CITATION:	*Centrecorp Aboriginal Investment Corporation Pty Ltd v Memorial Bowls Club Alice Springs Inc* [2018] NTSC 39
PARTIES:	CENTRECORP ABORIGINAL INVESTMENT CORPORATION PTY LTD (ACN 009 626 091) v MEMORIAL BOWLS CLUB ALICE SPRINGS INC
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	65 of 2017 (21736431)
DELIVERED:	15 June 2018
HEARING DATES:	11 October 2017
JUDGMENT OF:	Grant CJ

CATCHWORDS:

LANDLORD AND TENANT – AGREEMENT FOR LEASE – VOID UNDER PLANNING LEGISLATION – SUMMARY PROCEEDING FOR RECOVERY OF LAND

Whether purported lease arrangement void as subdivision without planning consent – subdivision includes division of land by lease into parts available for separate occupation or use – exception for leases for a term of not more than 12 years – exception for leases of part of a building – not lease arrangement for part of a building – severance of options to renew to bring below 12 year threshold not available – order for possession made.

Planning Act (NT), s 2, s 3, s 5, s 30, s 33, s 35, s 36, s 44, s 46, s 63, s 162
Supreme Court Rules (NT), O 53

A v Hayden (1984) 156 CLR 532, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41, *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, *Carney v Herbert* [1985] AC 301, *Carter v Mid-Murray Council* (2007) 97 SASR 462, *Commissioner of Police v Kennedy* [2007] NSWCA 328, *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594, *Electric Acceptance Pty Ltd v Doug Thorley Caravans (Aust) Pty Ltd* [1981] VR 799, *Finlay Stonemasonry Pty Ltd v JD & Sons Nominees Pty Ltd as Trustee for the Jenkins Family Trust* [2011] NTCA 7, *Firmin v Gray & Co Pty Ltd* [1985] 1 Qd R 160, *Hardy v Wardy* [2001] NSWSC 180, *Hilderbrandt v Stephen* [1964] NSWR 740, *Humphries v Proprietors Surfers Palms North Group Titles Plan 1955* (1994) 179 CLR 597, MacKinlay *v Derry Dew Pty Ltd* [2014] WASCA 24, *McFarlane v Daniell* (1938) 38 SR (NSW) 337, *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 136 CLR 326, *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, *R v Rose* [1965] QWN 42, *Re Lehrer* (1961) 61 SR (NSW) 365, *Roach v Bickle* (1915) 20 CLR 663, *South Wales Aluminium Co Ltd v Assessment Committee for the Neath Assessment Area* [1943] 2 All ER 587, *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516, *Taluja v Australian International Academy of Education Ltd* [2011] NSWCA 416, *Thiess v Collector of Customs* (2014) 250 CLR 664, *Thomas Brown & Sons Ltd v Fazal Deen* (1962) 108 CLR 391, *Vines v Djordjevitch* (1955) 91 CLR 512, referred to.

Butt, Peter, *Conveyancing Practice and the Law: Leases and Subdivisions* (2002) 76 *Australian Law Journal* 346.

REPRESENTATION:

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Centrecorp Aboriginal Investment Corporation Pty Ltd v Memorial Bowls Club Alice Springs Inc [2018] NTSC 39
No. 21736431

BETWEEN:

CENTRECORP ABORIGINAL INVESTMENT CORPORATION PTY LTD (ACN 009 626 091)
Plaintiff

AND:

MEMORIAL BOWLS CLUB ALICE SPRINGS INC
Defendant

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 15 June 2018)

[1] The issue for determination is whether a purported lease arrangement between the plaintiff and the defendant is rendered void by operation of s 63 of the *Planning Act* (NT).

Facts

[2] The plaintiff is the registered owner of Lot 9914, Town of Alice Springs situate at 127 Todd Street, Alice Springs in the Northern Territory of Australia (**the Land**). The Land was previously owned by an incorporated association which operated a community club on the

Land. The previous owner also allowed other parties to use and occupy parts of the Land for the conduct variously of a hairdressing business, a health and fitness business and a lawn bowls club. The defendant is an incorporated association which operates the lawn bowls club. The arrangement between the previous owner and the defendant was informal in nature, under which the defendant's members had use of the community club's facilities and the defendant was responsible for the maintenance and upkeep of the bowling green.

[3] The previous owner of the Land was placed into voluntary administration in March 2012 and ceased operation of the community club. The previous owner of the Land was subsequently placed into liquidation and the Land was offered for sale. The plaintiff purchased the Land on 29 August 2013. Following that purchase a new association was incorporated to operate the community club (**Memo Club Inc**). The plaintiff subsequently granted a lease of part of the Land to the Memo Club Inc and the community club recommenced operation on 16 June 2014.

[4] At or about the same time, the plaintiff sought to formalise the use and occupancy arrangements with the hairdressing business, the health and fitness business and the lawn bowls club. As part of that process, on 11 June 2014 the plaintiff and the defendant executed a document which purported to grant a lease of part of the Land to the defendant for the purpose of continuing its operation of the bowls club. Both

parties were represented by solicitors in that transaction. The lease document provided for a five year term commencing on 1 June 2014 with two options to renew of five years each. The lease document provided for rent in the amount of one dollar per annum, and for the defendant to pay 19.07 percent of the municipal rates levied in respect of the Land.

[5] The part of the Land purportedly demised under the lease document includes an outdoor bowling green constituted by natural turf; a lined concrete ditch around the perimeter of the bowling green approximately 15 centimetres deep and 20 centimetres wide, the outside wall of which rises approximately 25 centimetres higher than the turf surface of the bowling green; a concourse walkway constituted variously by concreted and grassed areas up to two metres in width running around the perimeter of the bowling green; fixed seating; and fixed shade stands. That part of the Land described in the lease document also includes part of a building which is used as a clubhouse and toilets, and part of a shed used to store equipment.

[6] The remainder of the Land contains a main building which was used for the operation of the community club; a storage shed; a manager's residence; the balance of the storage shed shared with the bowls club; and four car parking areas. The lease document contains no term making the grant of the lease conditional upon subdivision approval,

and no application was ever lodged with the Development Consent Authority for subdivision approval.

[7] The Memo Club Inc operated the community club on the Land between June and November 2016, during which period it sustained substantial losses. The community club was closed on 4 November 2016. At about that same time, the Central Australian Aboriginal Congress Aboriginal Corporation (**Congress**) expressed interest in purchasing the Land for the purpose of redeveloping it as part of the health precinct surrounding the Alice Springs Hospital. Under the redevelopment plans the bowling green on the Land would be converted to a car park.

[8] Congress advised the plaintiff that a condition of any sale would be vacant possession of the Land. On 6 December 2016, the plaintiff exchanged counterpart agreements for sale of the Land with Congress. The terms of that sale agreement included that completion is conditional upon all tenants vacating the premises by a sunset date of 6 April 2017. That sunset date has since been extended.

[9] In December 2016, the plaintiff requested the defendant to vacate the Land and the defendant refused to do so. On 30 January 2017, the plaintiff's solicitors sent two notices to quit to the defendant. The first notice was expressed to be in accordance with s 144(2) of the *Law of Property Act* (NT) on the basis that a tenancy at will may be

determined by either party by the giving of one month's notice in writing. The second notice was expressed to be in accordance with s 125 of the *Business Tenancies (Fair Dealings) Act* (NT). Both notices purported to terminate the tenancy with effect from one month after the date of notice. That period expired on 1 March 2017.

