



## Transcript of Proceedings

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Date 29/11/02

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WILSON J

No 10428 of 2001

ABACUS FUNDS MANAGEMENT LTD  
ACN 007 415 590

Plaintiff

and

NETHURST PTY LTD  
ACN 069 125 275

First Defendant

and

ANTOINE GHANEM and  
ADRIENNE GHANEM

Second Defendants

BRISBANE

..DATE 20/11/2002

JUDGMENT

**WARNING:** The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HER HONOUR: This proceeding was commenced on 21 November 2001, when the claim and statement of claim were filed. Subsequently, a defence was filed on 1 February 2002 and a reply was filed on 20 February 2002.

The defendants now wish to bring a counter claim against the plaintiff and two others, namely The Village Project Pty Ltd and Angus William Johnson.

Pursuant to Rule 179 of the UCPR, a counter claim is to be served within the same time as the defence. By Rule 178, a counter claim may be brought against a non party, if the plaintiff is also made a party to the counterclaim, and either the defendant alleges that the other person (that is the non party) is liable with the plaintiff for the subject matter of the counter claim, or the defendant claims against the other person relief relating to or connected with the original subject matter of the proceeding.

By Rule 178(2)(b), the defence and counter claim should be served on the other person within the time allowed for service on the plaintiff.

The defendants are clearly out of time to serve such a counter claim and accordingly, they have brought this application for an extension of time within which to do so.

There are two draft pleadings before me. One was marked as Exhibit 1 in the hearing. Attached to it was a schedule of

damages. Another was delivered with supplementary written  
submissions. I will have the latter marked as Exhibit 2 and I  
assume that the same schedule of damages is intended to be  
attached to it. The references to the counter claim in these  
reasons for judgment are references to the document which is  
Exhibit 2.

The plaintiff's claim is in relation to the lease of  
restaurant premises at a development known as Central  
Brunswick at New Farm. The plaintiff sues for arrears of rent  
and damages for breach of lease.

The first defendant was the lessee of those premises and the  
second defendants were guarantors. It is necessary to set out  
some of the background facts. By an agreement made on or  
about 16 May 1995, before the complex in which the restaurant  
was to be situated had been constructed, a company at  
different times named The Village Project Pty Ltd, Central  
Brunswick Pty Ltd and Petrie Point Pty Ltd agreed to grant a  
lease of the premises for seven years, from 13 October 1997 to  
the first defendant.

I shall refer to the first company as "the original lessor"  
and to the first defendant as, "the lessee". The second  
defendants, the guarantors, entered into a guarantee of the  
obligations of the lessee. The agreement for lease was varied  
on 14 August 1997, at a time when the construction was still  
not complete.

On 5 March 1998, the original lessor assigned the benefit of the lease and guarantee to IOOF Trustees Australia (NSW) Ltd, as trustee of the Abacus Central Brunswick Trust. That is admitted on the pleadings. Whether the lessee was given written notice of the assignment is disputed on the pleadings, but nothing turns on this, as the benefit of the covenants in the lease passed by virtue of section 117 of the Property Law Act 1974.

The plaintiff alleges that it acquired the rights and liabilities of IOOF by virtue of provisions of the Corporations Law. This is not admitted on the pleadings, although in argument before me the lessee and the guarantors did not demur from the proposition that there had been an assignment to plaintiff.

The plaintiff's case is that the lessee abandoned the premises on 6 March 1998, thereby repudiating the lease, and that it re-entered the premises, thereby accepting the repudiation and terminating the lease, on 1 July 2000.

It sues for \$300,132.06 arrears of rent to 30 June 2000 and \$248,232.53, damages for breach of the lease. The lessee and the guarantors have pleaded various defences: termination by the lessees in consequence of repudiation by the original lessor and IOOF, mutual abandonment, that the lease is void for unauthorised material and intentional alterations to the agreement for lease by the plaintiff, that the plaintiff as

successor in title to IOOF is estopped from pursuing its claim  
against the lessee and the guarantors.

For present purposes, the focus is on representations  
allegedly made on 19 August 1997. Under the agreement for  
lease (as varied), if practical completion was not reached by  
30 September 1997, the lessee was entitled to terminate. The  
lessee alleges that in reliance on certain representations  
made by Johnson, a director of the original lessor, on 19  
August 1997, it did not exercise that right and that it  
suffered loss in consequence of not terminating.

The lessee alleges those representations were misleading or  
deceptive, that there was no reasonable basis for them and  
that they were negligently made. It alleges that neither the  
original lessor nor IOOF took any action in relation to the  
lessee's surrender of the premises on 25 March 1998, thereby  
inducing an assumption that IOOF had agreed to a mutual  
surrender. As a result, the lessee did not pursue a damages  
claim under the Trade Practices Act, against the original  
lessor and Johnson. Such a claim is now time barred.

