SUPREME COURT OF QUEENSLAND

CITATION:	*Australian Postal Corporation v Ace Property Holdings Pty Ltd* [2009] QSC 199
PARTIES:	**AUSTRALIAN POSTAL CORPORATION** **(plaintiff)** **v** **ACE PROPERTY HOLDINGS PTY LTD ACN 076 383 410** **(defendant)**
FILE NO:	BS 9691 of 2008
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	30 July 2009
DELIVERED AT:	Brisbane
HEARING DATE:	14, 15 and 16 April 2009
JUDGE:	Mullins J
ORDER:	**Further submissions to be made by the parties as to the terms of the orders that follow from these reasons**
CATCHWORDS:	LANDLORD AND TENANT – COVENANTS – AS TO RESTRICTIONS ON USE TO WHICH PREMISES MAY BE PUT – where lease provided lessee must use premises only for purposes listed – whether lessee obliged to carry on all or any of the permitted uses – where landlord consented to addition of "mailroom solutions operations" as a permitted use under the lease – construction and meaning of the use "mailroom solutions operations" – where activities conducted at premises included security screening and scanning of mail of government and large corporate clients and receipt of government tenders and courier deliveries – whether use made of premises was permitted under lease LANDLORD AND TENANT – COVENANTS – NOT TO ASSIGN OR SUBLET – WHAT CONSTITUTES ASSIGNMENT, SUBLETTING ETC – where lease provided lessee may only sublet or part with possession of the premises with the consent of the lessor – where lessee permitted fully owned subsidiary to occupy the premises – where no express agreement between lessee and occupier about the occupier's occupation of the premises – where rent and outgoings were remitted to the lessor by the lessee but reimbursed to the lessee by the occupier – where there were some indications that the occupier's occupation of the premises was consistent

with exclusive possession but where the lessee maintained control of the possession of the premises – where occupier's use of the premises could be characterised as the lessee's use of the premises – whether lessee parted with possession of the premises in favour of the occupier

LANDLORD AND TENANT – COVENANTS – AS TO BUILDING AND ALTERATIONS AND IMRPOVEMENTS – WHERE LESSOR'S CONSENT REQUIRED – where lease provided that the lessee must not carry out work on the premises without the lessor's approval – where lessor was aware that the renovations had commenced but did not respond to the lessee's request for approval – where lessor deferred inspection of the works for three months by which time the works were near completion at significant expense – where both the lessor and lessee expected that approval would be sought and obtained – whether the lessee breached the lease by commencing renovations without the lessor's prior approval – whether the lessor is estopped from asserting that the lessee breached the lease by not obtaining the lessor's approval

Property Law Act 1974, s 124

Akiki v L R Butlin Ltd [2006] 1 WLR 201, considered
Alamdo Holdings Pty Limited v Australian Window Furnishings (NSW) Pty Ltd [2006] NSWCA 224, considered
Australian Safeway Stores Pty Ltd v Toorak Village Development Pty Ltd [1974] VR 268, considered
Lam Kee Ying Sdn Bhd v Lam Shes Tong [1975] AC 247, considered

COUNSEL: JC Bell QC and J Otto for the plaintiff
RA Perry SC for the defendant

SOLICITORS: ClarkeKann for the plaintiff
Herbert Geer for the defendant

[1] **MULLINS J:** In early September 2008 the defendant, as the landlord, served upon the plaintiff, as the tenant under registered lease number 7034559789 (the lease), a notice to remedy breach of covenant (the notice) pursuant to s 124 of the *Property Law Act* 1974 (the Act). In this proceeding the plaintiff seeks to prove either that it was not in breach of the lease or that the defendant was estopped from asserting that the plaintiff had breached the lease or had waived its right to do so. In the alternative, the plaintiff seeks relief from forfeiture.

Background

[2] The plaintiff entered into the lease for the whole of the land and buildings situated at 100 Victoria Street, West End for a term of four years that commenced on 1 October 1998. The purpose for which the premises could be used was specified in clause 6.1 of the lease:

> "The Lessee must use the Premises only for the purpose of conducting the business of warehousing, storage, equipment testing, research and development of mail sorting equipment or such other use as approved by the Lessor which approval will not be unreasonably withheld."

[3] In late 2001 in conjunction with renovations proposed to be undertaken in respect of about half of the premises, the plaintiff and the defendant agreed to an extension of the term of the lease until 28 February 2007, with an option for a further term of five years, and an amendment to the lease was registered. In late 2001 the defendant consented to the addition of "mailroom solutions operations" as a permitted use pursuant to clause 6.1 of the lease.

[4] In early 2002 the defendant caused the renovation works to be undertaken to half of the premises. A business unit of the defendant known as Post Mailroom Solutions then occupied that half of the premises for sorting mail. The other half of the premises was occupied by the engineering and research unit of the plaintiff.

[5] Decipha Pty Ltd (Decipha) was incorporated in April 2002 as a joint venture company involving the plaintiff. From about February 2003 the plaintiff's business of Post Mailroom Solutions was taken over by Decipha. Since December 2003 Decipha has been a wholly owned subsidiary of the plaintiff. Since late 2005 a large sign which states "Decipha A Business of Australia Post" has been in place outside the rear entrance of the premises.

[6] Five D Holdings Pty Ltd (Five D), a company unrelated to the plaintiff, was engaged by the plaintiff from April 2006 to provide property and facilities management services for the plaintiff's leasehold and freehold portfolio. The defendant was advised that, as from 3 April 206, all future communications and notices under the lease should be directed to the plaintiff via Five D.

[7] At various times from late 2004 until October 2006 the defendant, on the one hand, and the plaintiff and Decipha, on the other hand, engaged in negotiations regarding proposed renovations to the other half of the premises to allow for the expansion of Decipha's business into the whole of the premises. The works were undertaken by Decipha and commenced in late September 2006 and were completed by January 2007. On 26 October 2006 the plaintiff gave written notice to the defendant of its exercise of the option under the lease to extend the term of the lease for a further five years. The plaintiff does not deny that since about early 2007 it has permitted Decipha to occupy the whole of the premises, but the nature of that occupation and its legal consequences are in issue.

Notice to remedy breach of covenant

[8] The notice which was dated 27 August 2008 was served on the plaintiff on or about 2 September 2008. The breaches of the lease that the defendant alleges against the plaintiff are expressed in the notice in the following terms:

> "1. by changing the use of the premises (as notified by your solicitors Clarke Kann by letter dated 29 May 2008) to the effect that the premises are now used to store and screen Australia Post records and documents prior to their being archived, security screening and scanning of government and large corporate client mail, collection of mail by

messengers and couriers for distribution to government and corporate clients, in lieu of the use referred to in clause 6.1, and without the approval of the Lessor having been sought or given;

2. by leasing, or sub-letting, transferring or parting with possession of the premises in favour of Decipha Pty Ltd without the consent of the Lessor pursuant to clause 7.1 of the Lease, or without satisfying the Lessor in relation to the matters set out in clause 7.2 of the Lease or by providing to the Lessor any deed as therein provided;
3. by carrying out work to the premises in 2006 and 2007 without the Lessor's approval as provided for in clause 9.1 of the Lease and, contrary to clause 9.2 of the Lease, without ensuring the work was done by the Lessee:
   (a) by contractors reasonably approved by the Lessor;
   (b) in accordance with the plans, specifications and schedule of finishes required and approved by the Lessor;
   (c) in accordance with the law and requirements of the Relevant Authorities; and
   (d) in accordance with the Lessor's reasonable requirements and directions; and
4. by refusing to pay the Lessor's costs of $2,941.71 (per tax invoice dated 1 July 2008) in the time provided for under clause 13.2.1 of the Lease and having the Lessee's solicitors Clarke Kann write to the Lessor's solicitors by letter dated 28 July 2008 denying any requirement to meet those costs and requesting that the Lessor withdraw the invoice."