[10] The plaintiff expressly reserved its position in relation to whether any enforceable tenancy at will existed between it and the defendant. The plaintiff also contends that the Land does not include premises to which Part 13 of the *Business Tenancies (Fair Dealings) Act* applies. In making that reservation and contention, the plaintiff asserts that the lease document was void due to non-compliance with the *Planning Act*. The defendant denies that assertion and refuses to vacate the premises. The health and fitness business vacated the Land in April 2017. The Memo Club Inc vacated the Land in June 2017. At the time of the hearing of this matter, the hairdressing business had agreed to vacate the Land.

[11] By originating motion filed on 26 July 2017, the plaintiff sought an order for recovery of that part of the Land subject to the purported lease arrangement. That application is brought in pursuance of order 53 of the *Supreme Court Rules* (NT).

Statutory provisions

[12] Section 63 of the *Planning Act* provides:

Purported subdivision or consolidation prohibited

(1) A person must not enter into a transaction purporting to subdivide or consolidate land in contravention of this Part.

Maximum penalty: In the case of a natural person – 200 penalty units;

In the case of a corporation – 1000 penalty units.

(2) A transaction purporting to subdivide or consolidate land in contravention of this Part is void.

[13] Section 63(2) of the *Planning Act* has effect that a transaction purporting to subdivide or consolidate land in contravention of Part 5 of the Act is void. Section 44 of the *Planning Act* provides relevantly that Part 5 applies if the proposed development is the "subdivision" of land. The term "development" is defined in s 3 of the *Planning Act* to mean an activity which involves the subdivision of land. Section 46 of the *Planning Act* requires the owner of land to apply to the consent authority for consent to carry out a "development".

[14] There is then a process for the consideration and determination of development applications which contemplates public notification and opportunity to make submissions. If the application is approved a development permit issues, and any subdivision must be in accordance with an approved plan of survey. It is common ground in this case that no application for consent was made, and that no development permit issued.

[15] The matter turns on whether the purported lease arrangement in this case was a "subdivision". Section 5 of the *Planning Act* defines "subdivision" to mean:

> **Meaning of subdivision**
>
> (1) Subject to subsections (2), (3) and (4), in this Act, ***subdivision*** means the division of land into parts available for separate occupation or use, by means of:
>
> (a) sale, transfer or partition; or
>
> (b) lease, agreement, dealing or instrument purporting to render different parts of the land available for separate disposition or separate occupation.
>
> (2) Despite subsection (1), ***subdivision*** does not include:
>
> (a) a subdivision created by:
>
> (i) an acquisition or resumption of land or of an interest in land resulting from an action under the *Lands Acquisition Act* or the *Crown Lands Act*;
>
> (ii) an action under the *Control of Roads Act* or the *Local Government Act* to open a road, or to create a parcel of land to be included in a future road, if all the parts of the parcel that are not or will not be acquired for the purposes of the road will remain one parcel;
>
> (iii) the vesting of land in a local authority under section 187(3) of the *Local Government Act*; or
>
> (iv) a grant of an estate or interest in land for the purpose of section 16 or 24 of the *Control of Roads Act* if it is to be consolidated with the land already held by the grantee;
>
> (c) a subdivision that creates not more than 2 lots if one of the lots is or is intended to be a park or reserve within the meaning of the *Territory Parks and Wildlife Conservation Act*;
>
> (d) the subdivision of pastoral land under section 61 or 66 of the *Pastoral Land Act* if, after the subdivision, the land will remain pastoral land within the meaning of that Act;
>
> (e) a subdivision required under the *Encroachment of Buildings Act*;

(f) a sublease under the *Pastoral Lands Act*;

(g) a subdivision required under any other Act; or

(h) a subdivision, or a subdivision of a class of subdivision, prescribed for the purposes of this section.

(3) Land is not to be taken to be subdivided for the purposes of this Act:

(a) by the grant of a lease, licence or other right to use or occupy a part of the land unless the lease, licence or other right is for a term of more than 12 years; or

(b) by reason only of the lease of part of a building.

(4) For the purposes of subsection (3), a lease, licence or other right to use or occupy a part of land that contains:

(a) an option to renew the lease, licence or right for an additional term from the date of expiration of the lease, licence or right; or

(b) a provision for the granting of a further lease, licence or right for an additional term from the date of expiration of the lease, licence or right,

so that the aggregate of all the terms is more than 12 years is to be taken to be a lease, licence or right for a term of more than 12 years.

(5) …

(6) …

[16] The plaintiff contends that the lease arrangement engages s 5(1)(b) in that it is "the division of land into parts available for separate occupation or use, by means of … (b) lease, agreement, dealing or instrument purporting to render different parts of the land available for separate disposition or separate occupation". The plaintiff contends further that the lease arrangement is not excluded by operation of s 5(3) because it is "for a term of more than 12 years", and it is not "the lease of part of a building".

[17] The defendant concedes that, unless severance of the option to renew is available, the lease arrangement is for a term of more than 12 years. So far as the second matter is concerned, the "Premises" are defined in Item 4 of the lease document, which makes reference to that part of the Land hatched on the annexed plan and described as "Bowling Green". The plaintiff's contention is that the arrangement is not "a lease of part of a building" because, in essence, although the hatched area includes parts of two buildings comprised by the clubhouse, toilets and storage shed, it extends to include the bowling green (including the perimeter) and the open airspace above it, the concourse walkway, the fixed seating and the fixed shade stands. For that reason, the plaintiff contends that the subject matter of the lease cannot be characterised as "part of a building".

[18] By way of response to that physical characterisation, the defendant relies on the definition of the term "building" in s 3 of the *Planning Act* to include "a structure of any kind (including a temporary structure) and part of a building or structure". In the defendant's contention, there is no unimproved land comprised in the demised premises. On that characterisation, the storage shed, bowling green, retaining walls, drainage and other services all form part of a single interconnected structure which, together with the main building and those parts of the demised premises forming part of that building, constitute the recreational club.

Burden and standard of proof

[19] There is a preliminary question concerning the burden of proof. The plaintiff contends that the onus is on the defendant to prove the operation of the proviso which would exclude the lease arrangement from the definition of "subdivision" on the basis that it is a lease of part of a building. The plaintiff points to the decision of the High Court in *Vines v Djordjevitch*[1], to the effect that where a statute provides:

> an … exclusion which assumes the existence of the general or primary grounds from which the liability … arises but denies the … liability in a particular case by reason of additional or special facts, then it is evident that such an enactment supplies considerations of substance for placing the burden of proof on the party seeking to rely upon the additional or special matter …[2]

[20] That principle is said by the plaintiff to govern not only liabilities in the ordinary sense, but also transactions rendered void by statute unless falling within the terms of a specified exclusion. It is said the general principle is that a "subdivision" as defined by s 5 of the *Planning Act* will be void in the absence of planning consent. In that enquiry, the plaintiff accepts the onus of demonstrating that the transaction is the division by lease of land into parts available for separate occupation or use. On the plaintiff's contention, once it is established that the transaction fell within that general category requiring development approval (the general principle), the onus shifts to the defendant to

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1 (1955) 91 CLR 512.