Accordingly, it is alleged that the plaintiff as successor in  
title to IOOF is estopped from pursuing its claim against the  
lessee and the guarantors.

The proposed counter claim is against the original lessor as  
first defendant by counter claim, Johnson as third defendant  
by counter claim and the plaintiff as second defendant by  
counter claim.

It is alleged that the conduct of the original lessor and Johnson in making the representations on 19 August 1997 will cause loss to the lessee and the guarantors should the relief sought by counter claim not be granted.

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Further, it is alleged that the original lessor and Johnson owed the lessee and the guarantors a duty of care in making the representations on the 19th of August 1997, that that duty was breached and that the lessee and the guarantors suffered loss in consequence.

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That loss has been particularised in two ways: as moneys outlaid and also that if the lessee and the guarantors are not successful in obtaining the relief sought on the counter claim under the Trade Practices Act the amount claimed by the plaintiff will be a further loss.

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Therefore it is necessary carefully to consider the prayer for relief by way of counter claim. Before doing so I make some general observations.

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(a) Relief claimed under the Trade Practices Act is claimed pursuant to section 80 and section 87(1) which are in Part VI.

(b) Section 82(1) provides that a person who suffers loss or damage by conduct of another person done in contravention of a provision of Part V (which of course includes section 52) may recover the amount of the loss or damage

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by action against that other person or any person  
involved in the contravention.

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For present purposes I assume that the lessee suffered  
loss when it did not terminate the agreement for lease on  
30 September 1997. The time limit applicable to a claim  
under section 82 in the circumstances of this case was  
three years from 30 September 1997. Thus the lessee is  
out of time to pursue a remedy under section 82.

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- (c) By section 80 the Court may grant an injunction in such  
terms as it determines to be appropriate if it is  
satisfied that a person has engaged in conduct  
constituting a contravention of a provision of Part V or  
that a person has been knowingly concerned in such a  
contravention.

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There must be a nexus between the conduct alleged or  
found to constitute the relevant contravention and the  
injunction. See, for example *Australian Competition and  
Consumer Commission v. Z-Tek Computer Pty Ltd* (1997) 148  
ALR 339, where Justice Merkel refused to make an order by  
consent requiring the implementation of a compliance  
program with respect to all aspects of the Trade  
Practices law when the matters the subject of the  
proceeding were restricted to advertising and the  
company's compliance with sections 52, 53(e) and 53C of  
Part V.

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There is no time limit for claims under section 80.

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- (d) Section 87(1) provides that where in a proceeding instituted under Part VI the Court finds that a person who is a party to the proceeding has suffered or is likely to suffer loss or damage by conduct of another person engaged in in contravention of a provision of Part V, whether or not the Court grants an injunction under section 80 or damages under section 82, it may make such order as it thinks appropriate against the person who engaged in or was involved in the contravention to compensate for the loss or damage or prevent or reduce it.

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This section provides for ancillary relief. It applies in proceedings brought under another section of Part VI such as section 80 or section 82. The limitation period applicable to the granting of relief under section 87(1) is the same as that applicable to the section under which the claim is brought. That is, if it is ancillary to a claim under section 82, it is three years. If it is ancillary to a claim under section 80, there is no limitation period. See *Mayne Nickless Ltd v. Multigroup Distribution Services Pty Ltd* (2001) 114 FCR 108.

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- (e) Section 87(1A) is a stand alone provision. It allows the Court to make an order against a person who engaged in conduct in contravention of Part V where there is no proceeding for other relief under Part VI. The

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applicable limitation period is that in section 87(1CA),  
in this case three years from the accrual of the cause of  
action. See Mayne Nickless.

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I come then to the prayer for relief and the counter claim. I  
shall take the paragraphs seriatim.

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Paragraphs 1 and 2. Against the plaintiff pursuant to section  
80, injunctions preventing it from enforcing the lease and  
guarantee.

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But it is not alleged that the plaintiff breached a provision  
of Part V or was knowingly concerned in such a breach. There  
is no real nexus with a contravention of Part V. The  
contravention is alleged to have been committed by others, the  
original lessor and Johnson.

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In these circumstances I am satisfied that even if the facts  
on which the counter claim is based were proved this relief  
would not be available.

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Paragraph 3. Against the original lessor and the plaintiff  
pursuant to section 80, an injunction preventing the assertion  
of any rights under the lease and/or the guarantee.

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As against the plaintiff this is simply a reformulation of the  
relief sought in paragraphs 1 and 2, which is not available  
for the reasons I have already given.