[9] This proceeding was commenced by originating application, as a result of the service of the notice. On 27 October 2008 Applegarth J granted an interlocutory injunction, upon the plaintiff giving the usual undertaking as to damages, restraining the defendant from interfering with the plaintiff's possession of the premises and ordered that the proceeding continue as if started by claim. The plaintiff's claim was set out in the amended statement of claim and reply to the amended defence that were filed by leave on 14 April 2009. Many of the facts alleged in the statement of claim were admitted in the amended defence filed on 10 February 2009, but the defendant takes issue with the conclusions asserted by the plaintiff in reliance on those facts.

Evidence

[10] A large part of the evidence adduced at the trial was documentary. The lease, amendment to the lease, letters, emails, attendance memoranda and other documents were copied and tendered in a bundle (exhibit 2) that contained 274 documents. (I will identify documents referred to in these reasons by the document number in the bundle.) The written records of communications and negotiations were supplemented and contextualised by oral evidence from the various authors, recipients, the negotiators and those who were involved in contributing to the negotiations.

[11] Despite the extensive written evidence, this case required a careful evaluation of the oral evidence. There were some witnesses whose credit was put in issue. Where necessary to do so, I deal with what evidence I accept or reject for the purpose of making factual findings where in these reasons I analyse the evidence relating to those factual matters.

[12] There are some general observations that should be made. Although they are different sized corporations, the parties to this proceeding are commercially experienced. The lease governed their contractual relationship and the basis on which the plaintiff used the premises. The existence of the lease and its relevant terms were never very far from the centre of the dealings between the parties.

[13] It was also relevant to their dealings during 2005 and 2006 that both parties recognised that the rental terms of the lease were favourable to the plaintiff. The plaintiff was therefore seeking to maintain that position and the defendant was keen to have an opportunity to re-address the quantum of the rent. These respective motivations are understandable and are not matters that reflect adversely on the parties.

[14] Despite the central role played by the lease in the parties' dealings, it is incongruous that this proceeding has largely arisen out of the failure of the plaintiff to obtain the formal approval of the defendant to the renovations to the premises, in accordance with clause 9.1 of the lease, before those renovations commenced, and the failure of the defendant to insist on compliance with clause 9.1 of the lease, when the defendant became aware that those renovations to the premises were being carried out. These failures contributed to the complexity of the issues that required resolution.

[15] In a similar vein, the relationship between the plaintiff and Decipha with each other and with the defendant at the relevant times was vexed. Despite the plaintiff's concern to keep the lease in place, it was less than open with the defendant about the occupation of Decipha of the premises during the period leading up to the renovations and the exercise of the option. At the same time, the defendant was not unaware of the existence of Decipha, even if the defendant were not aware of the precise details of its corporate existence. I found it surprising, however, in light of the plaintiff's confused communications with the defendant about the role of Decipha that the plaintiff seeks in its written submissions to attack the credit of Mr Homewood, the defendant's managing director, on the basis that his evidence about his knowledge of Decipha was generally unsatisfactory. I will analyse the evidence relating to the nature of Decipha's occupation of the premises, when dealing with that issue in these reasons. At the outset, however, I reject the attack on Mr Homewood's evidence that was made by the plaintiff in general terms. It did not accord with my assessment of Mr Homewood's evidence, as he gave his oral evidence, and in reconciling his evidence with the contemporaneous documents. He readily made concessions and under cross-examination genuinely attempted to recall the numerous conversations and dealings about which he was questioned. The plaintiff's submissions on Mr Homewood's evidence about Decipha and its activities gave no weight to the fact that Mr Homewood's knowledge of the role and activities of Decipha was affected by the conflicting information that he received from the employees of both the plaintiff and Decipha.

[16] Neither party called as a witness a former employee of the plaintiff, Mr Robert Allan. On 2 April 2009 the plaintiff's solicitors made inquiries of Mr Allan as to his availability to participate in the hearing of this proceeding and ascertained that he was about to depart overseas for a holiday and had no intention of changing his plans to assist either party in respect of this proceeding. It is not a situation where any inference can be drawn from the failure of either party to call Mr Allan as a witness.

Negotiations for the renovation of the premises

[17] In September 2003 the State Operations Manager for Decipha, Mr John Miller, raised with Mr Homewood a proposal for alterations to upgrade the other half of the premises for mail sorting. Mr Homewood responded by obtaining a quote for the upgrade which was sent to the plaintiff on 17 September 2003 (doc 14). Nothing happened to progress those negotiations until 25 October 2004 when Mr Homewood obtained a quote for the works from architects (doc 15). In December 2004 Mr Miller and Mr Homewood negotiated on the basis of that quote. Mr Homewood proposed that the defendant contribute 40 per cent of the capital cost of the works and that the plaintiff contribute 60 per cent (doc 19). The email that Mr Miller sent on 13 December 2004 to Mr Homewood (doc 18) ended with his pro forma name and details. This remained the form of his electronic signature for all emails that he sent to Mr Homewood. His electronic signature (omitting the address, telephone and email details) was as follows:

> "John Miller
> State Operations Manager Qld
> Decipha Pty Ltd
> …
> A Business of Australia Post
> DECIPHA PTY LTD – Confidential Communication"

[18] On 11 January 2005 Mr Homewood proposed to Mr Miller (doc 21) that a new annual rental be set from 1 March 2005 (as from completion of the proposed capital works) for a period of five years plus annual CPI and GST on the basis that the base rental increase from the current rate of $74 per m^2 to $80 per m^2. Mr Miller rejected a proposed increase in the base rent, but indicated that the fit out component was agreeable at 60 per cent of the cost to Decipha and 40 per cent of the cost to the defendant (doc 22).

[19] Those negotiations were continuing, when Mr Miller arranged for Mr Homewood to join him at a lunch with Mr Vincent Rosano, who was the National Operations Manager of Decipha, on 9 March 2005. I found Mr Rosano's evidence of the discussions at this lunch unreliable. By way of example, one of the matters that he said was discussed at this meeting was that he and Mr Miller estimated that the fit out costs for the other half of the premises would be $371,000. This amount was, in fact, sourced from a document that was not created until February 2006 (doc 38) which Mr Rosano ultimately conceded could not have been the figure discussed at the lunch (at Transcript 3-3). Mr Rosano's evidence of the discussion at the lunch was not borne out by the communications that followed in the same month between Mr Homewood and Mr Miller. I prefer the evidence of Mr Homewood who described the discussion at the lunch as "generalised" (at Transcript 3-17). Although Mr Miller stated in his further affidavit that he had informed Mr Homewood at this lunch "that Decipha had secured a Queensland Government

contract to screen and sort mail", he acknowledged in his oral evidence that Decipha had not secured the Queensland government contract at that stage, as it was the subject of protracted discussions with the Queensland government, and that all that was discussed with Mr Homewood about Decipha's activities was the mail sorting (at Transcript 1-49). Mr Miller also conceded that the talk at this lunch about the business of Decipha was "in general terms about the type of work we did and… the types of contracts that we were looking at" (at Transcript 1-50).

