
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : VANTAGE SYSTEMS PTY LTD -v- PRIOLO
CORPORATION PTY LTD [2015] WASCA 21

CORAM : McLURE P
BUSS JA
NEWNES JA

HEARD : 1 AUGUST 2014

DELIVERED : 30 JANUARY 2015

FILE NO/S : CACV 123 of 2013

BETWEEN : VANTAGE SYSTEMS PTY LTD
Appellant

AND

PRIOLO CORPORATION PTY LTD
Respondent

ON APPEAL FROM:

Jurisdiction : DISTRICT COURT OF WESTERN AUSTRALIA

Coram : SLEIGHT DCJ

Citation : PRIOLO CORPORATION PTY LTD -v- VANTAGE
SYSTEMS PTY LTD [2013] WADC 158

File No : CIV 2105 of 2010

Catchwords:

Contract - Lease and licence - Agreement contemplating execution of formal lease and licence agreements - Agreement specified all essential terms required by law - Admissibility of evidence on intention - Subsequent conduct - Formal lease and licence agreements not executed - Concluded and binding agreement

Equity - Equitable remedies - Unilateral mistake - Rectification - Unconscionable conduct in knowingly taking advantage of another party's mistake

Practice and procedure - Application for leave to amend statement of claim after each party had closed its case - Leave to amend granted - Whether error in the exercise of the trial judge's discretion

Legislation:

Nil

Result:

Appeal dismissed

Category: A

Representation:

Counsel:

Appellant	:	Mr A P Hershowitz
Respondent	:	Mr G D Cobby

Solicitors:

Appellant	:	Granich Partners
Respondent	:	Clifton Tham, Commercial Law & Litigation

Case(s) referred to in judgment(s):

Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd (1985) 2 NSWLR 309

Allen v Carbone [1975] HCA 14; (1975) 132 CLR 528
Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd [2000] WASCA 27; (2000) 22 WAR 101
Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd (1988) 18 NSWLR 540
Bacchus Marsh Concentrated Milk Co Ltd (in liq) v Joseph Nathan & Co Ltd [1919] HCA 18; (1919) 26 CLR 410
Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd (1986) 40 NSWLR 622
Bosaid v Andry [1963] VR 465
Brambles Holdings Ltd v Bathurst City Council [2001] NSWCA 61; (2001) 53 NSWLR 153
Cement Australia Pty Ltd v Australian Competition and Consumer Commission [2010] FCAFC 101; (2010) 187 FCR 261
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales [1982] HCA 24; (1982) 149 CLR 337
Commission for the New Towns v Cooper (Great Britain) Ltd [1995] Ch 259
Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd (1995) 41 NSWLR 329
Equuscorp Pty Ltd v Glengallan Investments Pty Ltd [2004] HCA 55; (2004) 218 CLR 471
Ermogenous v Greek Orthodox Community of SA Inc [2002] HCA 8; (2002) 209 CLR 95
Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd (1979) 1 BPR 9251
Franklins Pty Ltd v Metcash Trading Ltd [2009] NSWCA 407; (2009) 76 NSWLR 603
Geebung Investments Pty Ltd v Varga Group Investments No 8 Pty Ltd (1995) 7 BPR 14,551
Godecke v Kirwan [1973] HCA 38; (1973) 129 CLR 629
GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd (1986) 40 NSWLR 631
Laidlaw v Hillier Hewitt Elsley Pty Ltd [2009] NSWCA 44
Leibler v Air New Zealand Ltd (No 2) [1999] 1 VR 1
Lennon v Scarlett & Co [1921] HCA 42; (1921) 29 CLR 499
Mackenzie v Coulson (1869) LR 8 Eq 368
Maralinga Pty Ltd v Major Enterprises Pty Ltd [1973] HCA 23; (1973) 128 CLR 336
Masters v Cameron [1954] HCA 72; (1954) 91 CLR 353
Medsara Pty Ltd v Sande [2005] NSWCA 40
Pacific Carriers Ltd v BNP Paribas [2004] HCA 35; (2004) 218 CLR 451
Placer Development Ltd v The Commonwealth [1969] HCA 29; (1969) 121 CLR 353

Quarante Pty Ltd v Owners Strata Plan No 67212 [2008] NSWCA 258
Racal Group Services Ltd v Ashmore [1995] STC 1151
Re Butlin's Settlement Trusts [1976] 1 Ch 251
Re Farepak Food & Gifts Ltd [2006] EWHC 3272
Ryledar Pty Ltd v Euphoric Pty Ltd [2007] NSWCA 65; (2007) 69 NSWLR 603
Sagacious Procurement Pty Ltd v Symbion Health Ltd (formerly Mayne Group Ltd) [2008] NSWCA 149
Shaw v Bindaree Beef Pty Ltd [2007] NSWCA 125
Sieff v Fox [2005] 1 WLR 3811
Sinclair, Scott & Co Ltd v Naughton [1929] HCA 34; (1929) 43 CLR 310
Sindel v Georgiou [1984] HCA 58; (1984) 154 CLR 661
South Australia v The Commonwealth [1962] HCA 10; (1962) 108 CLR 130
Tasman Capital Pty Ltd v Sinclair [2008] NSWCA 248
Taylor v Johnson [1983] HCA 5; (1983) 151 CLR 422
Terceiro v First Mitmac Pty Ltd (1997) 8 BPR 15,733
Tern Minerals NL v Kalbara Mining NL (1990) 3 WAR 486
Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd [1981] 1 WLR 505
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165
Tutt v Doyle (1997) 42 NSWLR 10
Wright v Goff (1856) 22 Beav 207; 52 ER 1087

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1 **McLURE P:** I agree with Buss JA.

2 **BUSS JA:** On 18 October 2013, after a trial in the District Court, Sleight DCJ entered judgment for the respondent (Priolo) on its claim against the appellant (Vantage) for, relevantly, breach of an agreement to lease.

3 His Honour ordered Vantage to pay damages of \$271,177.26 to Priolo together with interest on those damages and the costs of the proceedings.

4 The critical issue in the appeal is whether Priolo as lessor and Vantage as lessee made a concluded and binding agreement to lease in respect of office premises at 34 Colin Street, West Perth for a term of three years commencing on 1 July 2009.

The relevant facts and circumstances

5 At all material times, the property at 34 Colin Street, West Perth comprised land and an office building and other improvements (together the Property).

6 By a written agreement dated 6 August 2003, Gamol Pty Ltd (Gamol) leased part of the first floor of the office building (the Premises) to Vantage for a term of three years commencing on 1 July 2003 and expiring on 30 June 2006 (the Original Lease). The rent was payable monthly in advance.

7 Also, by a written agreement dated 6 August 2003, Gamol granted Vantage a licence to use six car bays on the Property for a period of three years commencing on 1 July 2003 and expiring on 30 June 2006 (the Original Licence). The licence fee was payable monthly in advance.

8 Both the Original Lease and the Original Licence contained an option to renew. Vantage exercised the options and renewed the term of the lease and the period of the licence for an additional three years commencing on 1 July 2006 and expiring on 30 June 2009.

9 The Original Lease contained a holding over provision which provided, in essence, that if Vantage remained in possession of the Premises after the expiry of the lease, Vantage would be a monthly tenant. This tenancy could be terminated by either party giving one month's written notice to the other.

10 On 21 December 2007, Priolo became the registered proprietor of the
Property.

11 At all material times, Savills (WA) Pty Ltd (Savills) was Priolo's
agent for the purpose of leasing and managing the Property.

12 At all material times, Vantage sublet part of the Premises to Deugro
Projects (Australia) Pty Ltd (Deugro).

13 In May 2009, there were discussions between Graham Postma, the
Divisional Director Commercial Leasing of Savills, and David Walker,
the Finance Manager of Vantage, concerning the possibility of a new
lease of the Premises upon expiry of the Original Lease as renewed.

14 By an email of 11 May 2009, Mr Postma sent Mr Walker a proposal
for a new lease. In the proposal attached to the email Mr Postma referred
to a telephone conversation he had with Mr Walker on 8 May 2009 and
then stated that Savills, following discussions with Priolo, was 'pleased to
provide the following proposal for your consideration'. The proposal was
not acceptable to Mr Walker. He objected to the amount of the rent and
the period for which a bank guarantee was required.

15 By email of 29 May 2009, Mr Walker informed Mr Postma:

We have been in discussion with our bank and our sub-tenant in order to
finalise the lease renewal.

At this stage, our sub-tenant appears happy to continue on at the rates you
have proposed, but I am waiting on their Head Office response.

Our Bank, however, have indicated they would not be prepared to increase
our facility by \$100,000 which is what providing a 6-month guarantee
would require. They have agreed, however, to consider increasing our
facilities and provide a 3-month bank guarantee.

Hopefully we can wrap this up shortly.

16 Mr Postma responded by email of 3 June 2009 as follows:

Further to your email below and our various conversations, we have
confirmed with the Lessor that they are prepared to accept a 3 month Bank
Guarantee.

For the purposes of clarity, we have prepared the attached revised proposal
outlining all of the agreed terms.

Can you please confirm in writing at your earliest that these terms are acceptable to Vantage such that we can instruct the Lessor's solicitors to prepare the draft documentation.

- 17 Later on 3 June 2009, Mr Walker sent an email to Mr Postma which stated, relevantly:

[W]e just noticed the original proposal had annual increases of 5%, but this proposal now incorporates CPI increases. If we can revert back to the fixed increases offering, I believe we will be able to accept the offer tomorrow.

- 18 On 4 June 2009, Mr Postma sent an email to Mr Walker which contained a revised proposal for a new lease. The revised proposal provided for a fixed annual rent increase of 5% on each rent review date. In the email Mr Postma made this request:

Can you please confirm in writing that this proposal is acceptable to Vantage and we will arrange for [Priolo's] solicitors to prepare the draft documentation.

- 19 The revised proposal attached to Mr Postma's email of 4 June 2009 read:

Further to our recent discussions and your email dated 29 May 2009, we confirm the Lessor is prepared to proceed with a new lease on the basis of the following proposal.

Lessor	: Priolo Corporation Pty Ltd ACN 083 058 548
Lessee	: Vantage Systems Pty Ltd ACN 069 420 177
Premises	: Part level 1, 34 Colin Street, West Perth having a net surveyed area of 242.6m ² .
Lease Term	: Three (3) years.
Lease Commencement Date	: 1 July 2009
Net Rental	: \$545/m ² per annum
Rental Commencement Date	: 1 July 2009.

