been the subject of previous examination – the whole point of the clause is that the request is made to the Review Board.

66. Nor can it be that the Review Board would merely "consider" the request to amend, without determining it or implementing its decision. It is not conceivable that a party would make a request to the Review Board to amend the financial terms of the Lease merely so the Review Board would "consider" the request to amend, with nothing more. This would achieve nothing. The parties would not have agreed to a term which was limited to providing for them to engage in some process that was merely of academic interest, to elicit some abstract comments from the Review Board, while time passed.

67. On APAM's case no "decision" for the purposes of clause 19.2(k) is made on a request to the Review Board by a party requesting amendment of financial terms of the Lease. That is so on the

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[47] Outline of submissions, paras 14ff.

construction contended for by APAM even though clause 19.1(d) unarguably provides for a party to make a request for amendment to the Review Board. Given this, and in circumstances where the Review Board does not make recommendations to the chief executive officers (or otherwise), but instead votes on the matters before it in a way that under clause 19.2(k) is expressly provided to be binding on the parties, clause 19.1(d) cannot simply mean, as APAM contends, that it is a function of the Review Board to "consider" a request by a party to amend financial terms of the Lease. Rather, the Review Board is plainly to determine the request for an amendment. His Honour was correct to accept this.[48]

68. APAM's resort to dictionary definitions of the word "review" is of no assistance. That is the case not so much because (as APAM acknowledges) the word "review" is capable of a great range of meanings – although that is part of the difficulty –but because the task of the Court is not to assign a particular synonym or meaning to the single word "review". Rather, it is to interpret clause 19.1(d) as a whole (taken in the context of the overall Lease). When that is done, it is plain that clause 19.1(d) empowers the Review Board to make a decision upon a request falling within the clause.

69. Certain submissions in APAM's outline[49] seem to proceed on the basis that the Review Board would itself implement a decision to amend financial terms of the Lease, by amending the Lease.[50] However, this is not the case. Rather, and as his Honour found, upon a review of a request to amend financial terms of the Lease (with or

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48 Reasons for judgment, paras 41, 44 and 45.

49 See, for example, paras 26 and 47 of APAM's outline.

50 Likewise, some of the correspondence passing between the parties prior to the commencement of the proceeding also referred to the issue of whether the Review Board had power to amend financial terms of the Lease, which might appear to contemplate to the effect that the Review Board would itself procure and execute the instrument constituting any amendment. However, as explained in the body of this outline, although an effective manner in which to express the matter shorthand, this is not accurate.

without a request to amend the business plan), the Review Board would vote upon the request as expressly provided for in clause 19.2. By virtue of that vote, it would make and record its decision on the request. That decision would then bind the parties by virtue of the express statement to such effect in clause 19.2(k). As a consequence, the parties would be obliged to amend the Lease in accordance with the vote of the Review Board, and each party could require the other party to act to achieve such an outcome.

70. Hence, for example, APAM's reliance on clause 27.2 of the Lease (as to variation and waiver) in paragraph 26 of its outline is misplaced. What would occur where the Review Board under clause 19.1(d) decided favourably upon a request to amend a financial term of the Lease would in fact be exactly what clause 27.2 refers to. After the Review Board's decision, the parties would be bound to implement it, which they would do by a written variation to the Lease signed by them in accordance with clause 27.2 of the Lease.

71. These matters also show that the point sought to be made in paragraph 35 of APAM's outline is of no substance. An expert under clause 27.15 does not need to be a lawyer because he or she will not be doing any drafting. He or she will decide the difference between the parties, arising from the failure of the CEOs to resolve the deadlocked vote of the Review Board, having regard *inter alia* to the submissions made to him or her by the parties as provided for in clause 27.15 (which submissions could include submissions as to any legal matters the paries wished to raise). The parties will then implement that decision.