2 *Vines v Djordjevitch* (1955) 91 CLR 512 at 519.

establish the additional or special facts bringing the transaction within the exception which recognises the general principle.

[21] Conversely, the defendant points to the decision of the High Court in *Director of Public Prosecutions v United Telecasters Sydney Ltd*[3] as authority for the proposition that where the scope of a provision is cut down "by way of definition rather than by way of proviso, exception or saving … there is no reason to suppose that … the legislature intended that the subsection should operate without limitation unless an accused brought himself within the terms of [the exclusionary provision]".[4] Similarly, Toohey and McHugh JJ said that:

> When a statute imposes an obligation which is the subject of a qualification, exception or proviso, the burden of proof concerning that qualification, exception or proviso turns on whether it is part of the total statement of the obligation. If it is, the onus in respect of the qualification, exception or proviso is on the party asserting a breach of the obligation. If it is not, the party relying on the qualification, exception or proviso must prove that he or she has complied with its terms.[5]

[22] The determination turns ultimately on whether the exception contains a matter which is really "in substance a fresh enactment, adding to and not merely qualifying that which goes before".[6] That distinction is not

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3 (1990) 168 CLR 594.

4 *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594 at 601 per Brennan, Dawson and Gaudron JJ.

5 *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594 at 611-612.

6 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 274-275, citing *Rhondda Urban District Council v Taff Vale Railway Co* (1909) AC 253 at 258.

always an easy one to make. As French J observed in *Bropho v Human Rights and Equal Opportunity Commission*[7]:

> While the incidence of the burden of proof of the exemption was not contested on the appeal it is not, in my opinion, a question that should be regarded as settled. Whether an exemption from a statutory liability is to be demonstrated by the person upon whom it is sought to impose the liability is a matter of substantive statutory construction not a mere matter of form. The constructional choice which typically arises in such cases was identified long ago by Lord Mansfield in *R v Jarvis* (1756) 1 East 643:
>
> > … it is a known distinction that what arises by way of proviso in a statute must be insisted upon by way of defence by the party accused; but, where exceptions are in the enacting part of the law, it must appear in the charge that the defendant does not fall within any of them.
>
> Professor Julius Stone observed that in the case of a statutory cause of action "… it is frequently a matter of some refinement to decide where the burden is placed" — J Stone and WAN Wells, *Evidence — Its History and Policies*, (1991), p 699. The substantive rather than the formal nature of that distinction was referred to in *Dowling v Bowie* (1952) 86 CLR 136 and also in *Vines v Djordjevitch*, where it was said (at 519):
>
> > … whether the form is that of a proviso or of an exception, the intrinsic character of the provision that the proviso makes and its real effect cannot be put out of consideration in determining where the burden of proof lies.
>
> See also *Banque Commerciale SA en liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 285 and *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 257 where Dawson, Toohey and Gaudron JJ said:
>
> > The distinction does not depend on the rules of formal logic: *Dowling v Bowie*. Rather, the categorization of a provision as part of the statement of a general rule or as a statement of exception reflects its meaning as ascertained by the process of statutory construction.[8]

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7 (2004) 135 FCR 105 at [75].

8 *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at [75].

[23] In the conduct of that substantive statutory construction exercise, the term “subdivision” is defined for the purpose of marking out those acts or transactions in the nature of development which require a permit from the consent authority. The principal definition includes the division of land into parts for separate occupation or use by way of lease, and is then “cut down” by exempting leases for a term of 12 years or less and leases of part of a building. That operation is more readily characterised as a statement of the complete factual situation which must be found to exist before a lease arrangement will constitute a “subdivision”, rather than the fresh enactment of some ground of excuse, justification or exculpation.

[24] The total statement of the obligation is that leases dividing land for a term of more than 12 years which are not simply leases of part of a building will require development approval. It may be that a different characterisation would apply to those exclusions in s 5(2) of the *Planning Act* relating to acquisitions, resumptions and statutory vesting under particular legislation. That form of exclusion is more apt to find characterisation as a proviso which requires the defendant to establish the additional or special facts bringing the transaction within its scope; although it is unnecessary to decide that matter for these purposes. For these reasons, the plaintiff carries the burden of proving the breach of obligation in pressing the contention that the lease arrangement was void.

[25] The relevant standard of proof for these purposes is the civil standard.[9] The fact that s 63 of the *Planning Act* provides (in different subsections) for both annulment of the transaction and criminal liability does not lead to any different conclusion. In the event a charge was laid on complaint pursuant to s 63(1) of the *Planning Act* the criminal standard of proof would no doubt have application to those proceedings.

The statutory context

[26] As the plurality observed in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[10] (footnotes omitted):

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.[11]

[27] Although "statutory construction must begin with a consideration of the [statutory] text", that "statutory text must be considered in its

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9 *Evidence (National Uniform Legislation) Act*, s 140.

10 (2009) 239 CLR 27.

11 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] per Hayne, Heydon, Crennan and Kiefel JJ.

context" which may include legislative history and extrinsic materials.[12]

[28] The evident purpose and express object of the *Planning Act* is to provide a framework of controls for the orderly use and development of land.[13] That object is achieved by, *inter alia*, "effective controls and guidelines for the appropriate use of land, having regard to its capabilities and limitations"[14]; and "ensuring, as far as possible, that planning reflects the wishes and needs of the community through appropriate public consultation and input in both the formulation and implementation of planning schemes"[15].

[29] In pursuance of that object, s 63(2) of the *Planning Act* creates a strict preclusion on the division of land into parcels for separate occupancy or disposition other than in accordance with the scheme of the Act. The legislative policy is plainly that government rather than private parties will have control over subdivision action. In the exercise of that control, the legislature has determined that certain lease arrangements do not give rise to an inconsistency with the objects of the Act and the orderly development of land in the Northern Territory. One such arrangement is the lease of part of a building.

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12 *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22], citing *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39]. See also *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936 at [14], [35]-[40], [81] and [92].

13 *Planning Act*, s 2A(1).

14 *Planning Act*, s 2A(1)(c).

15 *Planning Act*, s 2A(1)(f).

[30] New South Wales and Western Australia have statutory exclusions in similar terms. In New South Wales, s 4B(3) of the *Environmental Protection and Assessment Act 1985* (NSW) provides that "subdivision of land does not include: (a) a lease (of any duration) of a building or part of a building ...". The Northern Territory provision only extends to the lease of part of a building, however its provenance can be tracked back to the law and practice in New South Wales sourced in the decision of Jacobs J in *Re Lehrer*.[16] The substance of the decision was that the lease of a building (or part thereof) did not imply the lease of the land below or airspace above the building, and so was not a division of "land" requiring consent as a subdivision.[17]

[31] The reasoning in that decision may be summarised as follows:

(a) the relevant question was whether a part of a building or the airspace taken up by that part of a building is, distinctly from the soil upon which the building rests, "land" as the word is used in the definition of "subdivision" in the planning provisions;

(b) part of a building and the airspace of that part can be severed by conveyance from the soil upon which the building rests and can be dealt with as real property, even if that part would fall short of meeting the description of "land" at common law;

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16 (1961) 61 SR (NSW) 365.