[20] After the lunch, Mr Homewood sent two proposals to Mr Miller on the basis of a new fit out costing $275,508 (doc 25). One was on the basis that the defendant paid for the renovations and the other on the basis that the defendant contributed 40 per cent of the costs of the renovations. Negotiations then ensued on what was described as "base conditions" for a new lease in favour of Decipha. These base conditions included a base rent starting at $77 per m², annual rent reviews to be the lesser of 3 per cent or CPI, the defendant to pay for the renovations, the renovations to be "approved" by Decipha, a new lease term of five years with two options each for a further two years and the maximum rent increase at market review after term of five years not to exceed 5 per cent (doc 26). Mr Homewood made a counter offer in his email of 24 March 2005 (doc 27) which proposed that a continuation of annual rent reviews of the lesser of 3 per cent or CPI was not acceptable with the prospect of increased land tax not being recoverable under the current lease. Mr Homewood also did not agree to capping of market review after five years at 5 per cent.

[21] In April 2005 the Queensland leasing manager of Corporate Real Estate for the plaintiff, Mr Robert Allan, became involved in the negotiations. A meeting was held between Mr Allan, Mr Miller and Mr Homewood on 8 April 2005. Mr Homewood recalled that it was at that meeting that Mr Allan told him that his request for a market review would not be accepted (at Transcript 3-46). As a result of that meeting, Mr Allan gave advice by email to Mr Miller about the possible courses of action that could be taken in relation to the leasing of the premises and advised Mr Miller of the factors that were relevant in deciding whether to maintain the existing leasing arrangement or to enter into a new lease of the premises (exhibit 5). That advice favoured keeping the lease on the existing terms.

[22] By the latter half of 2005 Decipha planned to take over the entire premises, because the engineering and research unit of the plaintiff was relocating. Decipha's business of sorting mail for large corporate and government clients was expanding. Decipha was undertaking negotiations with the Queensland government to conduct security screening of government mail. Security screening required the installation of two x-ray rooms. The negotiations with the Queensland government continued over many months and resulted in a contract between Decipha and the Queensland government that was to commence in July 2006.

[23] There was no agreement in principle reached between Mr Homewood and Mr Miller in March/April 2005. The negotiations seemed to halt, although Mr Homewood did forward to Mr Allan on 20 July 2005 (doc 30) the architect's quote for the works dated 25 October 2004 and obtained on 26 July 2005 from the architects a revised probable estimate of cost for alterations and additions to the premises that he forwarded by facsimile to Mr Allan on 2 August 2005 (doc 32). There was then an exchange of emails in early August 2005 between Mr Homewood and Mr Allan about development approval (doc 33).

[24] The negotiations were then resumed by early December 2005 when a discussion about the renovations took place between Mr Miller and Mr Homewood. A proposal for staging the fit out requirements was then made by Mr Miller in his email of 2 December 2005 to Mr Homewood (doc 35). The spreadsheet that accompanied that email described the proposed works including the construction of a suspended ceiling to "screening" room, construction of three dividers for screening room and communications room and independently air-conditioning the screening room and communications room. That resulted in the defendant obtaining the quote from Mr Ryan dated 6 February 2006 for the renovations to the premises for the total sum of $370,475 (exclusive of GST) (doc 38) which Mr Homewood forwarded to Mr Miller and Mr Miller passed onto Mr Rosano. Mr Rosano used that quote as the basis for the business case to proceed with the renovations of the other half of the premises that was presented to the board of Decipha. That business case referred to the estimated cost of the fit out as $371,000 (exclusive of GST). The business case showed that without the proposed fit out Decipha would not be able to accommodate its expanding screening opportunities at the premises.

[25] Although the board of Decipha did not formally resolve to approve the business case for the fit out of the premises until its meeting on 26 April 2006, Mr Miller must have anticipated an affirmative decision, as he advised Mr Allan on 6 April 2006 that he had received approval to proceed with the capital works expenditure at the premises. There were some alterations to be made to the plans that had been previously costed. Mr Allan advised Mr Homewood of these matters by email on 7 April 2006 (doc 39).

[26] Mr Gregory Loane was employed by the plaintiff as the construction manager for Queensland. He was instructed by Mr Allan to assist the plaintiff with building works to be carried out on the premises. Mr Loane and Mr Allan attended at the premises on 8 April 2006 where they met Mr Homewood. Mr Loane instructed consulting engineer Mr John Douglass to prepare plans for the proposed works to the premises. Mr Douglass prepared a scope of works for the alterations and drawings ACE-101E and ACE-102C (doc 40) which Mr Loane sent to Mr Homewood (doc 41), so that Mr Homewood could have his builder provide a revised quotation. It is curious that neither the scope of works set out in the document prepared by Mr Douglass nor the plans expressly refer to the purpose of the two rooms being built on the ground floor as x-ray offices. The scope of works refers in general terms about the plaintiff seeking the works "to expand the office area within the warehouse." As Mr Homewood was to be absent overseas between 15 May and 4 June 2006, he organised for his employee, Mr Chris Thomson, to follow up with the builder.

[27] Mr Thomson provided Mr Ryan with amended plans on 19 May 2006 to obtain a revised quotation in respect of less extensive works to the premises than the basis of his earlier quote. Although Mr Ryan was quoting for the defendant, he dealt directly with Mr Miller, as he explained in his affidavit:

> "12. After I received the May plans, I had meetings with Mr Miller during which we discussed exactly what renovations works were required, so that I could provide a quote for those works.
>
> 13. My meetings with Mr Miller usually took place at Victoria Street. It was necessary for me to understand what business was to be performed at Victoria Street for me to be able to

> understand the renovation works which were required. Mr Miller told me that a security mail sorting facility operated at Victoria Street which was to be upgraded to deal with an increased volume of mail."

[28] Mr Loane updated the floor plans on 23 May 2006 and they were passed on to Mr Ryan. Mr Homewood's reluctance to finalise any arrangements until the plaintiff had confirmed the lease extension, interest rate for funding and incorporating amortisation payments into rentals was conveyed by Mr Thomson to Mr Miller (doc 56). The quote from Mr Ryan dated 26 May 2006 that was sent by Mr Thomson to Mr Homewood included the quote from the electrical contractor in which reference was made to "lights in x-ray rooms" (doc 63). After a meeting at the premises between Mr Thomson, Mr Miller and Mr Ryan on 31 May 2006, Mr Ryan provided a further quote for works (inclusive of GST) in the sum of $298,944 (doc 77). Mr Thomson prepared a note for the file (doc 70) which he sent to Mr Homewood. Reference was made in that note to the two offices to be constructed and that "New lighting in X-Ray offices to be separately switched."