Clause 19.1(d) is not a "rent review" clause

72. In its outline of submissions, APAM characterises the argument of the Nuance Group as being that clause 19.1(d) is a "rent review" clause, empowering the Review Board to undertake "rent reviews" in relation to the Lease, and then proceeds to attempt to argue against

such a position.[51] This is misconceived. The Nuance Group does not contend that clause 19.1(d) is a "rent review" clause. It contends that under clause 19.1(d) the Review Board has power to decide the outcome of a request for amendment of financial terms of the Lease, thereby binding the parties to that outcome, and that the resolutions which it put forward on 22 July 2004 were clearly a request for amendment of financial terms of the Lease.

73. Because the Nuance Group does not contend that clause 19.1(d) is a "rent review" clause, arguments by APAM based on the absence in the Lease of a separate, specific "rent review" clause do not have weight.[52]

74. To deal with the Nuance Group's argument as if it relates to "rent reviews", as APAM seeks to do, is not only incorrect as a matter of characterisation but also prevents or impedes proper analysis. "Rent reviews" are a particular and discrete aspect of traditional leases of real property. To talk in terms of them directs attention away from the terms of the actual Lease and from what is the proper construction of clause 19.1(d) having regard to its own words and a consideration of the Lease as a whole.

75. This is particularly significant as the "Rent" under the Lease is not rent calculated in any traditional fashion, as might be the subject of a "rent review" as that term is ordinarily contemplated. Rather, "Rent" under the Lease comprises a combination of payments calculated by reference to the sales and performance of the business.

76. Nor is it correct, as paragraph 27 of APAM's outline contends, that clause 19.1(d) cannot have the interpretation for which the Nuance Group contends because given the importance of Rent under the Lease a rent review clause would have been a separate clause not

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51 See, for example, paragraphs 27, 28 and 31 of APAM's outline.

52 See, for example, paragraphs 27, 28 and 31.

"submerged" within the phrase "financial terms of the Lease". On any view the terms as to Rent are "financial terms" of the Lease, especially given the basis on which Rent is calculated. Indeed, the provisions in the Lease as to "Rent" are the essence of the Lease's financial terms. As APAM points out, there are other "financial terms" in the Lease, beyond those concerning Rent.[53] In these circumstances it makes eminent sense that one particular paragraph in the clause dealing with the Review Board's functions would relate to amendment of financial terms generally.

77. Moreover, the absence in the Lease of a clause relating specifically to review of the provisions as to rent militates strongly in favour of construing clause 19.1(d) as his Honour did. It is hardly conceivable that the parties would have entered into a lease for 8 years in a volatile environment with no provision for amendment as to how the "Rent" was to be calculated in circumstances where:[54]

(a) the commencing rent was a large proportion of gross sales and left only a small possible margin for profit;

(b) the rent, whilst it could increase, could not decrease; and

(c) on the other hand, the revenue derived at the leased premises could decrease significantly.

Adequate guidance for expert

78. Contrary to APAM's outline,[55] his Honour was correct to reject at paragraph 49 of his judgment the submission of APAM at trial that the construction of clause 19.1(d) contended for by the Nuance Group could not be accepted because the Lease lacked sufficient guidelines or criteria by which an expert under clause 27.15 could proceed.

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53 See APAM's outline, paras 22, 23 and 27.

54 See also paragraph 43 above.

55 Outline of submissions, paras 31 and 32.

79. The distinction sought to be drawn in paragraph 32 of APAM's outline is illusory. The materials referred to at paragraph 49 of the judgment could and no doubt would include submissions as to how the expert ought treat the information available to him. Within the confines given by the materials referred to at paragraph 49 of the judgment, the expert would review and determine what remained in issue, applying his or her own expertise and established valuation or other principles as were applicable. It would not be impossible to determine whether the expert had properly completed his or her task (cf APAM's outline, paragraph 31), nor to ensure that he or she did so.

80. Further, it is not surprising for an expert under clause 27.15 to have some latitude. That is customary with dispute resolution clauses, the purpose of which is to vest in an independent third party the role, without constraints from the parties, of determining disputes, to ensure prompt and effective resolution of disputes. The parties agreed contractually to a simple and broad dispute resolution clause, and that it is of that nature is no reason for the construction of clause 19.1(d) maintained by APAM.