17 The decision is the subject of a note by Professor Peter Butt in (2002) 76 ALJ 346-7.

(c) an estate of that nature might fall within the definition of “land” in a general interpretation statute[18] but without attracting that meaning in the context and for the purpose of the planning legislation;

(d) that was the case in relation to the subdivision provisions of the New South Wales planning legislation having regard to the distinction between land and the buildings thereon drawn in the provisions of that legislation; and

(e) as a consequence, a lease of a part of a building distinctly from the soil did not effect a “subdivision” within the meaning of the planning legislation.

[32] Following that decision, the practice developed of describing leased property to denote that the lease was restricted to the physical building (or part thereof) and did not include any interest in the land on which the building stood.[19] That practice was subsequently reflected in the New South Wales legislation described above, which expressly excluded from the concept of subdivision for planning purposes a lease (of any duration) of a building or part of a building.

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18 Such as the definition in s 17 of the *Interpretation Act* (NT) to include: "all messuages, tenements and hereditaments, corporeal and incorporeal, of any tenure or description and whatever may be the estate or interest in the land".

19 See Professor Peter Butt, *Conveyancing Practice and the Law: Leases and Subdivisions* (2002) 76 *Australian Law Journal* 346-7.

[33] In the Northern Territory, an earlier iteration of the planning legislation which commenced in 1979 also provided a definition of "subdivision" by reference to the division of land into parts available for separate occupation or use by means of, *inter alia*, a lease arrangement. The principal Act did not exclude the lease of part of a building, but did make provision for classes of subdivision to be excluded by regulation. By regulation made in 1979, "[a]ny subdivision of a building or part of a building" was excluded from the definition. A new *Planning Act* was enacted in 1993, in which s 3(2) of the general interpretation section provided that "[l]and shall not be taken to be subdivided for the purposes of this Act (b) by reason only of the lease of part of a building". That provision was carried over into the present *Planning Act*, which was enacted in 1999.

[34] The defendant initially submitted that the narrowing of the exclusion from"[a]ny subdivision of a building or part of a building" to "by reason only of the lease of part of a building" was the result of drafting error. That does not necessarily follow. One would be slow to conclude that a substantive enactment in principal legislation was made in error, particularly in circumstances where the formulation is rationally explicable by a policy and legislative choice to treat the lease of a whole building as necessarily extending to the land on which

the building is situate.[20] Alternatively, as the plaintiff submits, the lease of a whole building exclusive of the land on which it is situate would create a vacant block of the balance of the land and give rise to planning implications and concerns as to whether the building would continue to be serviced by amenities on the land such as carparks.

[35] The subjective legislative intention underlying the exclusion, in either its previous or present form, is now difficult to ascertain given that no treatment is given to this particular issue in the second reading speeches or the explanatory memoranda.[21] That omission notwithstanding, it would seem clear that the Northern Territory legislature took its lead from what had become the accepted practice in New South Wales. While that result might have been achieved by giving differential treatment to "land" and "buildings" in the terms of the planning legislation, the legislative history indicates that the legislature sought to put the matter beyond doubt by express exception.

[36] That approach conforms to the relevant purpose of the planning legislation. As the plaintiff submits, the planning scheme assumes that existing buildings and uses are in compliance with the *Planning Act*, and it is for that reason that Part 4 of the *Planning Act* protects existing

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20 See, for example, the decision in *Hardy v Wardy* [2001] NSWSC 180. It is also the case that the amendment appears to form part of a considered legislative measure which also introduced the exclusion in relation to leases, licences and other rights for a term not exceeding 12 years.

21 The defendant adverts to the parliamentary debate at committee stage on 30 November 1993 (Hansard, p 10 655), but that exchange does not refer to this specific exclusion.

uses, buildings and works. The lease of part of an existing building does not give rise to planning implications (although it may have implications under the *Building Act*).

[37] On the other hand, the grant of a permanent or long-term right of separate occupation or use of a parcel of land within an existing lot does have planning implications. The grant of planning approval for the creation of a lot will ordinarily have involved a consideration of the appropriate size and configuration of the parcel of land for planning purposes. The subsequent division of that approved lot into separate parts available for separate occupation or use would deny to the planning authority the control of subdivisions to ensure that lots will be of a size and configuration appropriate to their use and in conformance with the planning scheme.

The scope of the exception

[38] On a plain and natural reading in context, the exception in s 5(3)(b) of the *Planning Act* has application where the lease arrangement is in respect of part of a building distinct from the soil (or "land" in its common law conception) on which it rests. By limiting the exception to "part of a building", the statutory implication would seem to be that the lease of a whole building must necessarily extend to the land.[22]

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22 That approach would be consistent with the factual determination made in *Hardy v Wardy* [2001] NSWSC 180, but may be displaced by an express statutory provision exempting a lease of both a building and part of a building: see *Taluja v Australian International Academy of Education Ltd* [2011] NSWCA 416 at [71]-[75].

That operation is consistent with the decision of the Court of Appeal in *Finlay Stonemasonry Pty Ltd v JD & Sons Nominees Pty Ltd as Trustee for the Jenkins Family Trust*[23], which concluded (emphasis added):

> The purpose for which the leased premises were leased, the exclusion of the external walls and the toilet, and the location of the sewerage pipes all point inexorably to the conclusion that the common intention of the parties was to include in the Lease those parts of the building necessary to enable the respondent to carry on the business of a coffee shop and eatery – that is *those parts of the building shaded in the plan attached to the Lease and not the ground underneath and air space above*. In my view the learned trial Judge was correct to find that the Lease was a lease of part of a building and hence not void by reason of s 5(3) of the Act.[24]

[39] Given the history described above, it is unsurprising that this operation reflects the approach adopted by Jacobs J in *Re Lehrer*[25]. That construction receives support from the limiting words "by reason only", which operate to deny the application of the exception to a lease arrangement which extends beyond part of the building to the land on which it stands. Moreover, the exception is limited to lease arrangements in which the demised premises are exclusively "part of a building". As discussed further below, it is not enough to establish that the lease arrangement includes part of a building together with other subject matter which does not meet that description.

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23 [2011] NTCA 7.

24 *Finlay Stonemasonry Pty Ltd v JD & Sons Nominees Pty Ltd as Trustee for the Jenkins Family Trust* [2011] NTCA 7 at [21] per Kelly J (with whom Riley CJ and Southwood J concurred).

25 (1961) 61 SR (NSW) 365.

The meaning of "building"

[40] Section 3 of the *Planning Act* defines "land" in the following terms:

> ***land*** includes land covered by water and buildings constructed on land.

[41] The term "building" is defined in that same general definition section, and subject to the appearance of a contrary intention, in the following terms:

> ***building*** includes a structure of any kind (including a temporary structure) and part of a building or structure.

[42] The term "structure" is not separately defined. There are obvious syntactical difficulties in applying that definition to the formulation "by reason only of the lease of part of a building". That application would lead nonsensically to the exception of "the lease of part of part of a building or structure".[26] Where "the definition as enacted does not fit comfortably into the text, the exercise of construction will need to address any logical or grammatical infelicities that arise".[27] Even leaving aside that syntactical difficulty, the subject matter of the provision in which the defined term occurs, and the broader statutory

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26 For the reasons already discussed, one would be slow to accept the defendant's contention that the enactment in those terms was made in error.