[29] A meeting was organised for 9 June 2006 at the office of the defendant's solicitor, Mr de Silva, at which Mr Homewood, Mr Allan, Mr Loane and the plaintiff's solicitor, Mr Kann, were present to discuss the proposed renovations to the premises. There was no representative of Decipha at the meeting. In anticipation of the meeting, Mr Thomson on behalf of the defendant had provided Mr Allan with an updated project budget and a letter of intent to vary the lease and exercise the lease option (doc 80). The rent for the first year of the term of the lease on the exercise of the option was to comprise base rent (5% increase on the rent that was paid under the existing lease for the preceding year that commenced on 1 March 2006) plus works rent, being the amortised final costs of the completed works proposed to be carried out by the defendant to the premises. Mr Kann's diary note of the meeting (doc 86) was made from the time that he arrived at the meeting (which was after it started) and noted the topics discussed and the action required of the participants. The diary note records "use will be the same." Mr Kann confirmed in his evidence that the nature of the use was not expanded upon or described as such. Although Mr Loane's affidavit also purports to say that at that meeting Mr Allan stated that the current use of the premises would continue after the works were completed and the affidavit then specifies that the current use was "scanning, screening and sorting mail by Decipha", Mr Loane could not recall whether Mr Allan did recite at the meeting the actual uses being made of the premises (at Transcript T2-64). The meeting was in the nature of a discussion or negotiation and nothing was finalised.

[30] On 28 June 2006 Mr Allan sent an email to Mr Homewood (doc 91) that advised that the plaintiff was intending to proceed with the project on the basis that the capital outlay was initially met by the defendant. Mr Allan was careful in the language that he used to Mr Homewood:

> "Australia Post, on behalf of Decipha wish to continue with the project as originally intended."

[31] There was a telephone conversation between Mr Allan and Mr Homewood on 3 July 2006 in which Mr Homewood did not object to what was proposed in Mr Allan's email of 28 June 2006, as Mr Allan referred to that telephone conversation in his email to Mr Homewood of 3 July 2006 (doc 92). In that same email Mr Allan

suggested that Mr Homewood have a second builder tender on the pricing "in order to ensure that Decipha are advantaged at the best possible outcome". That email concluded with the following statement:

> "John, Decipha are very keen to commence this project so any thing we can do from our end to assist, please advise me."

[32] By 4 July 2006 Mr Homewood had second thoughts about the proposal in Mr Allan's email of 28 June 2006 that were reflected in his instructions to his solicitor to advise the plaintiff's solicitor that he was not prepared to lay out funds unless there was some change made in the lease arrangements (doc 94).

[33] Mr Rosano sent an email to Mr Gray on 10 July 2006 (doc 99) setting out the preferred position for Decipha in respect of the premises. In summary, that was for the plaintiff to execute the extension option and continue as the tenant in order to "retain the favourable arrangements currently in place for extension and take away the risk of changing the starting position." Mr Rosano proposed that the plaintiff then sublease the site to Decipha and suggested that there be an agreement on the fit out costs before the commencement of those works. He also proposed that there be an agreement on sharing the risk between the defendant and Decipha, if Decipha were forced to vacate the site due to pressure by government agencies, such as the Council. Mr Rosano proposed that there be negotiation with the defendant on the risk of the wasted cost of the fit out, less what would be paid via annual amortization, be split equally between the defendant and Decipha.

[34] Mr Gray passed that proposal on to Mr Allan for his view on the likely response of Mr Homewood to the proposition. The full text of Mr Allan's email sent in immediate response on 10 July 2006 (doc 99) is:

> "I have known John for about eight years having negotiated the original lease at West End.
>
> My understanding of John is he is very honourable and a gentleman, but is not a fool.
>
> The issue that John as the Landlord faces is that his investment has declined over the past five years and will more so in the next five years. The terms of our lease are extremely beneficial to Post. The most obvious is the option we have. This option is capped at 5% with 3% annual increases throughout its term.
>
> Because of this John's growth has fallen behind yields for this type of property and has no means of catching up until 2012. In addition, he has sustained the impact of Land Tax no longer being recoverable from tenants. Presently, Land Tax is about $24,000 per annum, which in effect nets his rent back to about $100,000 per annum.
>
> The only positive about this investment is its capital growth, which is happening whether he has a tenant or not.
>
> Earlier this year John Miller asked me to provide market information as to comparable buildings in the area. This building sits at about $75 sq mtr net whereas the evidence available in other buildings averaged greater than over twice this rate a sq mtr.

> The current Lease if changed in any significant form will allow the landlord to renegotiate the essential terms. At least it will give him the opportunity to recover rental to a more appropriate level which in this instance could be as much as at least closer to $200k per annum than what we pay. I am not saying he would do that but I am saying we are open to that risk.
>
> In the instance of capital expenditure, John is simply a Bank for Post. He does not have to do it other than strengthening his relationship with us. He no doubt raises the funds externally at comparable interest rate and recovers it through rental cash flow. There are small advantages to him doing this but nothing as a leverage for us to take advantage of.
>
> Tony, it would be totally uncommercial for us to ask John to participate in risk. In my view he would neither contemplate or enter such an agreement as there is no benefit. Moreover, it would be construed as completely 'screwing' him for no reasonable reason.
>
> I cannot support this approach at this stage."

[35] The defendant's solicitors had sent a letter to the plaintiff's solicitors dated 7 July 2006 (doc 97) advising that, if the defendant were to outlay funds for capital works at the premises, it required an increase in rent on annual review equivalent to the higher of 5 per cent of the rent payable during the immediately preceding year or an amount to take account of variations in the Consumer Price Index. The letter expressed what the defendant believed had been understood by the plaintiff as to the defendant's attitude at the meeting on 9 June 2006:

> "Your client is aware of our client's reservations concerning further expenditure by the landlord as a condition of exercise of option.
>
> At present, the terms of the lease are highly advantageous to the lessee. As such, the landlord is not prepared to commit to any expenditure which might be a condition of your client's exercise of option unless the provisions for increase in rental on annual review are amended."

[36] Mr Gray advised Mr Rosano in relation to that proposal that the defendant was unable to review the basis on which the rent review was implemented if the option were exercised, but the requirement to fund the fitout works provided the defendant with that opportunity (doc 102). Mr Gray had a telephone discussion with Mr Rosano on 17 July 2006 in which Mr Rosano advised that Decipha wanted the option revised to retain the favourable lease conditions and, if this meant that the defendant was no longer interested in undertaking the fit out works, then Decipha would self fund the works. Mr Gray had set out the details of this discussion in his email to Mr Rosano on 17 July 2006 (doc 105).

[37] On 26 July 2006 Mr Allan advised Mr Homewood by email (doc 106) of the decision that the plaintiff did not wish to lose its current favourable lease terms and had decided to fund the capital cost of the improvements, rather then to seek

funding through the defendant. Mr Allan advised that the plaintiff would like to continue discussions with the contractors that had provided quotes to the defendant and that he and Mr Miller would like to meet with Mr Homewood because there were various matters to go over "such as owners consent to the proposed works." That meeting did not take place.