- Rent Reviews: : 1 July 2010: 5% increase
1 July 2011: 5% increase
- Outgoings : Payable by the Lessee in the proportion that the net lettable area of the Premises bears to the net lettable area of the building. Outgoings are currently estimated at \$128.32/m² per annum for the 2008/2009 financial year, exclusive of tenancy cleaning and GST.
- Car Parking : Six (6) permanent car bays will be licensed to the Lessee, for a term coterminous with the Lease, at an initial rate of \$375 per bay per annum excluding GST and Levies.
- One (1) additional bay will be provided on a monthly basis at the same rate and subject to the same review mechanism as the permanent bays.
- Car Bay Licence fees (excluding GST) shall be reviewed at each anniversary of the Lease to the then prevailing market rate but in any event to be not less than the rate payable in the preceding period.
- Reinstatement : The Lessee, if required by the Lessor shall remove all fixtures, fittings, fitout, cabling etc and make good any damage occasioned by such removal.
- The Lessee shall repaint the premises with 2 coats of commercial quality paint in a colour approved by the Lessor.
- The Lessee shall professionally clean all carpets and repair and or replace any damaged carpets, fair wear and tear accepted [sic].
- Guarantee : The Lessee shall provide a Bank Guarantee from an Australian trading Bank in an amount equal to three (3) months gross rental inclusive of car parking fees and levies, and GST with such Guarantee to not have an expiry date. Based on this proposal the initial

Guarantee amount shall be \$52,695.34

Lease Documentation : The Lessor's standard Lease and Licence shall be utilised to document and [sic] agreement between the parties, and shall be prepared by the Lessor's solicitors incorporating the relevant terms contained within this proposal.

GST : The dollar amounts expressed in this proposal do not include GST unless expressly stated otherwise. The Lessee shall pay to or reimburse the Lessor at the same time the base rental is payable any GST charges levied and payable.

Acknowledgements : This proposal is submitted subject to the formal approval of the Lessor.

This proposal will expire at the close of business on Wednesday 10 June 2009.

Can you please confirm in writing that the above proposal is acceptable to Vantage such that we can then proceed to instruct the Lessor's solicitors to prepare the draft Lease and Licence documents.

In the meantime should you require any further information or clarification of any aspect of this proposal, do not hesitate to contact the undersigned on 9488 4153.

20 The trial judge found that the revised proposal contained a material error. It wrongly stated that the licence fee for the six car bays was \$375 per bay *per annum*. It should have stated that the fee was \$375 per bay *per month* [20].

21 By email of 10 June 2009, Mr Postma inquired of Mr Walker whether the revised proposal was acceptable. The email read, relevantly:

[C]an you please confirm ASAP that these terms are acceptable, as your lease expiry is fast approaching and we need to finalise this agreement urgently, or reinstate our discussions with alternative tenants.

22 Later on 10 June 2009, Mr Walker sent two emails to Mr Postma.

23 The first email stated:

Vantage Systems is happy with the terms of the proposal.

I have just emailed Deugro Projects, and requested their acceptance of these terms in writing.

I expect no problems, and we should be good to start wrapping it all up.

24 The second email read:

We have received our sub-tenants [sic] approval of the terms as well.

Please proceed with wrapping this up.

25 Priolo's case at the trial and on the appeal was that the revised proposal and Mr Walker's emails of 10 June 2009 constituted an agreement to lease.

26 As is evidenced by Mr Walker's emails of 10 June 2009, Mr Walker had sent a copy of the revised proposal to Deugro and on that date Deugro informed Mr Walker that it approved the terms of the revised proposal.

27 On 11 June 2009, Mr Postma sent an email to Priolo's solicitors, Clifton Tham, informing them that 'agreement has been reached between Priolo ... and Vantage ... to renew their lease'. The email then said:

[C]an you please prepare draft Lease and Car Parking Licence documentation for review by the parties.

To assist in this regard, we have attached a copy of the agreed terms.

We look forward to receiving the draft documents at your earliest convenience.

28 The 'copy of the agreed terms' referred to in and attached to the email of 11 June 2009 was the revised proposal.

29 Clifton Tham prepared draft lease and licence agreements and sent them to Mr Postma by email of 1 July 2009. In the email, Clifton Tham said in relation to the draft lease agreement:

The earlier leases which we have prepared for 34 Colin Street did not have painting specifications included in the Schedule, but that was a matter that [Mr Priolo, a director of Priolo] wanted to address for future leases. For the time being, we have stipulated that Schedule 4 is not applicable.

Item 22 and 23 of Schedule 1 are only used if there is repainting and refurbishment to occur during the term of the lease in addition to that which is to occur when the tenant yields up the lease. Clause 20.2(a)(3) [and] clause 26.2(k) stipulate that repainting must occur when the tenant yields up the premises.

30 On receipt of the documents Mr Postma noticed that the licence fee specified in the draft licence agreement was incorrect. The agreement stated that the fee was \$375 per bay per annum instead of \$375 per bay per month. Mr Postma instructed Clifton Tham to correct the error. Clifton Tham complied with the instruction and, by email of 2 July 2009, sent the amended agreement to Mr Postma.

31 On 2 July 2009, Mr Postma sent the draft lease and licence agreements to Mr Walker. The documents were attached to an email which read:

Please see attached the draft Lease and Car Parking Licence agreement for your review.

Please confirm the documents are in order and we shall arrange for them to be engrossed ready for execution.

32 Later on 2 July 2009, Mr Walker informed Mr Postma by email that he would review the documents over the weekend. That did not occur.

33 On 14 July 2009, Mr Postma sent an email to Mr Walker requesting him to confirm as soon as possible that the documents were in order 'such that we can arrange for execution copies to be sent to you ASAP'.

34 On 21 July 2009, Mr Walker informed Mr Postma by email that he would review the draft documents that afternoon. That did not happen.

35 In or about early August 2009, there was a discussion between Mr Postma and Mr Walker. The trial judge noted in his reasons:

This is confirmed in an email from Mr Postma to Mr Walker dated 10 August 2009 requesting Mr Walker to detail by return email any desired amendments to the draft documents. According to the evidence of Mr Walker these discussions included Vantage pointing out that it was unhappy with the length of the draft lease and licence documents, it was concerned there was no option to renew and finally, and most importantly, it was dissatisfied with the reinstatement clause which Vantage believed placed unacceptable obligations on the lessee [34].

36 On 25 August 2009, Mr Postma sent an email to Mr Walker requesting details of any amendments as a matter of urgency. The email stated:

Given that the new lease commenced on 1 July 2009 we need to finalise this documentation and have it executed without delay. (emphasis added)

- 37 On 3 September 2009, Geoffrey Loneragan of Savills sent an email to Mr Walker stating:

We write in relation to the Leasing Proposal dated 4 June 2009 for the abovementioned premises and your email of 10 June 2009 confirming acceptance of terms on behalf of the lessee.

It is noted that to date, [Savills] has not received formal acceptance of the draft lease provided on 2 July 2009. The leasing proposal referred to above states that the 'Lessors [sic] standard Lease and Licence shall be utilised'.

We hereby give notice that, as it is now more than eight weeks since the draft lease was provided, the lessor's solicitor will be instructed to issue documents for execution by the lessee on **Thursday, 10 September 2009**. Any legal fees incurred in amending and re-issuing documents to incorporate further changes requested by the lessee (if approved by the lessor) after that date, are payable by the lessee. (original emphasis)

- 38 The trial judge found that Priolo sent invoices to Vantage for rent in respect of the months of July, August and September 2009 based on the amount of rent payable under the Original Lease as renewed, and that Vantage paid the rent as invoiced [37]. His Honour added:

Mr Postma in his evidence was unable to explain why the increased rental was not claimed immediately. Mr Loneragan, the Commercial Property Manager of Savills, stated in his evidence that the reason no claim was made for the new rental was that he was waiting on the formal lease documents to be executed. However, an invoice was eventually sent by Savills to Vantage for the additional rental at a monthly rate in advance calculated on the basis of the difference between the rental under the [Original Lease as renewed] and the rental prescribed under the alleged agreement for lease. The rental was claimed on the basis of a monthly accrual in advance. The additional rental claimed in each of the months of July, August and September 2009 was \$1,556.68 (inclusive of GST). It is common ground that this calculation is correct based upon the annual rental set out in the alleged agreement for lease [37].

- 39 On 4 September 2009, Mr Walker sent an email to Mr Loneragan. After apologising for Vantage's delay 'in wrapping this up', Mr Walker said:

As explained to Graham [Postma], our only concern with the lease was the 'make-good' provisions which are excessive and irrelevant. In fact, this is the largest lease document we have ever dealt with. Early next week we shall provide an alternative 'make-good' clause.

40 On 7 September 2009, Mr Walker sent an email to Mr Loneragan which attached an alternative 'make-good' clause. Also on 7 September 2009, Mr Walker sent an email to Scott Gullifer, the Financial Controller of Deugro, which attached the draft lease and licence agreements prepared by Priolo's solicitors. The email stated that Vantage had 'a major problem with their make-good clause'.

41 On 8 September 2009, Mr Gullifer informed Mr Walker by email that Deugro would review the documents. The email said that, in Deugro's opinion, the 'make-good' clause was 'way over the top'.

42 Later on 8 September 2009, Mr Walker sent an email to Savills informing them of Deugro's views about the 'make-good' clause.

43 The trial judge noted that Mr Walker said in evidence at the trial that he could not reconcile the amounts claimed by Priolo in Savills' calculation of the adjusted rent. On 8 September 2009, Mr Walker sent an email to Savills requesting an explanation in relation to the calculation of the adjusted rent, but he did not contest Vantage's liability to pay the rental adjustment [41].

44 On 11 September 2009, Mr Postma informed Mr Walker by email that Priolo was not willing to accept Vantage's alternative 'make-good' clause. The email elaborated:

The Lessor has previously suffered substantial losses when tenants have vacated his properties because the yielding up provisions were to [sic] vague to ensure that the premises were returned in an acceptable condition.

Consequently, the yielding up provisions in the Lessors [sic] new leases were specifically designed and worded by the Lessor to expressly set out the requirements that [the] Lessor expects his tenants to abide by when yielding up the premises.

The Lessor is prepared to delete individual provisions which are not relevant to the tenant and to negotiate with tenant's [sic] on individual items which may be too onerous on the tenant.

Accordingly can you please submit a list of the specific items which you believe are too onerous so that we can submit that list to the Lessor for proper consideration.

45 On 14 September 2009, Mr Walker sent a copy of Mr Postma's email about the 'make-good' clause to Mr Gullifer. Mr Walker suggested to Mr Gullifer that they 'work together to eliminate the clauses that we object to'.

46 On 23 September 2009, Mr Gullifer sent an email to Mr Walker in which he asked, 'how much notice ... will [Vantage] require before [Deugro] exits the office, given the original lease agreement has expired?'.

47 Later on 23 September 2009, Mr Walker informed Mr Gullifer by email that Vantage had raised the issue with their lawyers. The email continued:

Although the new lease has not been executed, due to ongoing negotiations over the make-good clause, [Deugro] has committed to the new lease by implication due to the email correspondence such as the ones below.

For Deugro to relieve themselves of their obligations you will need to find a new sub-tenant, and fulfill your make-good obligations. The costs of going through this process will need to be borne by [Deugro].