27 *Commissioner of Police v Kennedy* [2007] NSWCA 328 at [44].

context, suggests that the general definition should not be given application.[28]

[43] So far as the broader statutory context is concerned, the concept of a "building" is used for three general and principal purposes in the *Planning Act*. The definition of "building" to include structures has a clear purpose and application in those contexts. The first principal use is in provisions concerning development proposals relating to a subdivision of land on which a "building" is or will be situated.[29] In that case certification is required in relation to such matters as structural integrity and fire safety, and the general definition is adapted to that purpose. The second principal use is for the protection of existing "buildings" and uses in existence immediately before the commencement of a planning scheme (or an amendment).[30] That protection is properly extended to all structures. The third principal use is to exempt repairs or maintenance on existing "buildings" from the development provisions.[31] Again, the application of the general definition serves that purpose.

[44] However, there is a purposive difficulty in importing the general definition of "building" into the definition of "subdivision". The

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28 That principle is given particular expression in s 18 of the *Interpretation Act* (NT), which provides that definitions in an Act "apply except so far as the context or subject matter otherwise indicates or requires".

29 *Planning Act*, ss 30P, 46, 51.

30 *Planning Act*, s 33, 35, 162.

31 *Planning Act*, s 36.

subject matter of s 5(3)(b) of the *Planning Act* is buildings which are capable of division into parts for separate occupation or use. The application of the general definition to that subject matter would take the operation of the provision beyond its clear purpose of exempting buildings capable of division into separate tenements.[32] The better view is that the subject matter indicates the term "building" in s 5(3)(b) takes its ordinary and natural meaning. In *Hilderbrandt v Stephen*[33], Jacobs J made the following observations in that respect:

> I shall deal first with the ordinary meaning of the word "building". Although popularly it refers to a house, its ordinary meaning, I think, is wider than this; but I think that in its ordinary meaning, it at least involves the concept of a structure with a roof and a support for that roof. It is true to say that the word is defined in the Shorter Oxford Dictionary as a structure or edifice, but I do not think that it can thereby be suggested that every structure is a building, although obviously every building is a structure. … I do not think that a single word as a synonym for the word "building" is available in the language, and it is necessary therefore to regard the word in terms of the concept. To me the ordinary concept is, as I have said, a structure of which the main feature is probably the existence of some form of roof. I do not think that a bridge is ordinarily described as a building, nor a built-up road, despite the use in that context of the past tense of the verb "to build". I do not think that a telegraph post or a wireless aerial would ordinarily be described as a building, nor do I think that a fence would ordinarily be so described.[34]

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32 Whatever meaning might be attributed to the term "building" in the lease document cannot govern the meaning of "building" in s 5(3)(b) of the *Planning Act*. So, for example, the fact that the lease document includes other improvements within the conception of building does not lead to the conclusion that the term "building" in s 5(3)(b) of the *Planning Act* necessarily includes everything falling within the description "improvements".

33 [1964] NSWR 740.

34 *Hilderbrandt v Stephen* [1964] NSWR 740 at 742-743. In that case, it was found that a tennis court with a fence did not fall within the ordinary and natural meaning of the term "building".

[45] There may be added to that general meaning the requirement in this context that the thing be of such a nature as to allow it to be divided for use or occupation under a lease arrangement in such a way that the use or occupation amounts to a use of the building rather than of the land on which it stands.

[46] Even if the general statutory definition was considered to have application to the term "building" as it appears in s 5(3)(b) of the *Planning Act*, the extension of that meaning to include a "structure" must in context mean a structure in the nature of a building. The statutory purpose and context bears upon the meaning to be attributed to the word "structure". As Debelle J observed in *Carter v Mid-Murray Council*[35]:

> The meaning of the word "structure" will vary according to the context in which it is used. As Mahoney JA pointed out in *Mulcahy v Blue Mountains City Council* (1993) 81 LGERA 302 at 305-308, care must be taken with definitions in legislation of this kind. If the word "structure" is given its literal meaning, absurd results could follow and the legislation be rendered unworkable. In *Noarlunga City Corporation v Fraser* (1986) 42 SASR 450 at 457-458 White J made similar observations. It is desirable, therefore, when interpreting the *Development Act*, to have regard to its purposes or objects: *Mulcahy* (at 306-307).[36]

[47] A broader meaning of the term was considered in *R v Rose*[37], where Gibbs J said:

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35 (2007) 97 SASR 462.

36 *Carter v Mid-Murray Council* (2007) 97 SASR 462 at [12].

37 [1965] QWN 42 at 43.

> The word "structure" in its most natural and ordinary meaning is a building, but the word is capable of having the wider meaning of anything constructed out of material parts, and in that sense undoubtedly would include a machine and a caravan.[38]

[48] That broader meaning could have little or no practical application in the context of s 5(3)(b) of the *Planning Act*. It is difficult to conceive of a lease for occupation of part of a machine or part of a caravan. Even allowing that the statutory definition may operate to broaden the conception of a "building", the proper approach to the meaning of "structure" in this context is as described by Atkinson J in *South Wales Aluminium Co Ltd v Assessment Committee for the Neath Assessment Area*[39] in the following terms:

> There is nothing to suggest here that the word "structure" is not to be used in its ordinary sense. As used in its ordinary sense I suppose it means something which is constructed in the way of being built up as is a building; it is in the nature of a building. It seems to me it is not in the nature of a building, or a structure analogous to a building, unless it is something which you can say quite fairly has been built up. I do not think that is the only guide or the only test, but, roughly, I think that must be the main guide: how has it got there? Is it something which you can fairly say has been built up? I do not think it depends at all on whether it is fixed to the ground. That may be a relevant consideration.[40]

[49] That approach receives support from the definition of "construct" in the *Planning Act* which, in relation to a building (which would include a structure in the relevant sense), includes "to build, rebuild, erect or

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38 *R v Rose* [1965] QWN 42 at 43.

39 [1943] 2 All ER 587 at 592.

40 *South Wales Aluminium Co Ltd v Assessment Committee for the Neath Assessment Area* [1943] 2 All ER 587 at 592.

re-erect the building; to make alterations to the building; to enlarge or extend the building; and to place or relocate the building on land".[41] The definitions of "development" and "works" also draw a distinction between the construction of a building (including a structure) on the one hand, and the construction of roads, drains, car parking and landscaping, and the results of activity on the land causing physical change to it, on the other hand.[42] The inclusion of "a structure of any kind" in the statutory definition of "building" must be read consistently with those distinctions.[43]

[50] Given those textual and contextual indications, and even if the statutory definition has application, a "building" for the purpose of s 5(3)(b) of the *Planning Act* extends to a structure in the nature of a building, but does not comprehend other work such as roads, drains, carparks and landscaping.

The subject matter of the lease arrangement

[51] The general operation of the lease document has been described above. The "Land" is described in Item 3 of the Schedule as the whole of Lot 9914, Town of Alice Springs. The "Premises" are described in Item 4

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41 *Planning Act*, s 3.

42 *Planning Act*, s 3.