Renovations

[38] Mr Miller telephoned Mr Ryan in early September 2006 and advised him that Decipha was going ahead with the renovation works and requested him to prepare a tender based on plan ACE-101E. Mr Douglass had prepared a document dated 7 September 2006 calling for tenders for the renovations (doc 109). Mr Ryan responded to that call for tenders (doc 110).

[39] Mr Ryan sent an adjusted tender price for the proposed works at the premises for the sum of $396,500 to Mr Loane on 18 September 2006 (doc 112).

[40] On 20 September 2006 Mr Ryan sent a letter by facsimile to Mr Homewood (doc 113) which stated:

> "Within the next few day's I expect Australia Post to give me a works order to carry out fit out & construction work at 100 Victoria St generally in accordance with plans we previously had priced for you.
>
> I understand that you approve of these works & the appropriate agreements are in place.
>
> During our site investigations we did a roof inspection to determine the location of air conditioning plant etc. I noticed that the roof is in need of some maintenance. In particular the apron flashings, box gutters & ventilated ridge.
>
> It would be a good idea if you could have a look & perhaps get another opinion. I would think there are some leaks now."

[41] Mr Homewood found this letter amongst his documents when this litigation commenced, but he could not recall having seen it at the time. He stated, and I accept, that he did not at that time respond to the statement in the letter that suggested Mr Ryan believed that Mr Homewood had approved the works. Apart from that letter, Mr Ryan said that he had a subsequent telephone discussion with Mr Homewood about fixing the roof and Mr Homewood engaged his own plumber to do so, but Mr Ryan accepted that he spoke to Mr Homewood only about the roof (at Transcript 2-84).

[42] On 25 September 2006 Mr Ryan entered into a commercial building contract with Decipha for the refurbishment and fit out of the premises for the contract sum of $396,500 (GST inclusive) (doc 114). The date for commencement was shown in the contract as 25 September 2006 and the works commenced on or about that date.

[43] On 26 September 2006 Mr Gray emailed Mr Morley (doc 115) to instruct him to advise the defendant of the plaintiff's intention to exercise the option to extend the lease of the premises for a further turn of five years and to seek the defendant's formal approval to the fitout works that had been discussed with Mr Homewood on

the basis that the plaintiff would do the works. This instruction was given by Mr Gray to Five D when the plaintiff was satisfied that Decipha could use the whole of the premises, as the plaintiff did not have any other use for the premises at that time.

[44] On 27 September 2006 Mr Morley sent an email to Mr Homewood (doc 116) attaching two plans showing works "to be undertaken at your property by Australia Post at their costs" that had been attached to the email that Mr Morley had received the preceding day from Mr Gray. Mr Morley requested Mr Homewood's written approval of these works. At around the same time Mr Morley was dealing with Mr Homewood in relation to a plumbing issue that arose from corrosion of pipe work under the floor slab that required the defendant to undertake plumbing repair work. Mr Morley had raised that plumbing issue with Mr Homewood in an email of 15 September 2006 (doc 119). Mr Homewood explained that the plumbing issue was about a water line that needed replacing and that had nothing to do with the roof (at Transcript 3-70). Mr Homewood sent an email to Mr Morley on 29 September 2006 (doc 120) which stated:

> "I confirm I will attend to installing a new water service to the building using Ross Graham Plumbing. Ross is presently co-ordinating with Capital Works."

[45] I accept Mr Homewood's explanation (at Transcript 3-74) that "Capital Works" was a reference to the plaintiff's department called Capital Works at which Brigid Connor was the contact and Mr Morley had asked Mr Homewood to coordinate the plumbing with Brigid Connor (doc 119).

[46] Mr Morley had a telephone conversation with Mr Homewood at about the same time in respect of which he recorded in his email of 29 September 2006 to Mr Gray (doc 117) that Mr Homewood had informed him that he had approved his plumber to undertake repair work "but due to Post's site works then being carried out, he had not yet confirmed a start date for the plumber." That was Mr Morley's interpretation of what Mr Homewood told him, but Mr Morley knew of the commencement of renovations. I am not satisfied that it accurately recorded what Mr Homewood said or knew about the renovations on 29 September 2006, in the light of the emails that Mr Homewood sent on 2 and 10 October 2006 to Mr Morley.

[47] By email sent on 2 October 2006 (doc 123) Mr Homewood replied to Mr Morley's email of 27 September 2006 and enquired whether there was a written scope of works and a check on the quality of works proposed and requesting a copy of the quote, so that Mr Homewood could see who was "proposed to be used on the contract".

[48] The plumbing work to replace the water line had not been attended too, when Mr Morley sent an email on 9 October 2006 to Mr Homewood (doc 125) inquiring whether Mr Homewood had a date for the plumbing work. Mr Homewood responded on 10 October 2006 stating that he thought the plumbing work had been done, but would chase it up and inquired "When do you plan to commence work?" (doc 26). Mr Morley had a telephone conversation with Mr Homewood on 11 October 2006 in which the plumbing issue was canvassed and, in addition, Mr Homewood informed Mr Gray that before he would approve the works to the premises, he required more detail as to the changes that the plaintiff proposed to

carry out. Mr Morley's advice to Mr Gray about this telephone call was that Mr Homewood was upset.

[49] Because Mr Morley knew that the renovations at the premises had commenced, but that the defendant's approval had not yet been obtained, he did not respond directly to Mr Homewood's enquiry about when the works were to commence. As Mr Morley's client was the plaintiff, he acted on instructions from the plaintiff, and specifically Mr Gray. At the time that Mr Morley commenced his communications with Mr Homewood about the renovations, Mr Morley was aware of the existence of Decipha, but was not aware of the arrangements between the plaintiff and Decipha in relation to the premises.

[50] Mr Morley sent an email to Mr Homewood on 12 October 2006 (doc 129) attaching a description of the plaintiff's works (doc 128) that related to the two plans that had been previously forwarded on 27 September 2006 and requesting written approval for the "Australia Post work" and confirmation in relation to the plumbing issues.

[51] Mr Morley sent follow up emails inquiring about Mr Homewood's written approval for the lessee's work and the plumbing issues on 23 October and 1 November 2006 (doc 130).

[52] By letter dated 26 October 2006 sent by facsimile from Five D to the defendant (doc 131), the option under the lease for the further term of five years was exercised on behalf of the plaintiff. Under clause 3 of the lease, the rent for the first year of the new term was to be equivalent to the current market rent, but not exceeding 5 per cent of the rental applicable for the last year of the existing term. Instead of endeavouring to agree on a market rent at less than the maximum increase provided for by clause 3, the plaintiff indicated that it would agree to the 5 per cent increase in rental from 1 March 2007.

[53] On 1 November 2006 Mr Homewood indicated that he would attend to "the Works" issue over the next two days and advised that the plumber had finalised the water line and confirmed that the roof was fine, considering the design limitations (doc 130).