Given the current rental market in Perth it is reasonable to expect this can be completed by your planned exit at the end of October.

48 By letter dated 25 September 2009, sent by email on that date, Middletons, solicitors acting on behalf of Deugro, informed Vantage that:

- (a) there was no binding agreement between Vantage and Deugro in relation to 'the proposed sublease' of that part of the Premises which was occupied by Deugro;
- (b) Deugro had no legal obligation to enter into a sublease 'if and when one becomes available for the Premises'; and
- (c) Deugro intended to vacate the part of the Premises it occupied on or before 31 October 2009.

49 On 30 September 2009, Deugro gave Vantage a document in which it purported to terminate its alleged 'tenancy at will' by one month's notice.

50 By letter dated 6 October 2009, sent by facsimile transmission and post on that date, Batten Sacks Harvey Bruce, solicitors acting on behalf of Vantage, informed Priolo, in essence, that no concluded agreement to lease had been made between Priolo and Vantage, Vantage was occupying the Premises pursuant to the holding over provision in the Original Lease as renewed, and Vantage would vacate the Premises on 30 November 2009.

51 On 21 October 2009, Clifton Tham wrote to Batten Sacks Harvey Bruce. Clifton Tham disputed Vantage's alleged right to vacate the

Premises and asserted that Vantage was bound by a concluded agreement to lease with Priolo.

The trial judge's findings and reasoning

52 The trial judge concluded 'on the balance of probabilities that [Priolo and Vantage] intended to enter into a binding agreement for lease by the acceptance of the [revised] proposal by Vantage' [67].

53 His Honour's reasons for arriving at that conclusion were, in summary, as follows:

- (a) Vantage understood that when Priolo 'presented the [revised] proposal it was requiring a commitment from Vantage prior to the expiration of the [Original Lease as renewed] to take a new lease'. By accepting the revised proposal, Vantage 'made a commitment to enter into a new lease with Priolo'. Vantage continued in possession of the Premises after the expiry of the Original Lease as renewed 'on the understanding that it had secured the right to remain in possession as a result of a joint commitment for the creation of a new lease' [68].
- (b) As a result of Vantage's commitment to take a new lease, 'there was a lack of urgency in finalising the lease and licence documentation'. Vantage remained in possession 'and the parties saw no need to prioritise completion of the documentation' prior to the expiration of the Original Lease as renewed. The parties were 'still negotiating on the terms of the formal documentation' after the Original Lease as renewed had expired [68].
- (c) The fact that 'the acceptance of the proposal constituted an agreement for lease and not a lease itself explains why initially the rental invoice was under the old rental'. This was consistent with Mr Loneragan's explanation in evidence that 'the old rental was charged pending a formal lease document being executed'. It was not unreasonable for Priolo to demand an adjustment of rent 'once the negotiations as to the terms of the formal lease and car bay licence were dragged out by Vantage' in that 'Vantage was occupying the premises as a result of the agreement for lease'. Significantly, Mr Walker on behalf of Vantage 'did not contest the liability to pay the adjusted rent but only the calculation' [68].
- (d) It was significant that the revised proposal commenced, 'We confirm the Lessor is prepared to proceed with a new lease on the

basis of the following proposal'. This was different from the original proposal which commenced, 'We are pleased to provide the following proposal for *consideration*' (emphasis added). This change suggested that the revised proposal 'was intended to be in the nature of a contractual offer'. Consistent with this analysis, Mr Walker in his email of 3 June 2009 used the 'contractual' terms 'offer' and 'acceptance' when he stated, 'We will be able to accept the offer tomorrow' [68].

- (e) Notwithstanding the typographical error in the 'documentation clause in the [revised] proposal', the clause clearly meant that the agreement arising from the acceptance of the revised proposal was 'to be documented'. This was consistent with the parties 'having concluded a legally binding agreement which was then to be documented by a more elaborate agreement'. The other provisions of the revised proposal 'clearly contemplated further negotiations before finalising this documentation'. However, 'this further negotiation [was] not fatal to the contention of a binding agreement in the form of an agreement for lease'. Although it was contemplated that further negotiations would take place, 'the parties had agreed to the essentials of a lease ... [and, in fact,] the agreed terms went beyond the essentials'. Further, 'the scope for negotiations was narrowed by the provision agreed to by Vantage that the documentation of the agreement was to utilise the lessor's standard lease and licence'. Although a copy of Priolo's standard lease and licence was not attached to the revised proposal, his Honour accepted the evidence of Anthony Priolo (a director of Priolo) at the trial that 'there were standard lease and licence documents' and his Honour inferred that 'these were used ... in the preparation of the draft document submitted to Vantage for approval' [68].
- (f) There was 'a sufficient meeting of minds for there to be a binding agreement for lease' [68].

54 The trial judge noted and rejected four points raised by counsel for Vantage in support of his submission that there was 'a lack of meeting of minds' [68]. His Honour said:

- (i) Firstly, it was contended that the length of the draft lease and licence documents prepared by the solicitors for Priolo ... demonstrated that there were many matters outstanding. However this is not unusual when heads of agreement are entered into by parties to a commercial transaction. As I have already

noted, the proposal document contained substantially more than the essential terms of a lease. There was nothing in the draft lease and licence documents which contradicted the proposal document. Further, there was nothing in the terms of the draft lease and licence documents which was identified by counsel for Vantage as unusual. In my opinion both the length and the terms contained in the lease and licence documents were not extraordinary. This is supported by Vantage ultimately only complaining about the reinstatement clause. Again, in relation to the reinstatement clause, there was no complaint that it was inconsistent with the proposal document.

- (ii) Secondly, counsel for Vantage relied upon an answer given by Mr Priolo in cross-examination as to whether he would allow a tenant to remain in possession for three years in circumstances where the parties were unable to agree and sign a final lease document. When Mr Priolo was first asked the question he said that he would follow the advice of his solicitors and, then later when further pressed, stressed that he would always be able to reach an agreement. Finally when further pressed he stated he would not allow the tenant to remain. The first thing that should be noted about this evidence is that the subjective understandings or intentions of Mr Priolo are irrelevant, it is the intention of the parties ascertained objectively ... Further, in my view the questions asked of Mr Priolo were too broad to be helpful to ascertain objectively the intention of the parties. A situation where the parties are unable to reach agreement as to the provisions to be included in a more formal document could cover a multitude of circumstances. For example, if one party simply refused to negotiate then this may constitute a repudiation of the agreement for lease and entitle the other party to terminate the agreement for lease and seek immediate possession. Ultimately I am satisfied that initially Priolo ... would seek legal advice, as stated by Mr Priolo, and what action Priolo ... took would be dependent upon that legal advice.
- (iii) Thirdly, counsel for Vantage also relied upon the uncertainty created by the failure of the proposal to provide when and how the rental was payable. However, when and how the rental is payable is not an essential term and, as recognised by counsel for Vantage, in the absence of express agreement, the law provides it shall be payable monthly in arrears. However, in reality, when and how the rental was to be paid was not an issue between the parties so that when a draft lease and a draft car bay licence were presented providing for the rental and licence fees to be payable monthly in advance, no objection was raised to this provision.
- (iv) Fourthly, counsel for Vantage contended that as a result of the error in the proposal concerning the car bay licence rate there was not a

meeting of minds on an essential issue. I reject this. There was a meeting of minds on this issue as I find that, notwithstanding the error, Vantage was prepared to accept a licence fee of \$375 per bay per month as evidenced by the fact that Vantage raised no objection when the error was corrected in the draft lease and licence documents submitted to it. For reasons which I will give later in this decision, this was a situation where a rectification of the proposal document should be allowed [68].

55 Next, his Honour dealt with a number of other submissions advanced on behalf of Vantage.

56 Counsel for Vantage sought to rely upon a decision by Mr Priolo and representatives of Savills at a meeting on 17 December 2009 to instruct solicitors to advise whether 'make-good' expenses could be claimed under the Original Lease as renewed or the alleged agreement to lease or the unsigned draft lease agreement. According to counsel for Vantage, this decision demonstrated that Priolo 'did not believe a binding contract had been entered into by way of an agreement for lease'. The trial judge held that, by the decision in question, Priolo was 'simply prudently seeking legal advice about the difficult legal issue as to whether a binding agreement for lease existed' [69].

57 Counsel for Vantage also sought to rely upon the provision in the revised proposal which stated that the revised proposal was submitted 'subject to the formal approval of the Lessor'. There was no evidence that Priolo gave any relevant formal approval after Vantage had accepted the revised proposal and before Vantage repudiated the alleged agreement to lease. According to counsel for Vantage, 'a formal approval by Priolo ... was required before the accepted revised proposal became legally binding' [70]. His Honour held that the relevant provision in the revised proposal merely related to an approval of that proposal. It did not require 'an approval in the form of executing a final formal lease document' [71]. Also, his Honour held that 'once an express authority was given by Mr Priolo to present the [revised] proposal, this express authority vitiated any need for Priolo ... to later ratify the proposal by giving formal approval' [74]. Further, his Honour held that 'even if a ratification was required in the form of a formal approval, the withdrawal of Vantage before ratification [did] not cancel what otherwise would be an enforceable contract'. In his Honour's view, Priolo 'did ratify the agreement by the letter from its solicitors dated 21 October 2009', and that ratification was 'within a reasonable period given the delays that had been created by Vantage in not dealing with the draft lease and licence documents' [75]. In addition, his Honour held that 'the wording in the

revised proposal "the Lessor is prepared to proceed with a new lease" ... leads me to conclude that Priolo ... was not reserving the right to withdraw from the proposed lease and, therefore, this was not a case where there was no consideration provided' [76].

58 The trial judge expressed his satisfaction that 'the agreement for lease, having adequately set out the essential terms, was sufficiently certain to be enforceable' [78].

59 His Honour granted Priolo leave, at the conclusion of the trial, to amend its statement of claim to plead a claim for rectification of the revised proposal so as to correct the error in relation to the licence fee payable for the car bays.

60 The trial judge said the error in the revised proposal was never in dispute in the proceedings. Mr Walker gave evidence that Vantage understood, on receipt of the revised proposal, that Savills had made a mistake in preparing the revised proposal. Mr Walker's evidence was that 'Vantage took the attitude that, as it was paying what it considered to be a premium rate of rental, it should not alert [Priolo] to the mistake'. His evidence was to the effect that Vantage's attitude was 'okay we will accept that mistake on their behalf and we won't mention it'. His Honour said it was not disputed that Vantage's conduct in this respect constituted 'a sharp practice' [86].

61 The mistake in the revised proposal in relation to the car bay licence fee was corrected before the draft lease and licence agreements were sent to Vantage. Vantage did not at any time object to the correction of the mistake. There were discussions between Mr Postma and Mr Walker about the provisions in the draft documents, but Mr Walker did not at any time raise for discussion the amount of the car bay licence fee. On 3 September 2009, Mr Postma sent an email to Mr Walker which clearly stated that the car bay licence fee was \$375 per bay per month. Mr Walker said in evidence that by this time 'everyone recognised a mistake had been made in the [revised] proposal and the licence fee was now \$375 per bay per month' [87].