43 The statutory scheme under consideration in *Carter v Mid-Murray Council* (2007) 97 SASR 462 is clearly distinguishable from the position obtaining under the *Planning Act*. The question in that matter was whether improvements to an airstrip were a "development" requiring development approval. The term "development" included work by which a structure was constructed, and also included the construction or alteration of roads, streets and thoroughfares. The statutory purpose was to capture all activity involving works on land or a change in the use of land.

of the Schedule as "[t]hat part of the Land hatched on the plan annexed to this lease (marked Annexure A) and described as Bowling Green". That plan discloses that the subject matter of the lease includes the bowling green, its surrounds and what would appear to be parts of two buildings. The plaintiff's chief executive officer deposes to the fact that a large portion of the lease area is taken up by the bowling green, which has no roof or canopy over it and is entirely outdoors.[44] The president of the defendant association describes the lease area in the following terms:

> The area of the Land used for the purposes of the Bowling Club includes a well-drained lawn bowling area covered with maintained natural turf, which natural turf forms the surface of the lawn bowls playing area ("the Bowling Green"). The Bowling Green is bounded around its perimeter by a lined concrete ditch approximately 15 cm deep and 20 cm wide which traps played bowls. The outside wall of the ditch rises approximately 25 cm higher than the surface area of the Bowling Green to a concourse walkway around the perimeter of the Bowling Green.
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> The raised concourse walkway surrounding the Bowling Green is approximately 2 m wide and consists of concrete and grassed pathways to access a series of numerous fixed seating and fixed shade stands along that perimeter. Immediately behind those stands is a colorbond fence along the western and southern boundaries, with an open mesh fence along the eastern boundary.
>
> In addition to the Bowling Green, the associated concourse and seating facilities, the Bowling Club uses parts of the two buildings to the north of the green. Part of one of the buildings is used for the purpose of a clubhouse and toilets. The Bowling Club uses part of a storage shed to store the Bowling Club's equipment.
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> A shade structure, presently without shade cloth for the winter months, is erected over the area between the clubhouse and the

44 Affidavit of Randle Ernest Walker affirmed on 20 July 2017, para 18.

Bowling Green, over part of the concourse. This area is generally used for outside functions and club activities.[45]

[52] The most graphic depiction of the lease area appears in an exhibit to the affidavit made by the defendant's solicitor comprising 84 photographs.[46] So far as is relevant for these purposes, those photographs depict the following matters:

(a) the surface level of the Land is raised approximately 30 cm above the surface level of the footpath contiguous with Leichardt Terrace which borders the eastern boundary of the Land;

(b) the bowling green is surrounded variously by paved concrete walkways and grass;

(c) as described in the president's affidavit, the bowling green is constituted by natural turf and there is a lined concrete ditch around the perimeter of the bowling green approximately 15 centimetres deep and 20 centimetres wide, the outside wall of which rises approximately 25 centimetres higher than the turf surface of the bowling green;

(d) the surface of the bowling green sits below the level of the surrounding grassed and concrete areas, and is at approximately the same level as the footpath described above;

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45 Affidavit of Michael John Carmody made on 8 September 2017, paras 4-7.

46 Affidavit of Peer Schroter made on 8 September 2017, Exhibit PS 9.

(e) there is a shade structure at the northern end of the bowling green in front of that part of the main building which forms part of the lease area and which is used as a clubhouse;

(f) there is a walkway approximately 2 metres in width comprised by large concrete pavers running along the front of the clubhouse area;

(g) that walkway joins a wider concrete slab which forms an apron in front of a freestanding shed beside the clubhouse, part of which falls within the lease area and is used by the defendant to store equipment;

(h) there are a number of light poles and seats with metal awnings affixed to the grassed area running along the eastern boundary of the lease area;

(i) there are a number of seats with metal awnings affixed to the fence running along the southern boundary of the lease area;

(j) there are a number of light poles affixed to the grassed area running along the western boundary of the lease area;

(k) there are metal awnings affixed to the fence running along the western boundary of the lease area; and

(l) the concourse and grassed areas are at the same level as the car park on the Land contiguous to the western boundary of the lease area.

[53] Those photos disclose, to the extent it is not already apparent from the plan, that it would be highly artificial to describe the lease area and the main building which formerly housed the recreational club as forming part of a single structure. While it may be accepted that the whole of the lease area has been developed or improved, it is plainly comprised by separate elements. Those elements include part of the main building, part of the freestanding storage shed, the bowling green, the concourse surrounding the bowling green, and the light poles, seats and awnings on that concourse. That is so regardless whether or not it is accepted that the bowling green and the concourse are a “structure” within the meaning of the statutory definition of “building”, and regardless whether or not that statutory definition governs the operation of the exception.[47]

[54] That characterisation is not precluded by the fact that the concourse area is raised above the footpath which runs along the western boundary. To the extent the footpath might be described as the natural ground level, the surface of the bowling green is at or about the level of the footpath. The surface of the car park outside the eastern boundary of the lease area is at the same level as the concourse. While

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47 There is, in any event, a strong contextual reason why the bowling green cannot properly be characterised as a "structure" for the purposes of the exception. If the bowling green is a "structure" and "building" in the relevant sense, then so too would the carparks on the Land be. If part of a carpark could be subject to a subsequent and separate lease arrangement without subdivision approval, it would undermine the operation of the Northern Territory Planning Scheme which requires that particular uses have a minimum number of car parking spaces as a precondition to the grant of the original development approval.

these matters no doubt reflect the construction of roads, drains, car parking and landscaping both within and without the lease area, and are no doubt the results of activity on the land causing physical change to it,[48] they do not suggest that the lease area forms part of a single structure. Much less do they suggest that the lease is in respect of "part of a building" in the relevant sense.

[55] Nor should it be accepted that the exception is engaged simply because the lease area includes, amongst other elements, "part of a building" (or parts of two buildings). As already stated, the limiting words "by reason only" deny the application of the exception to a lease arrangement which extends beyond part of a building to the land on which it stands, or to other structures or parts of the land. As the plaintiff submits, the legislative scheme would be emasculated if the demised area need only include part of a building in order to fall within the exception. On that construction, a private party would need only to enter into a long-term lease which incidentally included part of a structure within the demised premises in order to avoid the obligation to make application for planning consent to a subdivision.

[56] Even leaving all those considerations aside, the subject matter of the lease is not "part of a building" in the sense described by Jacobs J in

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48 For this reason, the bowling green and related infrastructure falls within the definition of "works" in s 3(1) of the *Planning Act*.

Re Lehrer[49], and subsequently described by the Court of Appeal in *Finlay Stonemasonry Pty Ltd v JD & Sons Nominees Pty Ltd*[50]. Properly understood, the exception extends only to a lease in which the subject matter is part of a building and which does not include the ground underneath and the airspace above. The subject matter of this lease arrangement manifestly extends beyond part of a building. It clearly contemplates the airspace above the bowling green to the extent necessary to accommodate that activity. It clearly extends to the soil below the turf surface of the green itself. The lease arrangement expressly requires the defendant to maintain the green in a manner which necessarily involves that subsoil.

[57] The defendant's other contention in this respect is that the exception extends to include the lease of part of a building together with outside areas where the lease arrangement does not have what was described as a "subdivisional tendency". This submission would appear to be based on the contention that the words "by reason only" in the exception operate so that:

(a) where there is a lease which includes "part of a building";

(b) regardless whether the subject matter of the lease includes land, airspace and other property;

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49 (1961) 61 SR (NSW) 365.