As against the original lessor, in consequence of the transfer  
by assignment to IOOF the original lessor has no right to  
enforce the lease: section 117 of the Property Law Act 1974.  
If there is no right to enforce the lease there is nothing to  
enforce under the guarantee.

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I am satisfied accordingly that even if the facts on which the  
counter claim is based were proved this relief would not be  
available.

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Paragraph 4. Against the original lessor and Johnson pursuant  
to section 87(1):

(a) a declaration that the lease was void as of 1 October  
1998 (I assume this is in error for 1997);

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(b) a declaration that by virtue of (a) the assignment is  
ineffectual as a matter of law.

This relief is sought under section 87(1) and I ask, to what  
claim under Part VI is it ancillary? I have explained why I  
consider that the relief claimed under section 80 is not  
available. It seems to me that there is no claim under Part VI  
to which this is said to be ancillary. If the relief sought  
were available, it would be under section 87(1A), but of  
course relief under that provision is time-barred.

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Paragraph 5. Against the plaintiff pursuant to section 80, an injunction preventing it asserting rights against the lessee and guarantors said to have arisen by assignment.

Again the plaintiff is not alleged to have breached Part V and there is no nexus with the contravention of Part V that is alleged to have been committed by others.

Again I am satisfied that even if the facts were proved this relief would not be available.

Paragraphs 6 and 7. Against the original lessor and Johnson pursuant to section 87(1), a declaration of breach of section 52, and against Johnson pursuant to section 87(1), a declaration that he was knowingly concerned in such breach.

Again I ask ancillary to what? This cannot be a claim under section 87(1) as there is no claim against these parties for breach. Such a claim would be time-barred.

It cannot be a claim under section 87(1A) because that would be time-barred also.

Paragraphs 8 and 9. Against the original lessor and Johnson pursuant to section 80 or section 87(1), an order that they pay the plaintiff any sum found due by the lessee and the guarantors to the plaintiff pursuant to the lease or guarantee, and pursuant to the same sections, an order that

they indemnify the lessee and guarantors against liability to the plaintiff.

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This relief is not available under section 80. As there is no claim against the original lessor and Johnson under that provision, the necessary nexus is not established. It is not available under section 87(1) because there is nothing to which it is ancillary.

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Paragraph 10. Against the original lessor and Johnson pursuant to section 87(1), such other order as is appropriate. Again, there is nothing to which it is ancillary.

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I am conscious of the need for caution in effectively dismissing claims at the pleading stage. However, I am unpersuaded that the various matters under the Trade Practices Act sought to be raised by way of counterclaim have any prospect of success. Therefore, I would not allow an extension of time to deliver the counterclaim in so far as it contains those claims.

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That brings me to paragraph 11 of the prayer for relief, which seeks damages for negligence. As I have said, the claim by way of damages is for moneys expended and for damages representing the amount claimed by the plaintiff. Under Rule 178(1)(b) of the UCPR it is necessary to show a rational connection between the relief claimed against the original lessor and Johnson and the subject matter of the plaintiff's action against the lessee and the guarantors. See Watkins

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Limited. v. Plancorp No. 6 Pty Ltd [1983] 2 QdR 501 at 504,  
Asia Pacific International Pty Ltd v. Peel Valley Mushrooms  
Limited [1999] 2 QdR 458 at 465-466.

It seems to me that at least the second head of damages  
claimed has such a connection with the claims for arrears of  
rent and damages for breach of lease which are the subject  
matter of the plaintiff's claim. It may be, as Mr O'Donnell  
QC submitted, that the first head of damage is wrongly  
formulated in that what should be claimed is net loss, that  
is, that the lessee and guarantors have failed to bring to  
account benefits they obtained. However, I would not regard  
that as fatal.

In my view the defendants have a claim for negligence against  
the original lessor and Johnson. However, Rule 178(1) of the  
UCPR provides as follows:

"(1) A defendant may make a counterclaim against a person  
other than the plaintiff (whether or not already a  
party to the proceeding) if:

(a) the plaintiff is also made a party to the  
counterclaim; and

(b) either,

(i) the defendant alleges that the other  
person is liable with the plaintiff for  
the subject matter of the counterclaim or;

(ii) the defendant claims against the other  
person relief relating to or connected

with the original subject matter of the proceeding."

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In the view I have taken, subparagraph (b)(ii) is satisfied. However, as Mr Bland for the plaintiff has pointed out, subparagraph (a) is not satisfied, because the claim for negligence would not be against the plaintiff, and so the plaintiff would not be a party to the counterclaim.

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In these circumstances I cannot grant the application even in so far as it contains a claim for damages for negligence. I must dismiss the application in total, with costs.

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HER HONOUR: I indicate that in my view the matter was one warranting senior counsel.

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