62 His Honour held that, in all the circumstances, 'it would be unconscionable not to allow ... rectification given the reprehensible conduct of Vantage in not alerting Savills to the known error and the acceptance by Vantage of the correction once this was made in the draft lease and licence documents forwarded to Vantage for its consideration' [88]. Accordingly, his Honour ordered rectification of the revised

proposal, as sought by Priolo, and, as a result, the agreement to lease included the rectified term [88].

The grounds of appeal

63 Vantage relies on three grounds of appeal.

64 Ground 1 alleges that the trial judge erred in law and fact in finding that, by Vantage accepting the revised proposal, 'the parties intended to enter into a binding agreement for lease and that ... there was a sufficient meeting of minds for there to be a binding agreement for lease'.

65 Ground 2 alleges that his Honour erred in law in allowing Priolo to amend its statement of claim 'to plead a rectification of the [revised] proposal' after each party had closed its case.

66 Ground 3 alleges that, if ground 2 is not made out, then his Honour erred in law 'in allowing a claim for rectification of the [revised] proposal'.

Ground 1: the relevant issues

67 The relevant issues raised by ground 1, as developed at the hearing of the appeal, are as follows.

68 First, is evidence that was adduced, without objection, at the trial as to the uncommunicated subjective intention of each of Priolo and Vantage relevant in determining whether the parties intended that, upon Vantage accepting the revised proposal, there should be a concluded and binding agreement to lease the Premises?

69 Secondly, did the parties intend that, upon Vantage accepting the revised proposal, there should be a concluded and binding agreement to lease the Premises?

70 The parties were not in dispute about whether, upon Vantage accepting the revised offer, the parties had reached agreement upon such terms as were legally necessary to constitute a contract. At the hearing of the appeal, counsel for Vantage conceded that all essential terms required by law to create a valid agreement to lease were specified in the revised proposal (appeal ts 11 - 14).

Ground 1: the evidence adduced at the trial

71 At the trial, counsel for Priolo called Mr Postma, Mr Loneragan,
Graham Kennedy, a certified practising valuer, and Mr Priolo.

72 An extraordinary feature of the trial was that counsel for Vantage,
without objection, cross-examined Mr Postma and Mr Priolo on their
construction of various provisions of the revised proposal.

73 Mr Postma gave the following evidence, without objection:

- (a) This exchange occurred between counsel for Vantage and
Mr Postma during cross-examination:

[The revised proposal] says: The lessor's standard lease and
licence shall be used to document and [sic] agreement between the
parties shall be prepared by the lessor's solicitors, and the lessee
shall be responsible for the lessor's reasonable costs associated with
preparing, negotiating and executing the legal documentation. So it
was always contemplated there would be negotiation, wouldn't
there, between the parties about the terms of that standard lease---
Yes.

Priolo didn't have the right to just impose the standard lease on
them and say, 'Here it is. You need to sign it.' There was going to
be negotiation and discussion about that---Correct (ts 27).

- (b) A little later, this exchange occurred between counsel for Vantage
and Mr Postma during cross-examination:

And what you say [in the email giving instructions to Priolo's
solicitors] is: On behalf of our mutual client, that's Priolo, can you
please prepare draft lease and car licence documentation for review
by the parties? Once again, you understood that they had to be
reviewed, negotiated and agreed if possible, those agreements---
Yeah. If nothing else, to make sure that the commercial terms
reflect what's in the offer and that everyone's comfortable with that
wording.

HERSHOWITZ, MR: No. Not only the commercial terms but
everything in that lease-----Correct.

- - - was acceptable. Isn't that correct ... -----Yes (ts 34 - 35).

- (c) Mr Postma said he had a telephone conversation with Mr Walker
during which the 'make-good' provision in the draft lease prepared
by Priolo's solicitors was discussed (ts 18 - 19).

- (d) Mr Postma said he had specific discussions with Mr Walker 'on the make-good provision' in the draft lease (ts 39). Mr Walker told Mr Postma that the make-good provision 'was more onerous' (ts 39). Mr Postma accepted that it was 'a much more extensive clause' than the make-good provision in the Original Lease (ts 39).
- (e) Mr Postma said the 'make-good' provision in the draft lease reflected 'a change' to leasing agreements entered into by Priolo after it had incurred 'significant losses' in previous leasing arrangements (ts 50).
- (f) Mr Postma said that, as at 11 September 2009, the make-good provision in the draft lease prepared by Priolo's solicitors had not been agreed (ts 50, 52 - 53).
- (g) Mr Postma said he did not recall having a conversation with Mr Walker about whether the amount of the fee for the car bays, as specified in the revised proposal, was wrong (ts 35). Mr Postma added that he corrected the amount of the fee for the car bays 'to reflect what [he] thought the intention of the parties was' (ts 35).
- (h) Mr Postma said that when he gave the revised proposal to Vantage he did not provide Vantage with a copy of Priolo's standard lease and licence agreements (ts 32).
- (i) Mr Postma said that Savills was not paid its fee by Priolo for locating a lessee until the lessee executed formal documents (ts 40, 53).

74 It is unnecessary to refer to the evidence of Mr Loneragan or Mr Kennedy.

75 Mr Priolo gave the following evidence, without objection:

- (a) Mr Priolo said Priolo had standard lease and licence agreements and those documents were with its solicitors (ts 111).
- (b) This exchange occurred between counsel for Vantage and Mr Priolo during cross-examination:

Would you allow, as a director of Priolo, a tenant to remain in premises on a long term basis, say three years or more, in circumstances where it was not possible for the parties to execute a

formal lease and licence document because they couldn't agree things---We - we - we manage to---

Or would you not-----No.

- - - that's the question---No. No, I wouldn't (ts 113).

- (c) A little later, this exchange occurred between counsel for Vantage and Mr Priolo during cross-examination:

The make-good part in your standard lease was pretty important to you because of what happened previously. You were ... quite big on ensuring that you, as landlord, had the necessary protections you wanted---We try ... to educate our tenants as to the requirement, yes.

It was important to you as a very important part of leasing, is that right---It's important to both parties, yes (ts 126).

76 Vantage called Mr Walker and Glen Silver, who was employed by Vantage in or about 2009, as witnesses.

77 Mr Walker gave the following evidence, without objection:

- (a) Mr Walker referred to a discussion he had with Mr Postma about the 'make-good' provision in the draft lease prepared by Priolo's solicitors:

I then discussed the make-good provisions and I said, 'Look, in the [revised proposal] we agreed on what's called fair wear and tear ... we're not responsible for the landlord's infrastructure and equipment. He's responsible for that except for fair wear and tear. This new document that comes across says that Vantage is responsible for everything. If it's ... through normal use of the assets of Priolo's, we're responsible to repair or maintain or replace, it was air conditioning, heating, lighting, the kitchenette, the electricity' (ts 162 - 163).

- (b) Mr Walker said there were 'three clauses [in the draft lease prepared by Priolo's solicitors] that were critical' (ts 163). He then elaborated:

[t]he three clauses were ... clause 16, I think it was which was the fire extinguisher, clause 18 which was the repairs and maintenance clause and clause 26 was the yielding up provision and these three are what determines the make-good provisions of the lease (ts 163).

- (c) Mr Walker summarised in cross-examination, by reference to his email of 7 September 2009 to Mr Loneragan and Mr Postma, the outcome of the negotiations on the make-good provision in the draft lease prepared by Priolo's solicitors:

We started with the [revised proposal] which was based upon fair wear and tear. The ... proposed lease that came across was completely different from that where all of the responsibilities that were on ... the landlord side had been moved across to us. Now, what this is asking you to do was to take these new clauses, delete a couple of the clauses and bring it back to a fair wear and tear provision and it was impossible to do that.

...

You tried that, did you---Tried it and couldn't do it. Tried many times, just couldn't do it (ts 185).

78 It is unnecessary to refer to the evidence of Mr Silver.

Ground 1: Vantage's submissions

79 Counsel for Vantage relied on the failure of the parties to agree upon the 'make-good' provision in the draft lease prepared by Priolo's solicitors and the disconformity between the fee of \$375 per car bay per annum specified in the revised proposal, on the one hand, and the fee of \$375 per car bay per month specified in the draft licence agreement prepared by Priolo's solicitors, on the other.

80 As to the 'make-good' provision, counsel submitted:

- (a) it was not in dispute at the trial that the parties had been unable to agree upon the 'make-good' provision in the draft lease; and
- (b) both Priolo and Vantage considered that the 'make-good' provision was, from a commercial perspective, an important term.

81 Counsel sought support for his case on this point from the following evidence at the trial:

- (a) the draft lease stipulated that Vantage was responsible for all repairs and maintenance to the Premises and was required to repair or replace airconditioning, heating and lighting appliances without an exception for fair wear and tear;

- (b) Vantage was of the view that the 'make-good' provision in the draft lease imposed unacceptable obligations on it;
- (c) Mr Priolo was of the view that 'make-good' or reinstatement clauses were 'a very important part of leasing' and were important to 'both parties' (ts 126);
- (d) the 'make-good' provision in the draft lease was particularly important to Priolo because it had previously suffered substantial losses when lessees had vacated its properties and the provision was designed specifically to ensure that Priolo did not suffer losses of that kind again;
- (e) Mr Postma was aware that the 'make-good' provision in the draft lease was more extensive than the 'make-good' provision in the Original Lease;
- (f) Mr Postma said it was always contemplated that there would be negotiations between the parties about the terms of the standard lease referred to in the revised proposal, and the parties had to be comfortable not only with the commercial terms but everything in the lease;
- (g) by its email of 11 September 2009, Savills on behalf of Priolo explained to Vantage why its proposed alternative 'make-good' provision was unacceptable and informed Vantage that Priolo was prepared to negotiate on individual items which may be unduly onerous from Vantage's perspective;
- (h) Mr Priolo said that unless a formal lease and licence was concluded and executed he would not permit a lessee to remain in possession of the Premises for a period of three years or more;
- (i) Mr Postma said that Savills would not be paid a fee for locating a lessee until a formal lease had been concluded and executed; and
- (j) when Vantage accepted the revised offer it was not aware of the provisions of Priolo's standard lease and licence.

82 According to counsel for Vantage, the failure of the parties to agree upon the 'make-good' provision and the consequent failure by the parties to execute formal lease and licence agreements should have led the trial judge to find that 'there was no meeting of minds' and 'no binding agreement for lease had been concluded'.