50 [2011] NTCA 7 at [21] per Kelly J (with whom Riley CJ and Southwood J concurred).

(c) the exception is engaged unless the incorporation of the other property is of such character that the land should be taken to be subdivided.

[58] That contention finds no support in the legislative text, context or history, and should be rejected. As the plaintiff submits, that contention would introduce into the legislative scheme a consideration which does not find voice in the statutory text and which would require a value judgement as to the nature of the development. That is the type of value judgement properly made in the planning approval process in order to determine whether a development permit should be granted, rather than a matter which informs the operation of the exception.

Severance

[59] The defendant's alternative submission is that if the lease arrangement in this case does not engage the exception on the basis that it is of part of a building, the option to renew may be severed in order to bring the lease term below the 12 year threshold in s 5(3)(a) of the *Planning Act*.

[60] Severance is not possible where the entire arrangement is prohibited by public policy, common law or statute.[51] In those circumstances, the law cannot recognise the existence of a transaction which policy, law or statute has forbidden.[52] However, the power of a court to order

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51 *Roach v Bickle* (1915) 20 CLR 663 at 671; *A v Hayden* (1984) 156 CLR 532; *Firmin v Gray & Co Pty Ltd* [1985] 1 Qd R 160 at 164.

52 *Roach v Bickle* (1915) 20 CLR 663 at 671; *MacKinlay v Derry Dew Pty Ltd* [2014] WASCA 24 at [120] per Buss JA.

severance may be exercised in cases where a contract, otherwise legal, contains a provision in contravention of a statute, provided that the statute, properly construed, permits severance.[53] In other words, the doctrine of severance may be invoked if the transaction involves distinct promises or engagements, some of which are legal and some of which are illegal.[54]

[61] In *MacKinlay v Derry Dew Pty Ltd*[55], Buss JA conducted a review of the relevant authorities. The test his Honour ultimately adopted (Newnes JA concurring) was as formulated by Jordan CJ in *McFarlane v Daniell*[56]. His Honour extracted that test in the following terms:

> 126 In *McFarlane v Daniell* [1938] NSWStRp 20; (1938) 38 SR (NSW) 337, the appellant sued the respondent to recover a sum of money owing for salary and otherwise under a contract of employment of the appellant as an actor in the production of cinematograph films. The respondent raised a number of defences to the action including that the appellant could recover nothing because part of the consideration for the respondent's promise to pay a salary was a promise by the appellant to observe certain stipulations alleged to be a grossly unreasonable restraint of trade.
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> 127 Jordan CJ (Davidson & Owen JJ agreeing) considered whether severance is available where some of the promises made by a party to a contract are illegal or void and other promises made by that party are valid. His Honour said:
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> > When valid promises supported by legal consideration are associated with, but separate in form from, invalid promises, the test of whether they are severable is whether they are in substance so connected with the others as to form an

53 *MacKinlay v Derry Dew Pty Ltd* [2014] WASCA 24 at [69] per Pullin JA; *Thomas Brown & Sons Ltd v Fazal Deen* (1962) 108 CLR 391; *Carney v Herbert* [1985] AC 301.

54 *MacKinlay v Derry Dew Pty Ltd* [2014] WASCA 24 at [121] per Buss JA.

55 [2014] WASCA 24.

56 (1938) 38 SR (NSW) 337.

indivisible whole which cannot be taken to pieces without altering its nature: *Horwood v Millar's Timber & Trading Co Ltd* ([1917] 1 KB 305 at 315). If the elimination of the invalid promises changes the extent only but not the kind of the contract, the valid promises are severable: *Putsman v Taylor* ([1927] 1 KB 637 at 640 - 1). If the substantial promises were all illegal or void, merely ancillary promises would be inseverable (345).

128 A little later, Jordan CJ said:

It is difficult to see how, in principle, a legal promise associated with an illegal promise can ever be enforceable unless it is supported solely by a separate consideration so exclusively attributable to it that there are in substance two independent contracts and not one composite contract (346).

129 His Honour then elaborated:

The exact scope and limits of the doctrine that a legal promise associated with, but severable from, an illegal promise is capable of enforcement, are not clear. It can hardly be imagined that a Court would enforce a promise, however inherently valid and however severable, if contained in a contract one of the terms of which provided for assassination. In some of the authorities relied on for the proposition the invalid promises were not illegal but merely void. However this may be, it is at least well established that, as a general rule, a promise (not itself capable of further subdivision) is unenforceable if it is to do an act or acts all or any of which is illegal, and that a promise to do a lawful act is unenforceable if all or any part of the consideration for the promise is illegal. Thus, as a general rule, if a group of promises is supported by an inseverable consideration all or part of which is illegal, none of the promises is enforceable: *Lake View and Star Ltd v Cominelli* ([1937] AC 653 at 664). If, according to the terms of a contract, a party cannot be called upon to pay money except upon the performance by the other party of the whole consideration, then if any part of the consideration is illegal the money cannot be recovered: *Hopkins v Prescott* [1847] EngR 573; (4 CB 578 at 595-6) (346).[57]

57 *MacKinlay v Derry Dew Pty Ltd* [2014] WASCA 24 at [126]-[129] per Buss JA.

[62] That test was approved and applied by Kitto, Windeyer and Owen JJ in *Thomas Brown & Sons Ltd v Fazal Deen*[58], although that matter involved a contract for the bailment of gold, gems and a safe in which only the possession and control of the gold attracted a defence of illegality based upon a breach of the *National Security (Exchange Control) Regulations*. The test was also cited by the Privy Council in *Carney v Herbert*[59], with the following refinement:

> There are therefore two matters to be considered where a contract contains an illegal term, first, whether as a matter of construction the lawful part of the contract can be severed from the unlawful part, thus enabling the plaintiff to sue on a promise unaffected by any illegality; secondly, whether, despite severability, there is a bar to enforceability arising out of the nature of the illegality.[60]

[63] The question under consideration by the Western Australian Court of Appeal in *MacKinlay v Derry Dew Pty Ltd*[61] arose in a similar context to that of the present case. That question was whether a lease was void for contravention of s 20 of the *Town Planning and Development Act 1928* (WA) and, if so, whether an option to renew could be severed to save it. The legislation precluded the lease of land for any term exceeding 10 years (including options to extend or renew) without planning approval. There was a statutory exception in respect of a lease not exceeding 21 years of "the whole or a portion of a leased

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58 (1962) 108 CLR 391 at 411.

59 [1985] AC 301.

60 *Carney v Herbert* [1985] AC 301 at 311.

61 [2014] WASCA 24.

building" constructed pursuant to a building approval, provided that the lease did not relate to any land other than that building or portion thereof.

[64] The lease arrangement was originally for a term of 20 years, of which 14 years remained at the date of the relevant assignment. That assignment was effected by a deed which included an option for two further terms of five years each, bringing the remaining term of the lease to 24 years. The planning legislation created an offence of failing to comply with the requirement for planning approval, but did not expressly invalidate lease arrangements in breach of that requirement. However, it had previously been held by the Western Australian courts, and it was accepted by both parties, that the legislative intent was to render illegal and void any agreement in contravention of the requirement for planning approval.