[54] On 6 November 2006 Mr Morley was advised by Mr Miller that the roof continued to have minor leaks and that information was passed on by Mr Morley to Mr Homewood in an email of 7 November 2006 (doc 134) in which Mr Morley referred to what he had been informed by Mr Miller that had been conveyed "by the builder undertaking works" and also followed up again on written approval of the lessor to the "Lessee works" (doc 134). Mr Morley also made reference to the exercise of the option for the further term of five years and that Mr Homewood had agreed to the rental figure that was proposed by the plaintiff for the year commencing 1 March 2007 and requested confirmation that the necessary legal documents would be forwarded to Five D. Mr Homewood responded to that email on 9 November 2006 in which he confirmed the rental figure was fine and that he would be referring the matter to his solicitors in due course (doc 135). On the same day Mr Morley sent a further email to Mr Homewood seeking a written response with regard to the defendant's approval of the works (doc 136). A follow up email was sent on 22 November 2006 (doc 139).

[55] Mr Homewood acknowledged in his second affidavit that he was told that the renovations were already underway when he was chased up by Mr Morley for

approval of the works. Mr Homewood was not precise, however, about when during this period he was expressly told that the renovations had commenced. The extent and nature of the communications between Mr Homewood and Mr Morley in October and November 2006 were such, that I am satisfied that Mr Homewood was aware by 1 November 2006 that the renovations had commenced.

[56] On 30 November 2006 Mr Homewood sent an email to Mr Morley (doc 143) seeking to arrange a time to inspect the "recent works" and "report to Solicitors". Mr Morley forwarded this email to Mr Loane (doc 144) requesting him to contact Mr Homewood about an inspection of the work so that he could give landlord's approval. Mr Loane was instructed by Mr Gray not to act on that request. In fact, Mr Loane's involvement in the project had largely ceased after receiving the quote from Mr Ryan on 18 September 2006.

[57] Mr Morley sent an email on 8 January 2007 to Mr Homewood (doc 147) confirming that the description of the works and the two plans that had been previously forwarded to him for approval were the final plans and requested written approval for the works. A follow up email was sent by Mr Morley on 23 January 2007 to which Mr Homewood responded on the same day (doc 148). Mr Homewood informed Mr Morley that he had engaged a solicitor from Nicol Robinson Halletts to organise the option and stated "I have inspected the Works and they appear to be fine". Mr Homewood had attended at the premises when the works were substantially finished. I accept that the occasion that he did so in January 2007 was the first time he visited the premises after the renovations commenced.

Events subsequent to the completion of the renovations

[58] Mr Homewood did not initially seek advice from his solicitors about the failure of the plaintiff to obtain his formal approval to the renovations, as his instructions related to documenting the exercise of the option. On 22 February 2007 Mr Homewood was sent a draft document described as "lease option" by his solicitors (doc 156). The draft document provided for the new term of the lease by amending the existing lease. In relation to the alterations that had been undertaken to the premises, the proposed amendment provided for those works to become the lessor's property and that there would be no obligation on the lessee to remove any part of the works at the expiry or earlier determination of the lease. On 23 February 2007 Mr Homewood passed his solicitors' email and the draft document onto Mr Morley for his perusal and comment (doc 156).

[59] The plaintiff's solicitors sent a letter to the defendant's solicitors dated 6 March 2007 (doc 159) in relation to the proposed amendment document and advised that the plaintiff required the clause about the works to be deleted, on the basis they were to remain the property of the plaintiff and would be subject to the "make good" provisions of the lease (which are found in clause 14). There was also an issue about whether the plaintiff had agreed to pay the defendant's costs in relation to the amendment document. Correspondence on these matters was then exchanged between the respective solicitors for the plaintiff and defendant. By letter dated 1 June 2007 (doc 186), the plaintiff's solicitors advised the defendant's solicitors that the plaintiff was prepared to transfer ownership of the works at the end of the current term of the lease, on condition that the plaintiff was not required to remove any part of the works at the end of the lease and that the "make good" provisions of the lease did not apply to those works.

[60] The defendant's solicitors sent to the plaintiff's solicitors on 12 June 2007 the tax invoice (doc 187) that they had rendered to the defendant for professional costs of $3,350 between 30 January and 15 May 2007 in respect of the amendment to the lease, negotiating with regard to costs and dealing with alterations/approvals. On 20 July 2007 Mr Morley forwarded to Mr Homewood (doc 190) a copy of the certificate of classification for the renovations. The "as built" drawings were provided to the defendant's solicitors on 2 July 2007 (doc 193). The defendant requested copies of the drawings that showed they had been approved in accordance with the relevant town planning requirements (doc 195). The plans with legible approval stamps were forwarded by post by Mr Morley to the defendant on 31 July 2007 (doc 199).

[61] On 24 August 2007 the plaintiff's solicitors sent a letter to the defendant's solicitors (doc 200) setting out a schedule of amendments required by the plaintiff to the draft amendment of the lease that had been submitted by the defendant. Without admitting that the plaintiff was liable to pay the defendant's legal costs, the plaintiff was prepared to pay reasonable costs which it specified as $1,215 for the preparation and registration of the amendment document (comprising professional fees of $1,100 and registration fees of $115). The most significant amendment suggested by the plaintiff was to the draft clause about the works. The clause proposed by the plaintiff provided for the works to remain the property of the plaintiff, but that the plaintiff would transfer ownership of the works to the defendant, at no cost to the defendant, at the expiry or earlier determination of the lease and an acknowledgement that the tenant would not be obliged to remove any part of the works and the provisions of Part 14 of the lease would not apply to the works.

[62] On 30 August 2007 the defendant received advice from its solicitors about the defendant's solicitors' letter of 24 August 2007. Mr Homewood forwarded that email to Mr Miller (doc 201), in order to sort the matter out. In response Mr Morley sent a letter to the defendant dated 30 August 2007 (doc 203) informing the defendant that the plaintiff requested that any communication in connection with matters relating to the lease should be directed to Five D or to the plaintiff's solicitors. Mr Homewood negotiated directly with Mr Morley and, as a result, the amendment document was redrafted to delete any provisions relating to the works carried out by the plaintiff, so that the position would be that the parties would rely on the terms of the existing lease, both with respect to the works and with respect to costs. The defendant's solicitors prepared the amendment document without any clause relating to the renovations and conveyed the defendant's position (doc 206) that it would rely on the terms of the existing lease, both with regard to the works and costs. The plaintiff was requested to sign the amendment document.

[63] On 24 September 2007 the defendant sent a tax invoice to the plaintiff (doc 207) for the defendant's legal costs "relating to the granting of approval for works undertaken by the lessee, without having first obtained lessors approval" for the sum of $2,233. On 26 September 2007 the defendant sent a tax invoice to the plaintiff's solicitors (doc 208) for the defendant's legal costs relating to the amendment of the lease for the sum of $1,105.50. On 9 October 2007 the plaintiff's solicitors requested the defendant's solicitors (doc 217) to readdress the tax invoice for the legal costs of $1,105.50 to the plaintiff. The amendment to the lease was signed on behalf of the plaintiff on 1 November 2007 (doc 222) and forwarded to

the defendant's solicitors on 6 November 2007 (doc 223) together with a cheque for $115 for the registration fee payable to register the amendment.