83 As to the disconformity in relation to the fee for the car bays between the revised proposal, on the one hand, and the draft licence agreement, on the other, counsel submitted:

- (a) Priolo's case at the trial was that it had entered into a concluded and binding agreement with Vantage under which Vantage agreed, amongst other things, to pay a fee of \$375 per bay per month;
- (b) the revised proposal offered to make available car bays at the rate of \$375 per bay per annum;
- (c) by 10 June 2009, there could have been 'no meeting of minds' that Vantage would pay a fee of \$375 per bay per month; and
- (d) Mr Postma said in evidence that he could not recall raising with Mr Walker the fee payable for the car bays and he decided to include the rate of \$375 per bay per month in the draft licence agreement to reflect what he considered was the intention of both parties.

84 According to counsel for Vantage, his Honour should have found that the necessity to rectify the revised proposal in relation to the fee payable for the car bays was 'a factor against [there being] a binding agreement for lease'.

85 Counsel maintained that:

- (a) His Honour erred in finding that Vantage's understanding of its right to possession was a factor supporting the conclusion that the parties had intended to enter into a concluded and binding agreement for lease. The subjective understanding of Vantage was irrelevant.
- (b) His Honour erred in finding that the difference between the commencement of the wording in the revised proposal and the commencement of the wording in the email of 11 May 2009 was significant. It was never in issue that the revised proposal was 'in the nature of an offer' and his Honour's point obscured analysis of the true question, namely whether the parties intended that, upon Vantage accepting the revised proposal, there should be a concluded and binding agreement to lease the Premises.
- (c) His Honour erred in finding that it was to be inferred that the documents used by Priolo's solicitors in the preparation of the

draft lease and licence agreements were Priolo's standard lease and licence documents. This finding was against the weight of the evidence. The evidence established that the 'make-good' provision in the draft lease was specifically incorporated 'to cater for the bad experiences Mr Priolo had in the past when tenants vacated premises and changes were made to the standard lease at [that] point in time'. Also, there was no evidence that the draft lease and licence agreements were Priolo's standard lease and licence; indeed, there was evidence in the email of 1 July 2009 from Priolo's solicitors to Mr Postma that the draft lease was not the standard lease used by Priolo. Further, Mr Postma's instructions to Priolo's solicitors to prepare the formal documents did not refer to a standard lease and licence.

86 At the hearing of the appeal, counsel for Vantage accepted that his argument in relation to ground 1 was in effect that, on an objective assessment, after having regard to all relevant facts and circumstances in the relevant commercial context, neither Priolo nor Vantage was prepared to bind itself to a new lease of the Premises and a new licence of the car bays for three years on the terms and conditions set out in the revised proposal (appeal ts 18).

Ground 1: relevant legal principles

87 Priolo's contention is that the revised proposal, as accepted by Vantage, was within the so-called fourth class of case (additional to the three classes identified by Dixon CJ, McTiernan & Kitto JJ in *Masters v Cameron* [1954] HCA 72; (1954) 91 CLR 353, 360 - 362) which McLelland J formulated in *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd* (1986) 40 NSWLR 622, 628 on the basis of the High Court's observations in *Sinclair, Scott & Co Ltd v Naughton* [1929] HCA 34; (1929) 43 CLR 310, 317.

88 In *Sinclair, Scott & Co*, Knox CJ, Rich and Dixon JJ said in essence that there would be an enforceable contract where 'the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms' (317).

89 McLelland J's decision in *Baulkham Hills* was affirmed on appeal. See *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631. However, the Court of Appeal did not adopt the

nomenclature of the so-called fourth class. McHugh JA (Kirby P & Glass JA agreeing) held that 'the decisive issue is always the intention of the parties which must be objectively ascertained from the terms of the document when read in the light of the surrounding circumstances' (634).

90 The so-called fourth class has been recognised in a number of cases decided after *Baulkham Hills*. See, for example, *Tern Minerals NL v Kalbara Mining NL* (1990) 3 WAR 486, 494 - 495 (Ipp J); *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* [2000] WASCA 27; (2000) 22 WAR 101 [24] (Ipp J, Pidgeon J agreeing); *Laidlaw v Hillier Hewitt Elsley Pty Ltd* [2009] NSWCA 44 [86] - [88] (Handley AJA).

91 It has been suggested, however, that:

- (a) the *Baulkham Hills* case is in substance within the second class in *Masters v Cameron*, namely 'a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document' (360); and
- (b) the so-called fourth class does not cover any ground that is not covered by the first and second classes in *Masters v Cameron*.

See Tolhurst GJ, Carter JW and Peden E, 'Masters v Cameron - Again!' (2011) 42 *Victoria University Wellington Law Review* 49, 53, 58.

92 In *Godecke v Kirwan* [1973] HCA 38; (1973) 129 CLR 629, Gibbs J examined the second class in *Masters v Cameron* and said:

In these remarks the Court was not, in my opinion, intending to exclude from the class a case in which the formal document, when executed, would include terms additional to those already expressed, provided that the additional terms did not depend on further agreement between the parties (648).

Those comments indicate that the second class includes cases where the contemplated formal document may contain additional terms.

93 In *Sagacious Procurement Pty Ltd v Symbion Health Ltd (formerly Mayne Group Ltd)* [2008] NSWCA 149 [118] and *Tasman Capital Pty Ltd v Sinclair* [2008] NSWCA 248 [26], Giles JA noticed the academic challenge to the existence of the so-called fourth class, but his Honour found it unnecessary to consider the point.

94 Similarly, in the present case, it is unnecessary to enter into the debate over the so-called fourth class.

95 Vantage's contention is that the revised proposal, as accepted by Vantage, was within the third class in *Masters v Cameron*, namely 'one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract' (360).

96 The fundamental question in the present case is whether the parties intended that, upon Vantage accepting the revised proposal, there should be a concluded and binding agreement to lease the Premises and take a licence in respect of six car bays. In other words, did the parties intend that, upon Vantage accepting the revised proposal, they would be bound immediately and exclusively by the express and any implied terms of the revised proposal, while expecting to execute formal lease and licence agreements in substitution for the earlier agreement which would contain, by consensus and after negotiation, additional terms? This issue is not the same as, although in some cases it may be closely related to, whether the parties have reached agreement upon such terms as are, in the circumstances, essential as a matter of law to constitute a contract. See *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540, 548 (Gleeson CJ, Hope & Mahoney JJA agreeing). The relevant intention is intention to contract, and not what the parties intended by the terms of the alleged concluded and binding agreement. See *Anaconda Nickel* [26]. As I have mentioned, in the present case the parties are agreed that, upon Vantage accepting the revised offer, they had reached agreement upon such terms as were legally necessary to form a contract.

97 There is no doubt that in Australia the objective theory of contract underpins the law relating to the formation, construction and interpretation of contracts. See *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407; (2009) 76 NSWLR 603 [4] (Allsop P) and the cases there cited.

98 In *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; (2002) 209 CLR 95, Gaudron, McHugh, Hayne and Callinan JJ emphasised:

Because the search for the 'intention to create contractual relations' requires an objective assessment of the state of affairs between the parties (*Masters v Cameron* (1954) 91 CLR 353 at 362, per Dixon CJ, McTiernan and Kitto JJ; *ABC v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 548 - 549, per Gleeson CJ) (as distinct from the

identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any prescriptive rules. Although the word 'intention' is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened (*Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 348 - 353, per Mason J; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436; 186 ALR 289). It is not a search for the uncommunicated subjective motives or intentions of the parties [25].

99 So, whether a completed and binding agreement has been made is to be assessed objectively, and the search for an intention to create contractual relations is not a search for the uncommunicated subjective motives or intentions of the parties. In other words, '[i]t is not the subjective thing known as meeting of the minds, but the objective thing, manifestation of mutual assent, which is essential to the making of a contract': *Williston on Contracts*, 3rd ed, vol 1, par 21. Those propositions accord with the 'general test of objectivity [that] is of pervasive influence in the law of contract': *Commonwealth Games* (549), cited with approval in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55; (2004) 218 CLR 471 [34] (Gleeson CJ, McHugh, Kirby, Hayne & Callinan JJ).

100 In *Ermogenous*, Gaudron, McHugh, Hayne and Callinan JJ stated in effect that the subject matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances may be taken into account in determining whether a completed and binding agreement has been made [24] - [25]. See also *South Australia v The Commonwealth* [1962] HCA 10; (1962) 108 CLR 130, 154 (Windeyer J); *Placer Development Ltd v The Commonwealth* [1969] HCA 29; (1969) 121 CLR 353, 367 (Windeyer J).

101 The surrounding circumstances, for this purpose, include the dealings and communications between the parties over a period of time and the commercial circumstances, known to the parties, surrounding those dealings and communications. See *Commonwealth Games* (550); *Allen v Carbone* [1975] HCA 14; (1975) 132 CLR 528, 531 - 532 (Stephen, Mason & Murphy JJ); *Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd* (1979) 1 BPR 9251, 9255 (McLelland J).

102 It is the objective intention of the parties which must be ascertained even where they expressly contemplate, either in an informal document or in communications between them when the informal document is prepared, that a formal contract is to be executed. As McHugh JA noted in *GR Securities*:

[T]he decisive issue is always the intention of the parties which must be objectively ascertained from the terms of the document when read in the light of the surrounding circumstances: *Godecke v Kirwan* (1973) 129 CLR 629 at 638; *Air Great Lakes Pty Ltd & Ors v KS Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 at 332 - 334, 337. If the terms of a document indicate that the parties intended to be bound immediately, effect must be given to that intention irrespective of the subject matter, magnitude or complexity of the transaction.

Even when a document recording the terms of the parties' agreement specifically refers to the execution of a formal contract, the parties may be immediately bound. Upon the proper construction of the document, it may sufficiently appear that 'the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms': *Sinclair Scott & Co Ltd v Naughton* at 317 (634).

103 In *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 65; (2007) 69 NSWLR 603, Campbell JA (Mason P agreeing) said that, for the purpose of deciding whether parties have made a concluded and binding agreement, the 'objective intention' of the parties which the court seeks to ascertain is 'the intention that a reasonable person, with the knowledge of the words and actions of the parties communicated to each other, and the knowledge that the parties have of the surrounding circumstances, would conclude that the parties had, concerning the subject matter of the alleged contract' [262]. The authorities his Honour cited in support of that proposition included the decisions of the High Court in *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165 in relation to the proper construction of a contract. Similarly, in *Quarante Pty Ltd v Owners Strata Plan No 67212* [2008] NSWCA 258, Sackville AJA (Campbell & Bell JJA agreeing) said the principles in *Pacific Carriers* and *Toll* concerning the proper construction of a contract apply also where the question is whether the parties intended to make a concluded and binding agreement [87]. Those observations in *Ryledar* and *Quarante* are consistent with the statement by Gaudron, McHugh, Hayne and Callinan JJ in *Ermogenous* that the word 'intention', in the context of an intention to create contractual relations, is used in the same

sense as it is used in other contractual contexts, and describes 'what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened (*Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 348 - 353 per Mason J; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436; 186 ALR 289)' [25].