Clause 19.1(j) of the Lease

81. Paragraphs 24 and 43 of APAM's outline of submissions, attempting to rely on clause 19.1(j), are misconceived. APAM seeks to say that his Honour's interpretation of the word "review" in clause 19.1(d) has the effect, when applied in the context of clause 19.1(j), that the whole Lease could be rewritten by the Review Board or by an expert acting under clause 27.15. On the basis of this proposition, APAM says that such a result would be absurd and therefore that that interpretation of "review" in clause 19.1(d) must be rejected. The contention lacks merit.

82. First, the only function that clause 19.1(j) invests in the Review Board is the function of reviewing other relevant matters that the Review Board "decides should be reviewed by it" (our emphasis).

Consequently, before the Review Board has any function under the clause, it must first decide that it should, under the clause, review whatever is said to be the relevant matter. Given the composition of the Review Board and its voting procedures, the commercial reality is that this would not occur unless both parties desired it. Further, if, as APAM raises, there were an equality of votes on whether or not the Review Board should review the relevant matter, all that would be referred to the chief executive officers for joint resolution by them under clause 19.2(i) would be whether or not the Review Board should decide to review the relevant matter, not what should be the outcome on the relevant matter itself.

83. Likewise, and importantly, upon any failure of the chief executive officers to agree upon whether or not the Review Board should decide to review the relevant matter, the only "difference arising between the parties" for the purposes of clause 27.15, and therefore all that could be referred to an expert under that clause, would be the same issue, namely whether or not the Review Board should decide to review whatever was the relevant matter.

84. The expert would resolve the issue of whether or not the Review Board should decide to review whatever was the relevant matter, and that issue only. He or she would not decide the outcome on the relevant matter itself.

85. Moreover, any resultant review by the Review Board of a matter which it had been decided should be reviewed by the Review Board under clause 19.1(j) would not be a matter on which the Review Board made a binding decision, which could carry forward to the CEOs and an expert. Hence, paragraphs of APAM's outline such as paragraph 44, contemplating the Review Board being deadlocked in a vote under clause 19.1(j) on whether to extend the duration of the Lease, are misconceived.

86. That is so because, in contrast with paragraphs 19.1(a), (d) and (e), the language and subject matter of clause 19.1(j) does not lead to that result. In particular, the language and nature of clause 19.1(j) is relevantly different from that of clause 19.1(d). Accordingly, the manner in which the word "review" is to be interpreted in clause 19.1(d) cannot simply be transposed to apply in the case of clause 19.1(j). APAM's contention suffers from the vice of focusing on a particular word ("review"), divorced from its context, and as a result proceeds from the incorrect assumption that the word "review" must do the same work in each and every paragraph of sub-clause 19.1. As discussed earlier, that is not the case.[56]

87. Clause 19.1(j) is akin to clauses 19.1(b)-(c), (f), (g) and (i), which sub-clauses only provide for the Review Board to consider the matters to which they relate. Clause 19.1(j) is not akin to clauses 19.1(a) and (e), whose language and nature show that the Review Board is to make a decision upon, and determine the outcome of, the matters to which those clauses relate. However, as already submitted, and in contrast to clause 19.1(j), clause 19.1(d) is akin to clauses 19.1(a) and (e). A proper reading of clause 19.1(d), including but not focusing only upon the word "review", shows that it is to the same effect as clauses 19.1(a) and (e).

88. Hence, contrary to APAM's submission, his Honour's view of the proper interpretation of clause 19.1(d) does not inexorably lead to clause 19.1(j) having an unacceptably wide scope, such as to militate against his Honour's view.

Conclusion on clause 19.1(d)

89. His Honour was correct to conclude that the Review Board had power to decide, in a manner binding on the parties, the Nuance Group's request to amend the financial terms of the Lease constituted by its resolutions circulated on 12 July 2004. Accordingly the vote

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[56] See paragraphs 56 and 57 above.

taken at the meeting of the Review Board on 22 July 2004 was valid and effective.