[64] The defendant followed up the plaintiff by letter dated 16 November 2007 sent to Five D (doc 226) as to the payment of the invoices sent respectively for the defendant's legal costs of $2,233 and $1,105.50. Those two accounts were eventually paid by the plaintiff.

[65] The national finance manager of Five D, Mr Lambert, had sent a circular letter on 11 October 2007 to all landlords of premises leased by the plaintiff but occupied by Decipha. Such a letter was sent to the defendant (doc 218) and gave details of the Melbourne office of Decipha for addressing invoices. The operative part of the letter stated:

> "Five D is the Facilities Management provider for Australia Post. Your company currently provides services to Australia Post at the above premises. Australia Post has leased out the premises to Decipha Pty Ltd, a fully owned subsidiary of Australia Post and we would like you to arrange for Decipha Ltd to be responsible for the payment of your services."

[66] Mr Morley stated that letter was sent in error and confirmed that from the time that Five D became responsible for managing the premises for the plaintiff, the plaintiff deposited funds into the account of Five D for payment of the rent to the defendant. Mr Morley described the letter as "confused" and explained that it was sent by Five D's finance division on instructions from the plaintiff's finance division without consulting the property divisions of the organisations (at Transcript 1-85). He explained that the intention was to send it to contractors who provided services to Decipha and not to the landlords of premises leased by the plaintiff (at Transcript 1-86). The arrangements that this letter proposed were not implemented and I accept the evidence of Mr Morley that the letter was sent by mistake. It does not amount to evidence that a sublease for the premises had been granted by the plaintiff to Decipha.

[67] As a result of receiving the letter from Five D dated 11 October 2007, Mr Homewood eventually sent an email to Mr Lambert on 8 February 2008 (doc 238) requiring the plaintiff to seek permission to enter into the sublease with Decipha, in accordance with clause 7 of the lease.

[68] On 20 March 2008 the defendant's solicitors advised the plaintiff's solicitors (doc 244) that the defendant had not signed the amendment to lease, because the defendant was waiting for the plaintiff to rectify the issue of subleasing the premises without the defendant's consent. On 4 April 2008, the plaintiff's solicitors advised the defendant's solicitors (doc 245):

> "Our instructions are that there has been no sub-leasing of the Premises by Australia Post. Australia Post remains the Lessee."

[69] The defendant had commenced sending invoices to the Melbourne address of Decipha referred to in the letter of 11 October 2007 and by email dated 23 April 2008 (doc 250) Mr Morley confirmed to Mr Homewood that all correspondence and invoices from the defendant should be directed to the plaintiff at the office of Five D. By email dated 24 April 2008 (doc 251) Mr Morley expressly confirmed to Mr

Homewood that the letter from Mr Lambert dated 11 October 2007 should be ignored.

[70] By letter dated 23 April 2008 the plaintiff's solicitors confirmed to the defendant's solicitors (doc 249) that the plaintiff was the lessee of the premises and Decipha, a wholly owned subsidiary of the plaintiff, occupied the premises and had occupied the premises or part of the premises "from the outset" and asserted that the defendant was aware of that and had not previously objected to Decipha being the occupier of the premises. The defendant's solicitors responded to the plaintiff's solicitors on 30 April 2008 (doc 252) in which they conveyed the two matters that were of concern to the defendant. These were that the defendant's consent to a sublease to Decipha had not been sought and that it had come to the defendant's intention that the current use of the premises as a full scale mail sorting centre with increase in the vehicular movement exceeded the use permitted under the lease and the defendant's consent to the increase usage had not been sought.

[71] In response to the defendant's solicitors' request for information about current use of the premises, the plaintiff's solicitors in their letter dated 29 May 2008 (doc 255) advised:

> "3. The premises are used to store and screen Australia Post records and documents prior to their being archived. Mail of government and large corporate clients is also security screened and scanned at the premises. Once cleared, that mail is collected by either Messenger Post of private couriers such as Toll and TNT for distribution to government and corporates.
>
> 4. A tender receipt point is also provided for government and tenders received on behalf of government are security screened and scanned."

[72] The defendant's solicitors in their letter dated 13 June 2008 (doc 256) advised that the defendant considered there had been a change of use of the premises for which approval had not been sought and requested the plaintiff to seek the consent to the change of use or to return the use of the premises to that which was permitted under the lease and that the defendant required the plaintiff to obtain the defendant's consent to the parting with possession of the premises by the plaintiff to Decipha. A deed of consent was submitted by the defendant's solicitors to the plaintiff's solicitors. It was proposed that a condition of the defendant's consent to the parting with possession of the premises to Decipha was that rent be reviewed to market from the date of parting with possession. The plaintiff's solicitors in their letter dated 20 June 2008 to the defendant's solicitors (doc 257) asserted that the defendant had known since 2002 the nature of the services conducted by Decipha from the premises and that there had been no parting with possession of the premises as the plaintiff had appointed Decipha to conduct the business on its behalf from the premises. By letter dated 4 July 2008 the defendant's solicitors advised the plaintiff's solicitors (doc 259) that the defendant was not aware of the details of the services provided by Decipha from the premises and, as Decipha was a separate legal entity, the defendant required a deed of consent be executed relating to the possession of the premises by Decipha.

Analysis of alleged breaches

[73] The approach followed in the statement of claim of pleading the plaintiff's case in respect of each of the four alleged breaches as four separate series of allegations has affected how the parties made their submissions in this proceeding. Both parties have addressed separately each of the breaches specified in the notice. That is artificial to some extent because the alleged breaches are interrelated. The alleged change in the use of the premises arose because Decipha was conducting its business from the premises and procured the renovations which enabled it to expand its operations (including the activity of screening mail) into the whole premises which brought into issue the basis of the occupancy of Decipha of the premises. The issue about the change of use would not have arisen, if it were not Decipha that was carrying on business in the premises, but that raises the basis on which the plaintiff permitted Decipha to carry on its business at the premises. In addition, the breach alleged against the plaintiff of failing to obtain the approval of the defendant to the carrying out of the renovations does not sit easily with the fact that it was not the plaintiff, but Decipha, that paid for the renovations, but that may be affected by the basis on which Decipha occupied the premises. In view of the way the claim has been pleaded and argued, I will follow the parties' approach in analysing the alleged breaches.

Whether the use of the premises is permitted under the lease

[74] For the purpose of the initial analysis of this alleged breach, I will put to one side the fact that the business in the premises was being carried on by Decipha. The issue is whether the use that Decipha made of the whole premises after the renovations were completed in January 2007 was permitted under the lease.

[75] It is necessary to construe clause 6.1 of the lease. There are competing constructions put forward by the plaintiff and the defendant. The approach of the plaintiff is that the present uses of the premises by Decipha, including the security screening of mail, are activities of the mailroom and fall within the meaning of the term "mailroom solutions operations". Implicit in this submission is the contention that clause 6.1 permits the tenant to carry on any one or more of the uses that are specified or permitted under clause 6.1.

[76] The defendant contends that, on a fair reading of clause 6.1, permission in 2001 for the additional use of mailroom solutions operations did not result in extinguishment of all of the other uses in favour of the new uses, without obtaining consent of the plaintiff under clause 6.1. It is argued that the plaintiff required approval of the defendant to change the use of the premises from the mix of uses described in clause 6.1 and for which permission had previously been given under clause 6.1 to the limited uses now made of the premises, as no permission had ever been sought of the defendant to make the additional use of mail sorting into the sole use of the premises.