[65] The Court of Appeal held that severance was not available in those circumstances, although different approaches were taken. Buss JA (Newnes JA concurring) held relevantly:

> In my opinion, severance is not available in the present case. The options to renew granted under the Deed were in substance so connected with the assignment of the balance of the term of the Lease, in the context of the respondent's purchase of the Forrestfield Tavern business, as to form an indivisible whole. The options cannot be severed without radically altering the nature of the tenure or prospective tenure which the parties to the Deed agreed should be conferred on the respondent. The grant of the options was not merely ancillary to the assignment of the balance of the term of the Lease and the other provisions of the Deed. The

> options cannot reasonably be characterised as a distinct and independent grant, the elimination of which would not change in kind the transaction evidenced or recorded in the Deed. The only reasonable conclusion, on an objective assessment of the transaction as a whole, is that the options to renew were, from the respondent's perspective as the purchaser of the Forrestfield Tavern business, at or close to the heart of the agreed arrangements.[62]

[66] Pullin JA took the view that the grant of a lease for a term (including any options to extend) longer than specified and without requisite approval was both illegal and void for contravention of the statutory prohibition. The result was that the court could not adjust the lease by severing portions to the point where it was no longer in contravention of the statutory provision. That was because the lease was void in its entirety, rather than "partially illegal".[63]

[67] As has been observed, "the test of severability is flexible. Each case depends, to some extent, on its own circumstances, including in particular on the nature of the illegality."[64] In the plaintiff's submission, the doctrine of severance cannot apply to validate transactions that were always void by the operation of statute. The submission follows that s 63(2) of the *Planning Act* has that express operation, rendering the entire contract contrary to public policy in the

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62 *MacKinlay v Derry Dew Pty Ltd* [2014] WASCA 24 at [152] per Buss JA.

63 *MacKinlay v Derry Dew Pty Ltd* [2014] WASCA 24 at [71] per Pullin JA.

64 *MacKinlay v Derry Dew Pty Ltd* [2014] WASCA 24 at [122] per Buss JA, citing *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432 at 438; *Carney v Herbert* [1985] AC 301 at 309; *Humphries v Proprietors Surfers Palms North Group Titles Plan 1955* (1994) 179 CLR 597 at 619; *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516 at [41]-[43].

manner discussed in *Roach v Bickle*[65]. In that submission, the specific terms of s 5(4) of the *Planning Act* operate such that a lease to use or occupy a part of land that contains an option to renew so that "the aggregate of all the terms" is more than 12 years is deemed to be a lease for a term of more than 12 years. Accordingly, it would be contrary to the legislative policy expressed in that provision to allow severance to recraft the transaction into something other than that which the parties intended.

[68] While it may be accepted that s 63(2) of the *Planning Act* provides expressly that a transaction purporting to subdivide land in contravention of Part 5 is void, it does not in my opinion follow that a contravention by reason of an aggregate lease term in excess of the 12 year threshold gives rise to an illegality displacing the doctrine of severance. The purpose of ss 5(1) and (3) of the *Planning Act* is, as Buss JA described the counterpart Western Australian legislation, to put an end to *de facto* or "do it yourself" subdivisions[66], while excepting arrangements which would not have that effect. The purpose of s 5(4) of the *Planning Act* is to ensure that the statutory prescription of 12 years is not subverted by the device of options to renew or extend.

[69] Severance would not be inconsistent with those purposes such that "despite severability, there is a bar to enforceability arising out of the

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65 (1915) 20 CLR 663.

66 *MacKinlay v Derry Dew Pty Ltd* [2014] WASCA 24 at [150] per Buss JA.

nature of the illegality"[67]. The majority finding to that effect in *MacKinlay v Derry Dew Pty Ltd*[68] did not turn on the fact that the balance of the lease, as assigned by the deed, was not of itself an illegal transaction. The transaction under consideration was the assignment by the deed of the balance of the term in combination with the granting of the options to renew, just as the focus here is on the lease term incorporating the options to renew. In each case, severance would require the excision of an item in the schedule to the transactional document.

[70] That leaves the question of whether, as a matter of construction, the lawful part of the contract may be severed from the unlawful part. In the defendant's contention, the primary purpose of the lease arrangement was to make a binding agreement for the use and occupation of the land, rather than to secure the options to extend; and the principal provisions of the arrangement were not contingent on the option and would be unaffected by its severance. The defendant says, in essence, that severance is available because to do so would not change the kind of contract between the parties[69], and the offending clause is not so "material and important a promise in the whole bargain

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67 *Carney v Herbert* [1985] AC 301 at 311. It may also be noticed in this respect that *A v Hayden* (1984) 156 CLR 532 was concerned with a contractual term which adversely affected the administration of justice contrary to public policy and was unenforceable for that reason, rather than a contract voided under statute.

68 [2014] WASCA 24 at [149].

69 *Thomas Brown & Sons Ltd v Fazal Deen* (1962) 108 CLR 391 at 411.

that there should be inferred an intention not to make a contract which would operate without it"[70].

[71] The test formulated by Jordan CJ in *McFarlane v Daniell*[71] includes that: "a legal promise associated with an illegal promise can [not in principle] be enforceable unless it is supported solely by a separate consideration so exclusively attributable to it that there are in substance two independent contracts and not one composite contract".[72] The arrangement here is not properly characterised as two independent contracts respectively containing lawful and unlawful provisions. It is one composite contract for a lease including rights of renewal and extension which form an indivisible whole of the lease arrangement. This is because an option to renew is an incident "so intimately connected with the term granted to the lessee … that it should be regarded as part of the estate or interest which the lessee obtains under the lease".[73] By way of contrast, an option to purchase may be described as a separate and independent contract.[74]

[72] As Buss JA observed in *MacKinlay v Derry Dew Pty Ltd*[75], the options to renew cannot be severed without radically altering the nature of the

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70 *Electric Acceptance Pty Ltd v Doug Thorley Caravans (Aust) Pty Ltd* [1981] VR 799 at 821.

71 (1938) 38 SR (NSW) 337.

72 *McFarlane v Daniell* (1938) 38 SR (NSW) 337 at 346.

73 *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 136 CLR 326 at 345.

74 *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 136 CLR 326 at 347.

75 [2014] WASCA 24 at [152].

tenure or prospective tenure which the parties to the transaction agreed. The fact that the respondent in that case desired a long lease for commercial purposes is not a relevant point of distinction. The defendant in this case no doubt also desired a long lease. The options to renew were not a distinct and independent grant, and were not supported by separate consideration (rent not being separate consideration in the material sense). As Pullin JA observed in *MacKinlay v Derry Dew Pty Ltd*[76], to sever the options provision would be to change the kind of contract recorded in the varied lease from a lease plus options to a lease with no options, and dramatically alter the lessee's rights. That is no doubt correct, and closes off the defendant's contention that the lease merely formalised the existing relationship between plaintiff and defendant. The arrangement prior to the purported formation of the lease was one of tenancy at will. The new arrangement purported to create a leasehold interest for a term of up to 15 years.

[73] For these reasons, severance is not available in the present case.

Disposition

[74] The plaintiff is entitled to judgment in possession in Form 53A of the *Supreme Court Rules*.

[75] The Court will hear the parties in relation to the question of costs.

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76 [2014] WASCA 24 at [78].