90. The Court should dismiss the appeal, with costs.

New grounds of appeal

91. By grounds 3, 10 and 11 of its amended notices of appeal, the Appellant raises as grounds of appeal matters that it did not raise at trial and which were not in issue at trial. Since first receiving notice of those grounds, the Nuance Group has at all times maintained that APAM ought not be permitted to rely upon them.[57] It continues to do so. If APAM is permitted to rely upon the grounds raising issues not raised at trial, the Nuance Group submits that, in any event, they are unsound.

92. It is convenient to deal separately with each ground of appeal that raises new issues, as the considerations affecting whether APAM should be permitted to rely upon them differ as between the different grounds.

Ground 11

93. Ground 11 is the most significant of the 3 new grounds. It is that his Honour "erred in finding that any failure of the chief executive officers to reach a joint resolution under clause 19.2(i) of the Lease would be a "difference" for the purpose of clause 27.15".

94. This matter was not raised by APAM at trial. There was no issue whatsoever at trial that a failure to resolve under clause 19.2(i) fell

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[57] It expressed its position at the hearing in the Court of Appeal last year of APAM's application for leave to appeal, a stay and expedition; in correspondence; before Master Dowling when APAM sought leave to amend its notices of appeal; and by notice filed and served on 22 March 2005. By the Master's orders the grant of leave to amend the notices of appeal was expressly provided not to prejudice the Nuance Group's ability to submit to the Court on the hearing of the appeal that APAM should not be permitted to rely on the grounds raising new matters.

within clause 27.15. APAM now seeks to raise a contrary argument. It should not be permitted to do so.

95. That the issue was not raised by APAM at trial, and was in fact expressly accepted by APAM, is apparent from, inter alia:

(a) paragraphs 28 and 29 of the reasons for judgment;

(b) the parties' written submissions at trial (note particularly the opening paragraphs of the Nuance Group's written outline at trial, from which APAM at no point dissented); and

(c) transcript p18 lines 14-17, p23 lines 15-21, p23 line 31 to p24 line 3, p34 lines 9-14, p53 lines 15-21 and p71 lines 11-15.

96. Indeed, the applicability of clause 27.15 upon a failure to resolve under clause 19.2(i) was a premise behind a number of the submissions made by APAM at trial (see, for examples, paragraphs 15, 18 and 22 of APAM's written outline at trial, the transcript references above, and paragraph 26 of his Honour's reasons).

97. Whilst the operation of clause 27.15 was raised in the Nuance Group's counterclaim, that is irrelevant, given that, in the fashion in which the trial was conducted, clause 27.15 was plainly not an issue. See *Water Board v Moustakas* (1988) 180 CLR 491 at 497; *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447 (HCA) at para 52.

98. The following principles apply in relation to whether APAM should be permitted on appeal to raise a new issue:

(a) it is an exceptional course for a new issue to be permitted to be raised on appeal and elementary that a party is bound by the conduct of his case at trial: see *Geelong Building Society (in liq) v Encel* [1996] 1 VR 594 at 605-8, 612; *University of Wollongong v Metwally (No 2)* (1985) 60 ALR 68 at 71 (HCA); *Coulton v Holcombe* (1986) 162 CLR 1 at 8;

(b) whether this will be permitted is in the discretion of the Court (see authorities referred to in sub-paragraph (a));

(c) merely that the new issue raises no questions of fact and is purely a matter of law or construction does not mean that it will be permitted to be raised; there remains a discretion in the Court and it must be "expedient in the interests of justice" for the new issue to be permitted: see, for example, *Coulton v Holcombe* (1986) 162 CLR 1 at 8, quoting *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319; *Water Board v Moustakas* (1988) 180 CLR 491 at 497;

(d) indeed, there "can be no necessary expectation that an appellate court will deal at the instance of an appellant with a pure point of construction that has not been raised and decided below. The ordinary rule is that such a point may not be raised unless there are exceptional circumstances": *Geelong Building Society (in liq) v Encel* [1996] 1 VR 594 at 605 lines 28-33; see also at 606 lines 21-27;