104 There are statements in some Australian cases, especially in New South Wales, to the effect that evidence of the actual or subjective intention of each party is, at least in some circumstances, relevant and admissible in determining whether the parties made a concluded and binding agreement. For example, in *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309, Mahoney JA said:

The proper view is, in my opinion, that the existence of a contract is a consequence which the law imposes upon, or sees as a result of, what the parties have said and done. Actual subjective intention to contract is a factor which the law takes into account in determining whether a contract exists but it is not, or not always, the determining factor (330).

105 In *Commonwealth Games*, Gleeson CJ, after explaining that whether a completed and binding agreement has been made involves an objective determination of the intention of the parties from a consideration of the communications exchanged by them in the context of their dealings over a period of time, including the commercial circumstances surrounding the exchange of communications, noted in relation to the admissibility of other extrinsic evidence:

The position is by no means so clear, however, in connection with internal memoranda, communications by one or other of the parties with some third party, or statements as to subjective intention made by individuals in the course of giving evidence (550).

106 The statements in some Australian cases about the receipt of evidence of the actual or subjective intention of each party must be examined carefully in view of the clear and emphatic decisions of the High Court on the primacy of the objective theory of contract including, in particular, the observations in *Ermogenous* [24] - [25].

107 However, there is undoubtedly a category of exceptional cases where evidence may be given as to actual or subjective intention in determining whether the parties intended to contract; for example, evidence that:

- (a) during the negotiations the parties or their representatives were jesting, joking, engaged in a dramatic performance or doing or saying things that were not intended to be taken at face value;
- (b) the 'contract' was a sham; or
- (c) the actual state of mind of one or more of the parties was materially affected by mistake, misrepresentation, duress or undue influence.

See *Film Bars* (9255); *Air Great Lakes* (318 - 319) (Hope JA), (336 - 337) (McHugh JA); *Commonwealth Games* (550); *Quarante* [88].

108 In *Ryledar*, Campbell JA suggested that this category of exceptional cases is 'an application of the objective theory of contract, not an exception to it':

[A] subjective intention not to contract, not communicated in any way to the person with whom one is dealing, and not ascertainable from the context within which one is speaking or acting, is not sufficient to stop a contract being entered. Thus, the only reason why it can be said that the subjective intention of the person who is playacting or joking is taken into account is because a reasonable person, in the context in which the words in question are communicated, would realise that they were not to be taken at face value [266].

109 It may be that the rationale for the category of exceptional cases is the prevention of the unconscientious reliance by a party upon a document or a manifestation of apparent agreement which does not represent or express the common intention of the parties. See, in the context of the remedy of rectification, the reasoning of Campbell JA in *Ryledar* [309] - [315]. See also *Shaw v Bindaree Beef Pty Ltd* [2007] NSWCA 125 [98] (Basten JA).

110 It is well-established that a court may take into account the dealings and communications between the parties after, as well as before, the formation of an alleged concluded and binding agreement, for the purpose of determining, objectively, whether they intended to form such an agreement. See *Commonwealth Games* (547 - 548, 550); *Geebung Investments Pty Ltd v Varga Group Investments No 8 Pty Ltd* (1995) 7 BPR 14,551 [14,562] - [14,563] (Kirby P); *Brambles Holdings Ltd v Bathurst City Council* [2001] NSWCA 61; (2001) 53 NSWLR 153 [25] (Heydon JA).

111 As Giles JA (Hodgson & Campbell JJA agreeing) observed in *Sagacious Procurement*, the juridical basis on which subsequent dealings and communications between the parties bear upon their contractual intention may not be settled [102]. His Honour referred to comments by McLelland J in *Film Bars* (9255 - 9256), Gleeson CJ in *Commonwealth Games* (548) and Kirby P in *Geebung Investments* [14,569]. Giles JA then said:

I respectfully suggest that subsequent communications are not simply aids to interpretation, or a source of information as to matters with which a concluded contract should deal. Their probative value may be more direct. To repeat, the objective intention of the parties is fact-based, and found in all the circumstances. That in their subsequent communications the parties have continued in negotiations, or have expressed the common understanding that they are not legally bound unless and until a formal contract is executed, is of itself probative as to their contractual intention: see *Howard Smith and Co Ltd v Varawa* [[1907] HCA 38; (1907) 5 CLR 68], stating simply that any statements or conduct inconsistent with the existence of a concluded contract are relevant [105].

112 It is unnecessary in the present case to pursue that issue.

113 Plainly, whether in a particular case it should be inferred, on an objective assessment, that parties intended to make a concluded and binding agreement must depend on the facts and circumstances of the case.

Ground 1: its merits

114 Priolo's case at trial was that on 10 June 2009 Vantage accepted the revised proposal. The acceptance was embodied in the two emails sent by Mr Walker to Mr Postma on that date. In the first email Mr Walker said Vantage was 'happy with the terms of the [revised] proposal' and he had emailed Deugro 'and requested their acceptance of these terms in writing'. In the second email Mr Walker said he had received '[Deugro's] approval of the terms as well' and asked Mr Postma to '[p]lease proceed with wrapping this up'.

115 As to the first relevant issue raised by ground 1, in my opinion:

- (a) the evidence given by each of Mr Postma and Mr Priolo, without objection, as to his construction of various provisions of the revised proposal; and

- (b) the evidence given by each of Mr Postma, Mr Priolo and Mr Walker, without objection, as to his uncommunicated subjective views, motives or intentions,

was irrelevant in determining whether the parties intended that, upon Vantage accepting the revised proposal, there should be a concluded and binding agreement to lease the Premises and take a licence in respect of six car bays.

116 The irrelevant evidence included:

- (a) Mr Postma's uncommunicated explanations as to why the 'make-good' provision in the draft lease prepared by Priolo's solicitors had been included in the document and why the provision was different from the reinstatement provision in the revised proposal;
- (b) the uncommunicated subjective views of each of Mr Postma, Mr Priolo and Mr Walker about the 'make-good' provision in the draft lease and the alternative provision put forward by Vantage; and
- (c) Mr Priolo's uncommunicated subjective view that he would not permit 'a tenant to remain in premises on a long term basis, say three years or more, in circumstances where it was not possible for the parties to execute a formal lease and licence document because they couldn't agree things' (ts 113).

117 As to the second relevant issue raised by ground 1, in my opinion it is to be inferred, on an objective assessment, that upon Vantage accepting the revised proposal the parties intended that:

- (a) there should be a concluded and binding agreement to lease the Premises and take a licence in respect of six car bays;
- (b) the parties would be bound immediately and exclusively by the express and any implied terms of the revised proposal;
- (c) the concluded and binding agreement to lease the Premises and take a licence in respect of six car bays would in due course be superseded by formal lease and licence agreements to be prepared by Priolo's solicitors and executed by the parties; and

- (d) the formal agreements would be in the form of Priolo's standard lease and licence agreements, but those standard agreements would be amended to incorporate the express terms of the revised proposal and any other provisions which may, by negotiation, be agreed upon between the parties.

118 I am of that opinion for the following reasons.

119 First, as at 10 June 2009, when Vantage accepted the revised proposal, Vantage had been in occupation of the Premises as lessee since 1 July 2003. It was therefore very familiar with the Premises, including the standard of the fixtures, fittings and services (for example, the air conditioning, lifts and electrical appliances) and the suitability of the Premises for Vantage's business activities.

120 Secondly, as at 10 June 2009, when Vantage accepted the revised proposal, Priolo had been the owner of the Property and the lessor of the Premises since 21 December 2007. Vantage was therefore very familiar with the representatives of Priolo with whom it dealt (for example, Mr Postma). Vantage was in a position to make a decision, based on practical experience, as to whether Priolo and Savills were reliable and trustworthy commercial entities. Similarly, Priolo and its representatives were very familiar with the representatives of Vantage with whom they dealt and must have formed a view as to Vantage's reliability and trustworthiness as a lessee.

121 Thirdly, as at 10 June 2009, when Vantage accepted the revised proposal, the expiry date of its lease was 30 June 2009. As at 10 June 2009, Vantage had not identified any other office premises which it might lease and it was not endeavouring to locate alternative premises. Similarly, as at 10 June 2009, Priolo was not endeavouring to locate an alternative lessee for the Premises. If Vantage did not agree upon a new lease with Priolo by 30 June 2009, and it remained in occupation of the Premises after that date with Priolo's consent, Vantage would not have security of tenure. It would be holding over as a monthly tenant under the Original Lease as renewed.

122 Fourthly, as at 10 June 2009, when Vantage accepted the revised proposal, Vantage's sublessee, Deugro, had informed Vantage that it approved the terms of the revised proposal.

123 Fifthly, the revised proposal embodied all terms that were legally necessary to form a contract.

124 Sixthly, the duration of the new lease, as specified in the revised proposal, was three years commencing on 1 July 2009. This was, on any view, a short term lease of commercial premises. The duration of the new lease was identical to the duration of both the initial term and the renewed term of the Original Lease.

125 Seventhly, the revised proposal did not involve Priolo or Vantage accepting any provisions that were materially more onerous or materially less advantageous, from a legal or commercial perspective, than those contained in the Original Lease as renewed.

126 Eighthly, the revised proposal included an express term with respect to Vantage's obligation to reinstate or 'make-good' the Premises upon the expiry of the new lease. The provision stated:

[Vantage], if required by [Priolo] shall remove all fixtures, fittings, fitout, cabling etc and make good any damage occasioned by such removal.

[Vantage] shall repaint the premises with 2 coats of commercial quality paint in a colour approved by [Priolo].

[Vantage] shall professionally clean all carpets and repair and or replace any damaged carpets, fair wear and tear accepted [sic].

127 The failure of the parties to agree upon the 'make-good' provision in the draft lease prepared by Priolo's solicitors or the alternative provision put forward by Vantage is not inconsistent with an objective assessment that the parties intended that, upon Vantage accepting the revised proposal, there should be a concluded and binding agreement.

128 The consequence of the failure to agree upon the 'make-good' provision in the draft lease prepared by Priolo's solicitors or the alternative provision put forward by Vantage was that the parties were bound by the express term in the revised proposal with respect to Vantage's obligation to reinstate or 'make-good' the Premises and any other provisions with respect to repair, maintenance or reinstatement which might be implied.

129 Ninthly, the trial judge accepted Mr Priolo's evidence that Priolo had 'standard lease and licence documents' [68]. Vantage's grounds of appeal do not challenge his Honour's finding that Priolo did have standard lease and licence documents.

130 It is true that particular (viii) of ground 1 challenges his Honour's additional finding, by inference, that those documents were used by Priolo's solicitors in preparing the draft lease and licence agreements

submitted to Vantage for approval. However, if Priolo's standard lease and licence documents were not in fact used by Priolo's solicitors on this occasion, that failure may have been a breach of the revised proposal but it was not inconsistent with an objective assessment that the parties intended that, upon Vantage accepting the revised proposal, there should be a concluded and binding agreement.