(e) it is critical for the system of administration of justice that trials are not rendered mere preliminary skirmishes by virtue of new issues which could and should have been raised at trial being permitted to be raised for the first time on appeal: see *Coulton v Holcombe* (1986) 162 CLR 1 at 7; *Geelong Building Society (in liq) v Encel* [1996] 1 VR 594 at 606-608 especially at 608 lines 12-28;

(f) that is especially in relation to cases in the commercial list, as the present was: see *Geelong Building Society (in liq) v Encel* [1996] 1 VR 594 at 608 lines 25ff;

(g) the principles limiting the raising of new issues at trial are to be rigorously applied: see *Martin v Hendersons Industries Pty Ltd* [2004] VSCA 19 at para 26 per Charles JA; and

(h) in Victoria a narrow control is kept on the raising of new issues on appeal: see *Geelong Building Society (in liq) v Encel* [1996] 1 VR 594 at 604-9, Williams' *Civil Procedure Victoria* [I.64.01.365] at p5688.79.

99. Here, even though the new issue, had it been raised at trial, would not have turned on any new evidence, and is purely a matter of construction, the following considerations, taken in the context of the principles set out in the foregoing paragraphs, show that APAM ought not be permitted to rely on ground 11:

(a) the new issue is a very significant one which wholly changes the complexion and content of the proceeding;

(b) in the context of a trial that lasted only 1 day, and an appeal that will be of equal duration, the warning about rendering trials mere preliminary skirmishes is particularly potent;

(c) that APAM did not raise, and indeed conceded, the issue below was plainly not an oversight. It was apparent on the face of the pleadings, given the terms of the Nuance Group's counterclaim, and APAM was represented at trial by the most senior of Counsel. It can only be taken to have been a forensic decision at the time, which APAM has decided to revisit following the comments made by Callaway JA in argument at, and in his reasons delivered upon, the hearing of APAM's application for leave to appeal. APAM's conduct in seeking to raise the new issue in these circumstances is opportunistic and should not be permitted;

(d) ground 11, even if permitted to be relied upon, cannot lead to a decision by the Court of Appeal that his Honour erred. Acceptance of ground 11 would identify no error in his Honour's decision, nor render erroneous the orders which he made. Ground 11 seeks to raise a new claim, not a new issue

within the scope of the proceeding argued below. As a result, it is not an appeal point and should not be permitted to be relied upon.

The proceeding brought by the plaintiff APAM, both as argued and on its pleadings, was confined to the proper interpretation of clause 19.1(d). It did not extend to clause 27.15, whether as argued or as pleaded by APAM. Even if the ground were permitted, and the Court agreed with it, the order of the Judge would still correctly have been that the proceeding be dismissed. APAM would require significant amendment of its statement of claim and prayer for relief, by way of addition of a new claim, in order for the subject matter of ground 11 to be able to be entertained. This should not be permitted at this late stage (see *Geelong Building Society (in liq) v Encel* [1996] 1 VR 594 especially at 608, 611 lines 38-48 and 612 lines 26-38). It places the present case in a particular position, militating against the new issue being permitted to be raised. Further, no proposed amended pleading has even been formulated, nor affidavit material provided as to why the issue was not raised below (see *Encel* at 612-613).

These matters are not merely procedural. They show the extent to which the new issue alters the entire nature of the case, because it adds a wholly new claim, as opposed to raising a new issue on what was already before the Court. They demonstrate the inexpediency of allowing the new ground and the fact that it is not in the interests of justice to do so.

By reason of the matters set out in this sub-paragraph, the statement in paragraph 62 of APAM's outline that if the Nuance Group does not successfully defend the appeal on this ground it was never entitled to the relief which it

obtained at trial is incorrect. The new ground does not go to the construction of clause 19.1(d), which was the subject of the Nuance Group's relief at trial on its counterclaim. It relates to a logically subsequent matter, wholly different. APAM did not bring a proceeding on that issue, and it was not dealt with at trial under the Nuance Group's counterclaim. Even if APAM were permitted to raise the new issue, and APAM were successful on it, that would not vitiate the relief granted by his Honour on the Nuance Group's counterclaim, nor his order dismissing APAM's proceeding. There is no justification for APAM now being permitted to enlarge the scope of its proceeding.