131 Tenthly, on a proper construction of the revised proposal, the parties did not agree that, upon Vantage accepting the revised proposal and absent further or other agreement, the concluded and binding agreement would comprise the provisions in Priolo's standard lease and licence agreements, as amended and supplemented by the express terms of the revised proposal.

132 Rather, on a proper construction of the revised proposal, the provisions in the standard lease and licence agreements were to be merely a guide for the purpose of the parties' negotiations. This construction reflects the express language in the revised proposal with respect to 'Lease Documentation', namely that Vantage must pay Priolo's reasonable legal costs associated with 'preparing, *negotiating* and executing the legal documentation' (emphasis added).

133 Eleventhly, the trial judge was correct in finding that the word 'and' in the phrase, '[t]he Lessor's standard Lease and Licence shall be utilised to document and [sic] agreement between the parties', in that part of the revised proposal with respect to 'Lease Documentation', was a typographical error. The word 'any', rather than the word 'and', was intended. The requirement that Priolo's standard lease and licence documents be used to 'document any agreement between the parties' is not inconsistent with an objective assessment that the parties intended that, upon Vantage accepting the revised proposal, there should be a concluded and binding agreement. The words 'any agreement', properly construed, merely referred to the agreement that would be formed upon Vantage accepting the revised offer.

134 Twelfthly, the fact that the revised proposal stated that the licence fee for the six car bays was \$375 per bay per annum is not inconsistent with an objective assessment that the parties intended that, upon Vantage accepting the revised proposal, there should be a concluded and binding agreement. The stipulation of \$375 per bay per annum was binding on the parties unless Priolo could establish that the revised proposal should be rectified on the ground of unilateral mistake.

135 For the reasons I give in the course of considering grounds 2 and 3, the trial judge was correct in allowing Priolo to amend its statement of claim to seek an order for rectification of the revised proposal and in granting that relief. I merely note, in the context of ground 1, his Honour's unchallenged findings that Vantage understood, on receipt of the revised proposal, that the stipulation of \$375 per bay per annum (as opposed to \$375 per bay per month) was a mistake; Vantage was willing to accept a licence fee of \$375 per bay per month; Vantage did not object when the mistake was corrected in the draft licence agreement prepared by Priolo's solicitors; Vantage deliberately decided not to inform Priolo of the mistake; and the mistake in the revised proposal was never in dispute at the trial.

136 Thirteenthly, upon Vantage accepting the revised proposal, no matters of legal or commercial significance were left to future negotiations.

137 Fourteenthly, on a proper construction of the revised proposal as accepted by Vantage, the fact that subsequent negotiations between the parties may not culminate in the execution of formal lease and licence agreements did not affect the binding and enforceable character of the agreement made upon Vantage accepting the revised proposal.

138 I am satisfied that the factors I have mentioned, in combination, decisively outweigh any relevant countervailing factors. On an objective assessment, and after having regard to all relevant facts and circumstances in the relevant commercial context, both Priolo and Vantage were willing to and did bind themselves to a new lease of the Premises and a new licence in respect of six car bays on the terms set out in the revised proposal.

139 The subsequent negotiations, dealings and communications between the parties did not destroy the earlier concluded and binding agreement between them. In particular, the subsequent negotiations, dealings and communications did not operate to rescind or otherwise discharge the earlier agreement. See *Lennon v Scarlett & Co* [1921] HCA 42; (1921) 29 CLR 499, 509 (Knox CJ, Higgins & Starke JJ); *Film Bars* (9256).

140 Ground 1 fails.

Ground 2: Priolo's application for leave to amend its statement of claim

141 On 19 June 2013, after the close of each party's case at the trial, counsel for Priolo moved for leave to amend its statement of claim to seek

an order for rectification of the revised proposal to correct the mistake in relation to the licence fee payable for the car bays.

142 Counsel for Vantage opposed the application. He asserted that Vantage would be prejudiced by the amendment because, amongst other things, he would have taken a different approach to the evidence given at the trial and Vantage would have adduced further evidence (ts 277 - 282).

143 The trial judge was highly sceptical of counsel for Vantage's submission that Vantage would be prejudiced by the amendment (ts 277 - 283). Nevertheless, his Honour adjourned the hearing of the application and gave Vantage the opportunity to file and serve an affidavit dealing with the alleged prejudice.

Ground 2: Mr Walker's affidavit

144 On 24 July 2013, Vantage filed an affidavit of Mr Walker sworn 16 July 2013.

145 In the affidavit Mr Walker deposed in effect that if the amendment to the statement of claim had been made before Vantage closed its case, Vantage would have adduced evidence as to the history of negotiations between Vantage and Priolo's agent since 2006 (even though Priolo did not acquire the Property until late 2007), as to when Mr Walker first noticed the mistake in the revised proposal and as to the timing of negotiations for the new lease and their impact on 'the costs of the lease and on [Deugro]'.

146 Mr Walker also deposed that had the revised proposal contained 'a cost of the lease of \$545 per sq metre plus a monthly charge of \$375 for car bays', Vantage would not have accepted the revised proposal and '[n]egotiations on the cost of the rent and on the cost of [the] car bays would have continued': par 12.

Ground 2: the trial judge's ruling on the application for leave to amend

147 On 5 August 2013, after hearing further submissions from counsel for the parties, the trial judge granted Priolo leave to amend its statement of claim.

148 His Honour gave detailed reasons for his decision (ts 290 - 294). In particular, he rejected counsel for Vantage's contention, and Mr Walker's affidavit evidence, to the effect that Vantage would suffer relevant prejudice if the amendment were to be allowed. His Honour said:

Firstly, I do not accept that the issue of rectification raises a new evidentiary issue. The central issue of the trial was whether the parties had entered into a binding agreement. As to that question, it is relevant to consider the extent there was a meeting of minds on the terms of the alleged contract. This was acknowledged by counsel for [Vantage] in closing submissions at transcript 219. [Priolo's] claim was always that a meeting of minds had occurred, including that the licence fee would be \$375 per month per bay. [Vantage's] contention at the trial was that it did not agree to \$375 per bay per month. Relevant to that contention would be evidence that the rate of \$375 per bay per month would have been unacceptable to it. [Vantage] chose not to lead any evidence on this issue, that it would not have agreed to a car bay licence fee of \$375 per bay per month at trial. There appears to be a very good reason for this, and that goes to my second reason for rejecting the contentions of [Vantage].

Secondly, the contention of [Vantage] that it would have led evidence that it would not have accepted an amount of \$375 per bay per month is contrary to the evidence given at the trial. The evidence given during the trial was that [Priolo] corrected the error that had been made in the proposal document when a draft lease and licence was prepared. [Vantage] was aware of the correction. [Vantage] raised no objection to the correction. [Vantage] did not seek at that point of time to renegotiate the rental and licence fees. [Vantage] through Mr Walker indicated by its email dated 4 September 2009 that its only concern was the make good clause.

Thirdly, I've taken into account that the remedy of rectification is based upon unconscionability. Without finally deciding the issue of rectification, there appears to be a prima facie case of error and unconscionability if the rectification is not allowed. As acknowledged by counsel for [Vantage], the conduct of [Vantage] in not alerting [Priolo] was unacceptable commercial practice. The evidence of this was described by counsel for [Vantage] as unpalatable. Transcript 218. Not to allow the amendment to plead rectification would in my view reward this sharp practice of [Vantage]. I do not believe that that is in the interests of justice.

Finally, I take into account the rectification sought, if allowed, would leave [Priolo's] claim otherwise consistent with the claim as initially pleaded and argued (ts 292 - 293).

Ground 2: Vantage's submissions

149 Counsel for Vantage submitted that the trial judge made an error, in the exercise of his discretion, in allowing Priolo to amend its statement of claim 'to plead a rectification of the [revised] proposal', in that:

- (a) each party had closed its case;
- (b) there was no explanation from Priolo for the late amendment; and

- (c) Vantage was deprived of the opportunity properly and fully to canvass the issue of rectification with the witnesses.

150 According to counsel, the effect of allowing the amendment was 'to deprive [Vantage] of [the opportunity of properly] meeting the claim for rectification'.

Ground 2: its merits

151 It is unusual for an amendment to a statement of claim to be allowed after each party has closed its case at trial, but the timing of an application for leave to amend a pleading is not, of course, decisive. A judgment must be made, on the facts and circumstances of the particular case, as to where the interests of justice lie. No doubt the making of that judgment in a particular case will be informed by, amongst other things, the prejudice that would be suffered by each party if the amendment were to be allowed or refused.

152 It is true that Priolo did not file an affidavit in support of its application for leave to amend. However, counsel for Priolo, in his written submissions filed in support of the application and in the course of his oral submissions, accepted responsibility for the failure to appreciate the need to plead the claim at an earlier stage (ts 277). No objection was taken to counsel's explanation. It was reasonably open to the trial judge to accept that explanation without requiring it to be verified by affidavit. See *Cement Australia Pty Ltd v Australian Competition and Consumer Commission* [2010] FCAFC 101; (2010) 187 FCR 261 [46] - [50], [55] - [56] (Keane CJ, Gilmour & Logan JJ).

153 It was necessary, in the present case, for his Honour to evaluate Vantage's alleged prejudice by reference to the pleadings, the real issues in dispute at the trial, the evidence (including the admissions) made by the witnesses and the scope and object of the proposed amendment. His Honour, having presided over the trial, was well placed to deal with these issues.

154 The application for leave to amend involved the exercise of a judicial discretion. The trial judge's reasons for decision are persuasive. I am satisfied that his Honour's exercise of the discretion was not vitiated by a material error of law or fact. Further, after examining the trial record, his Honour's reasons and the submissions made on behalf of Vantage, I am satisfied that his Honour's decision to grant leave to amend was not unreasonable or plainly unjust.

155 Ground 2 is without merit.

Ground 3: the formulation of the ground

156 Ground 3 asserts that '[i]n the event that ground of appeal 2 is not upheld', then the trial judge 'erred in law in allowing a claim for rectification of the [revised] proposal'.

Ground 3: the trial judge's classification of Priolo's case for rectification

157 The trial judge referred to a passage in Spry ICF, *Equitable Remedies*, (8th ed, 2010), 608. His Honour said:

Spry *'Equitable Remedies'* (8th ed) at page 608 identifies three classes of cases where rectification may be granted:

1. Firstly, rectification may be granted where all parties to a document are under a concurrent mistake, that is, a common mistake at the time of its execution, as to the provisions that it contains.
2. Secondly, it may be granted where, although one party is not under a mistake as to the provisions in fact contained in a document, executes it in the knowledge that another party has executed it under a mistake as to those provisions, or other circumstances render it unconscionable that those provisions should not be rectified.
3. Thirdly, a court of equity may order rectification of documents where it is appropriate to do so pursuant to specific equitable doctrines, such as those that relate to trusts and to the enforcement of fiduciary duties [85].