(e) Further, there has been no appointment of an expert under clause 27.15, and there is no evidence before the Court as to the course and content of an attempt at joint resolution by the CEOs. In the circumstances, the claim sought to be raised by ground 11 is premature and would fall to be considered inappropriately, in a vacuum.

(f) Paragraph 63 of APAM's outline does not assist APAM. Clause 19.1(d) means what it means, as determined by this Court. If his Honour's decision is affirmed then it is not to the point how APAM may wish to characterise the effects if it, and APAM would not be permitted to rely on the new issue to seek to avoid those effects as characterised by it. If his Honour's decision is not affirmed, the point in paragraph 63 of APAM's outline is of no application.

100. If, contrary to the foregoing, the Court does permit APAM to rely on ground 11, the Nuance Group submits that it is in any event without basis.

101. On the plain language of clause 27.15, a failure by the CEOs to resolve jointly a deadlocked vote referred to them from the Review Board

under clause 19.2(i) would be a difference arising between the parties on the words of clause 27.15. The essence of the circumstances in issue would be the two CEOs, each plainly acting on behalf of and only on behalf of the parties, taking different positions on what should be done, such that, between the parties, the difference reflected in the deadlocked vote of the Review Board continued.

102. There is no basis to read clause 27.15 down as proposed in paragraph 40 of APAM's outline. The language of the clause does not permit it and nothing warrants it. Further, the suggested construction is untenably narrow. It might be understandable and acceptable to construe clause 27.15 as relating to differences under and in connection with the Lease – which construction would include a failure to resolve under clause 19.2(i) – but there is no basis to confine the broad words of the clause to differences with respect to "existing rights and obligations" under the Lease.

103. Paragraph 39 of APAM's outline seeks to support ground 11 by focussing on how (it is said) it would be desirable to construe clause 19.1. But ground 11 relates to the construction of clause 27.15, not clause 19.1.

104. Further, as with most dispute resolution clauses, clause 27.15 is plainly intended to apply broadly. Its presence in clause 27, which is entitled "Miscellaneous", is consistent with this. It cannot be said (cf APAM's outline, para 39) that clause 27.15 is in a different part of the Lease such as to militate against its application in the circumstances in issue. To the contrary, by forming part of "Clause 27 Miscellaneous", clause 27.15 is divorced from any particular part of the Lease dealing with specific subject matter and its applicability generally is emphasised.

105. Paragraphs 41 and 42 of APAM's outline relate to whether clause 27.15 would apply wherever one of the parties desired amendment of financial terms of the Lease, That wide situation is not in issue.

What is in issue is whether the clause applies where there is a failure of the CEOs to resolve under clause 19.2(i). Paragraphs 41 and 42 are therefore irrelevant. Contrary to the last sentence of paragraph 42, there are strong reasons why a request directed to the Review Board should stand in a different position, including the very fact of the presence in the Lease of clauses 19 and 27.15.

106. Paragraphs 43 and 44 of APAM's outline suggest that clause 27.15 should be held inapplicable because otherwise, given clause 19.1(j), too much could reach an expert for determination under clause 27.15. In addition to the fact that these submissions do not grapple with the broad wording of clause 27.15, they proceed on a misconstruction of clause 19.1(j) – see paragraphs 81-88 above.

Ground 10

107. Ground 10 is that his Honour "erred to the extent that he found that any refusal by the Appellant to agree to amend the Lease in accordance with the Respondent's proposed resolutions dated 12 July 2004 would constitute a difference between the parties within the meaning of clause 27.15".

108. The short response to APAM's attempt to rely on this ground is that his Honour nowhere so found. He did not to any extent make such a finding. The reason why he did not is that not only was the matter not raised at trial, it was not within or capable of being brought within the scope of the parties' pleadings.

109. In these circumstances there is no utility in APAM being permitted to argue the ground, and indeed that would be inappropriate. APAM should not be permitted to do so. Within the meaning of the authorities referred to above, in the circumstances nothing renders it expedient in the interests of justice for APAM to be able to rely upon the ground; indeed, to the contrary. That is reinforced by the fact that the same issues as referred to in sub-paragraph 99(d) above in relation to ground 11 are applicable in relation to ground 10.

110. Further, it is unclear whether the ground as drafted relates to a refusal by APAM after a decision of the Review Board (or CEOs or expert) in favour of the resolutions, or is not so restricted. If it is the latter, as paragraph 41 of APAM's outline seems to suggest, the ground relates to circumstances that are outside the steps contemplated under clauses 19.1(d), 19.1(i) and 27.15 of the Lease, have not occurred and could not sensibly occur. In this case, the Nuance Group's contention in the preceding paragraph is reinforced and the ground cannot sensibly be permitted or considered.

111. If, contrary to the foregoing, APAM is permitted to rely upon the ground, it is without merit. Assuming that the ground is intended to relate to a refusal by APAM after a decision of the Review Board (or CEOs or expert) in favour of the resolutions, it is abundantly clear that such a refusal would constitute a difference between the parties under clause 27.15. This scenario would involve APAM refusing to do that which clause 19.2(k) contractually obliged it to do, and the Nuance Group requiring performance with that clause. On any view that is a difference within clause 27.15.

Ground 3

112. As drafted in the amended notices of appeal, ground 3 clearly raises a matter not in issue at the trial. It is expressly cast in the alternative to ground 2 (which in short is a ground contending that his Honour should have found that the Review Board was not empowered to grant the Nuance Group's requests to amend), and commences "if upon a proper construction of clause 19.1(d) of the Lease the Review Board was empowered to make a decision on a request by the Respondent to amend the financial terms of the Lease". It goes on to contend that, to the extent that the Nuance Group's resolutions were to operate retrospectively, the Judge erred in finding that the Review Board had power to make a decision on them.

113. That is to say, the ground as drafted contends that even if, contrary to APAM's case at trial, the Review Board as a general matter had power on the resolutions, it did not have power on them to the extent that they were retrospective. Such an issue was not pleaded and was not raised at trial. It would be a new issue and the Nuance Group, relying on the authorities already set out, would oppose APAM being permitted to pursue it.

114. However, paragraph 45 of APAM's outline seems to make clear that ground 3 is not intended in the fashion referred to above, despite its drafting. Rather, according to that paragraph, ground 3 is meant to raise an argument that his Honour's decision as to the proper interpretation of clause 19.1(d) is erroneous because it would mean that retrospective changes could be decided upon by the Review Board and this could not be correct. That is to say, ground 3 is put as another consideration said to militate against his Honour's decision.

115. If APAM relies on ground 3 in that fashion and that fashion only, the Nuance Group does not oppose APAM being permitted to do so. So modified, the ground would not be a new issue, but a further argument of construction on the issues that were live at trial.

116. However, the argument is unsound. First, the resolutions proposed by the Nuance Group were to no extent retrospective. They were to be considered and adopted as from 22 July 2004, but only modified the Lease in a way that was to take effect from November 2004. They did not contemplate a change in financial terms of the Lease such change taken to have been made at an earlier time, which is the type of change to which the supposed difficulties arising from retrospective changes set out at the end of paragraph 45 of APAM's outline relate.

117. In particular, the Nuance Group notes that, contrary to paragraph 45 of APAM's outline, the one off payment was not retrospective. This was so not only in its form, but also in that to which it related. The

payment, taken together with the other amendments, was to alter appropriately the overall ratios of concession fee and income to the Nuance Group over the entire life of the Lease. See AB C128. Also, even though the second year of the Lease had passed, and one aspect of the resolutions was to change the wording as to how the GIPP for the second year was to be calculated, the change in wording did not change the actual dollar amount of the GIPP for that year. That is to say, the amount of the GIPP was only to change prospectively.

118. In any event, the fact that his Honour's decision meant that, even if the resolutions had been to any extent retrospective, they would have been within power of the Review Board, does not militate against that decision, given the other considerations upon which his Honour relied and set out in this outline. Retrospectivity would simply make a request to amend more unlikely to be accepted, at any level.