158 A little later, after discussing the evidence in the present case and making findings of fact, his Honour concluded:

[T]he circumstances of this case fall within the second category of cases referred to in Spry *'Equitable Remedies'* and in all the circumstances it would be unconscionable not to allow the rectification given the reprehensible conduct of Vantage in not alerting Savills to the known error and the acceptance by Vantage of the correction once this was made in the draft lease and licence documents forwarded to Vantage for its consideration [88].

159 The trial judge therefore ordered rectification of the revised proposal as sought by Priolo.

Ground 3: Vantage's submissions

160 Counsel for Vantage argued that the second category of cases identified in Spry, *Equitable Remedies*, (8th ed, 2010), 608 applies 'to situations where one party who is not under a mistake as to the provisions of fact contained in a document executes that document'.

161 It was then submitted that, in contrast to cases within the second category, the revised proposal in the present case was not executed or signed by or on behalf of Vantage.

162 Accordingly, so it was submitted, Vantage's acceptance of the revised proposal 'did not result in a binding agreement and ... [Vantage] did not "execute" the [revised] proposal such that it can be rectified'.

163 At the hearing of the appeal, this court put to counsel for Vantage that his Honour's order for rectification was justified on the basis of the principles applicable to the rectification of an instrument on the ground of unilateral mistake (appeal ts 28). Counsel's response was that the present case '[was] not a unilateral mistake situation' (appeal ts 28). He then claimed that the revised proposal was not able to be rectified because it '[was] not an instrument' and, in addition, the revised proposal did not '[fit] within the requirements of a rectification as contemplated by [his Honour]' (appeal ts 29). Counsel said he had been unable to find any 'direct authority ... dealing with' the points he had made (appeal ts 29).

Ground 3: its merits

164 The object of the equitable doctrine of rectification is to reform an instrument where it is established, by clear and convincing proof, that when the instrument was executed the relevant party or parties, as the case may be, had an actual intention (if more than one party, a common intention) that was mistakenly expressed in the instrument. Equity may and does rectify instruments. It does not rectify bargains or transactions. See *Mackenzie v Coulson* (1869) LR 8 Eq 368, 375 (Sir William James VC).

165 Rectification therefore corrects a disconformity between an instrument, on the one hand, and the actual intention of the relevant party or parties (if more than one party, a common intention), as the case may be, when the instrument was executed, on the other, so that the instrument contains the provisions which the relevant party or parties actually intended it to contain. See *Bacchus Marsh Concentrated Milk Co Ltd (in liq) v Joseph Nathan & Co Ltd* [1919] HCA 18; (1919) 26 CLR 410,

427 (Isaacs J); *Maralinga Pty Ltd v Major Enterprises Pty Ltd* [1973] HCA 23; (1973) 128 CLR 336, 350 (Mason J, Menzies J agreeing); *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337, 346 (Mason J, Stephen J relevantly agreeing).

166 The jurisdiction to rectify may be exercised in respect of a broad range of instruments. It is not confined to bilateral or multilateral instruments. Rectification of a unilateral instrument (for example, a deed-poll or a declaration of trust) may be ordered if it is established that, by mistake, it does not accord with the actual intention of the party who made it. See *Wright v Goff* (1856) 22 Beav 207, 214; 52 ER 1087, 1090 (Sir John Romilly MR); *Re Butlin's Settlement Trusts* [1976] 1 Ch 251, 260 (Brightman J); *Racal Group Services Ltd v Ashmore* [1995] STC 1151, 1155 (Peter Gibson LJ, Kennedy LJ & Sir Iain Glidewell agreeing); *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329, 331 (Mahoney AP), 340 - 341, 344 (Sheller JA), 345 (McLelland AJA); *Sieff v Fox* [2005] 1 WLR 3811 [35] (Lloyd LJ); *Re Farepak Food & Gifts Ltd* [2006] EWHC 3272 [46] - [52] (Mann J).

167 In *Sindel v Georgiou* [1984] HCA 58; (1984) 154 CLR 661, rectification was ordered in the context of a dispute as to whether the parties had made a binding contract. After an exchange of parts of a contract for the sale of land, it became apparent that the vendor's copy did not correspond with the purchaser's. A number of details, including the name of the purchaser, the purchase price and the amount of the deposit, had been left blank in one of the parts. Mason, Murphy, Wilson, Brennan and Dawson JJ held that 'if the parties, through negotiations between their solicitors, have agreed on the terms of their bargain and settle on an exchange of parts in order to seal that bargain, it would usually accord with their intention to treat the exchange as creating a binding contract, notwithstanding the lack of correspondence in the parts, so long as that lack of correspondence is capable of being remedied by rectification' (667).

168 If a court makes an order for rectification, the order relates back so that the rights of the parties are treated as having always been in accordance with the instrument as rectified. See *Bosaid v Andry* [1963] VR 465, 468, 473 (Sholl J); *Franklins* [644] (Campbell JA).

169 In the present case, there is no doubt, on the trial judge's findings of fact, that when Mr Postma signed the revised proposal Priolo's actual intention in relation to the licence fee payable for the car bays was

mistakenly expressed in the revised proposal. The revised proposal stated erroneously that the fee was \$375 per bay per annum. It should have stated, consistent with Priolo's actual intention, that the fee was \$375 per bay per month.

170 As I have held in the course of considering ground 1, it is to be inferred, on an objective assessment, that upon Vantage accepting the revised proposal the parties intended that there should be a concluded and binding agreement to lease the Premises and take a licence in respect of six car bays. In other words, a concluded and binding agreement was formed upon Vantage accepting the revised proposal. The agreement comprised the revised proposal and Mr Walker's emails of 10 June 2009. Those documents together constituted a contract and, also, an instrument for the purposes of the law of rectification.

171 The general rule is that rectification of an instrument made by two or more parties is not permitted on the ground of a unilateral mistake by one party as distinct from a common mistake by both or all of the parties. There are, however, exceptions to the general rule. See the discussion in *Meagher, Gummow and Lehane's Equity Doctrines & Remedies* (5th ed, 2015) [27-125] - [27-140].

172 In the present case, the important point is whether one of the exceptions applied.

173 In *Leibler v Air New Zealand Ltd (No 2)* [1999] 1 VR 1, Kenny JA summarised the principles which govern an application for rectification of a contract on the ground of unilateral mistake, as follows:

If (1) one party, A, makes an agreement under a misapprehension that the agreement contains a particular provision which the agreement does not in fact contain; and (2) the other party, B, knows of the omission and that it is due to a mistake on A's part; and (3) lets A remain under the misapprehension and concludes the agreement on the mistaken basis in circumstances where equity would require B to take some step or steps, depending on those circumstances, to bring the mistake to A's attention; then (4) B will be precluded from relying upon A's execution of the agreement to resist A's claim for rectification to give effect to A's intention [36].

174 The conduct of the party who is not mistaken must ordinarily be unconscionable or involve actual, constructive or equitable fraud. See *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505, 515 - 516 (Buckley LJ, Brightman LJ agreeing); *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259, 277 - 280

(Stuart-Smith LJ, Evans & Farquharson LJJ agreeing), 292 (Evans LJ, Farquharson LJ agreeing); *Terceiro v First Mitmac Pty Ltd* (1997) 8 BPR 15,733, 15,739 (McLelland CJ in Eq).

175 In *Tutt v Doyle* (1997) 42 NSWLR 10, the salient facts were these. Between the making of a contract for the sale of land and the completion of the contract, the vendor, to the purchasers' knowledge, made a mistake in a plan of subdivision as to the size of the lot to be transferred. As a result, the transfer registered by the purchaser gave him a larger lot than was agreed under the contract. The Court of Appeal of New South Wales held that the vendor was entitled to relief for unilateral mistake because it would have been unconscionable for the purchaser to avail himself of the advantage obtained. An order for re-conveyance of part of the land was made.

176 Meagher JA (Brownie AJA agreeing) said the real question in the case was whether it was unconscionable for the purchaser knowingly to take advantage of the vendor's mistake (12). His Honour held that an affirmative answer to that question flowed from the High Court's decision in *Taylor v Johnson* [1983] HCA 5; (1983) 151 CLR 422, a case concerned with the rescission of a contract for unilateral mistake. His Honour elaborated:

True, in that case the only equitable remedy under consideration was rescission, and rescission in the present case was impossible because the Tutts took the trouble to build a house on their newly acquired strip of land. But I do not read the High Court as saying that once the ground of unconscionability is made out, it becomes a case of rescission or nothing (12 - 13).

See also *Medsara Pty Ltd v Sande* [2005] NSWCA 40 [4] - [5] (Ipp JA, Handley JA & Young CJ in Eq agreeing).

177 Similarly, in *Tutt* (14), Handley JA (Meagher JA & Brownie AJA agreeing) referred to the following statement of principle by Mason ACJ, Murphy and Deane JJ in *Taylor*:

The particular proposition of law which we see as appropriate and adequate for disposing of the present appeal may be narrowly stated. It is that a party who has entered into a written contract under a serious mistake about its contents in relation to a fundamental term will be entitled in equity to an order rescinding the contract if the other party is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake ... about either the content or subject

matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake (432).

178 Handley JA then pointed out that Mason ACJ, Murphy and Deane JJ also endorsed wider equitable principles which enable a court to grant relief for unilateral mistake in cases not covered by the principle they had enunciated:

They approved (at 431) the statement by James LJ in *Torrance v Bolton* (1872) LR 8 Ch App 118 at 124, that the power to set aside a contract for unilateral mistake was based on the ordinary jurisdiction of equity 'to deal with' any instrument or other transaction 'in which the court is of the opinion that it is unconscientious for a person to avail himself of the legal advantage which he has obtained'. They also approved the decisions in *Riverlate Properties Ltd v Paul* [1975] Ch 133 at 145 and *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 at 514 - 516; [1981] 1 All ER 1077 at 1085 - 1086, where rectification, and not rescission, was granted on this ground (14).

179 Kenny JA's analysis in *Leibler* [68] of the High Court's decision in *Taylor* is similar to that of Meagher JA and Handley JA in *Tutt*.

180 In the present case, the trial judge's findings of fact in relation to Priolo's claim for rectification were compelling. Those findings have not been challenged in the appeal. In all the circumstances, Vantage's conduct in seeking to take advantage of Priolo's obvious and significant mistake in the revised proposal, being a mistake about which Vantage at all material times had actual knowledge, was unconscionable. This unconscionable conduct was such as to make it inequitable that Vantage should be permitted to object to the rectification of the revised proposal.

181 It is irrelevant that the revised proposal was not executed or signed by or on behalf of Vantage. A concluded and binding agreement was formed upon Vantage accepting the revised proposal. As I have mentioned, the revised proposal and Mr Walker's emails of 10 June 2009 together constituted a contract and, also, an instrument that was capable of rectification.

182 Ground 3 fails.

Conclusion

183 I would dismiss the appeal.

184 **NEWNES JA:** I agree with Buss JA.