[77] Clause 6.1 is expressed in mandatory terms to the extent that the tenant is bound to use the premises for the purposes listed in clause 6.1 or for which permission is given. The use of the word "only", however, suggests that the tenant is limited to the purposes that are permitted under clause 6.1, rather then being bound to use the premises for each of the purposes. The clause must be construed in the context of the particular lease which is of land improved by a stand alone commercial building

where the whole of the premises is leased to the one tenant. The purpose of a user provision is to allow the landlord to exercise some control over the activities that are conducted on the premises. By virtue of clause 1.3, the heading "Trading and Use" for clause 6 does not affect the interpretation of the lease and, in any case, there are no clauses regulating trading hours or the manner of trading. The purpose of the user clause in this lease can be contrasted to that applying to a tenancy within a retail shopping centre where the mix and the balance of uses is of importance to both the landlord and the other tenants. Despite aspects of clause 6.1 being expressed in positive terms, clause 6.1 in context should be construed as permitting the tenant to carry on any one or more of the uses that are specified or permitted under clause 6.1, without obliging the tenant to carry on all or any of them: *cf* the discussion in respect of the construction of user provisions in the lease in *Australian Safeway Stores Pty Ltd v Toorak Village Development Pty Ltd* [1974] VR 268, 271-273.

[78] The expression "mailroom solutions operations" is not in common usage. It clearly took its form from the plaintiff's description of its business unit that was operating from the premises at the time permission was obtained from the defendant to add that use to the list of permitted uses. The contention of the defendant is that the description "mailroom solutions operations" applied to mail sorting at the time the permission for that use was given and the permission for mail sorting did not necessarily cover any activity that Decipha chose to expand into. The plaintiff argues that the proper construction of "mailroom solutions operations" is a wide one which covers the variety of activities associated with the receipt, sorting and delivery of mail. It was common ground in the proceeding that, at the least, the expression covered mail sorting which was the explanation given by the plaintiff to the defendant in 2001 for the activities covered by the expression. The meaning of the expression "mailroom solutions operations" must be determined in the context of the lease and is not limited by what the parties may have contemplated as relevant activities at the time permission for that use was given by the defendant. It suggests a service for processing and sorting mail.

[79] The activities conducted by Decipha after the completion of the renovations include mail sorting of government and large corporate clients including security screening and scanning of the mail. After being processed, that mail is collected by messenger post or private couriers for distribution to the government and corporate clients. The collection of mail by couriers from the premises on completion of the mail sorting is incidental to the mail sorting. In addition, the premises are used as a tender receipt point for government tenders which are received on behalf of the government and security screened and scanned. The sign on the premises (which is shown in the photographs exhibited in Mr Miller's third affidavit) states: "Qld Government Tender/ Courier Lodgements". The premises are also used to store and screen the plaintiff's records and documents prior to being archived. The last mentioned use falls under the description of warehousing or storage.

[80] It is the security screening and scanning of mail and the tender and courier services that are primarily the subject of the defendant's submission that those activities are outside the description of mailroom solutions operations.

[81] Prior to the renovations, Decipha did mail sorting for some government departments or agencies. The motivation for taking over the balance of the premises was that it was confident of obtaining a contract from the Queensland government to provide

mail sorting and security screening services of all government mail. In considering Decipha's use of the premises prior to and after the renovations, a distinction must be drawn between intensity of use as a result of expansion of activities into the whole premises and the nature of the activities. The fact that Mr Miller admitted in cross-examination that the operations of Decipha at the premises after the renovations were "different" (at Transcript 1-64) does not resolve the issue of whether the use made of the premises after the renovations was permitted under the lease.

[82] Mr Miller explained that the security screening component was an additional service that Decipha provided to the Queensland government which was not provided prior to renovations (at Transcript 1-64). I infer that was the purpose of the construction of the two x-ray offices that were part of the renovations. The nature of this activity was not explored in any depth in the course of the evidence. From what can be gleaned of the description of the activity and the manner in which it is carried out at the premises, it is one stage of the processing and sorting of the mail addressed to the Queensland government. It therefore falls within the use described as "mailroom solutions operations".

[83] The tender and courier services result in deliveries for the Queensland government of that nature to the premises. The tender services involve providing a system of recording the receipt of the tenders. Security screening applies to deliveries received as tenders or by courier. These deliveries are a special type of mail. There was no evidence about the quantity of them. What evidence there was suggests that these services are aspects of the processing and sorting of that type of mail addressed to the Queensland government. They also fall within the use described as "mailroom solutions operations".

[84] Apart from the complication that these activities were carried on by Decipha at the premises, I am satisfied that the use that Decipha made of the premises after the renovations were completed in January 2007 was permitted under the lease.

Nature of the occupation by Decipha

[85] Clause 7.1 of the lease provides:

> "The Lessee may only sublet or licence or otherwise part with possession of the Premises with the consent of the Lessor."

[86] Such a covenant must be strictly construed, as forfeiture may result from a breach: *Lam Kee Ying Sdn Bhd v Lam Shes Tong* [1975] AC 247, 256 (*Lam*). In *Lam* the tenant carried on business at the premises in partnership with others. The tenant and his partners formed a company for the purpose of acquiring the business carried on by the partnership. Some of the evidence was treated as equivocal about whether the tenant had parted with possession of the premises to the company, such as the sign erected with the company's name at the premises, the transfer of the utilities to the name of the company, and the issue of the invoices and receipts in the name of the company. The fact that the company issued its cheques for the payment of the rent was an indication that it regarded itself as in possession of the premises and it was also relevant that neither the tenant nor the company before the trial or in evidence gave an unqualified denial that the tenant had parted with possession to the company. It was held that the tenant had parted with possession of the premises in breach of the lease.

[87] It was stated in the course of the judgment in *Lam* (at 256) that:

> "A covenant which forbids a parting with possession is not broken by a lessee who in law retains the possession even though he allows another to use and occupy the premises."

[88] *Lam* was applied in *Akiki v L R Butlin Ltd* [2006] 1 WLR 201 where (at 210[42]) the stringency of the test that has to be satisfied to establish that a lessee had parted with possession was noted. Reference was also made (at 210[39]) to the "elusive" distinction between possession and occupation. The distinction is whether the lessee is entitled against the party in occupation to exercise a right of possession to the premises or otherwise to control the possession to the premises, despite the occupation by the other party.

[89] The covenant in clause 7.1 can be construed as being concerned only with the sub-letting, licensing or parting with possession of the whole of the premises, because of the definition of "Premises" in clause 1.1 of the lease. In any case, the plaintiff possessed or exercised control over the part of the premises that were occupied, and then vacated, by its engineering and research unit before the renovations were commenced in late September 2006. The issue of whether clause 7.1 has been breached arises in a substantial way only after these renovations were commenced.

[90] The plaintiff's submissions as to its retention of possession of the premises, despite the activities of Decipha, apply to Decipha's occupation both before and after the renovations. The plaintiff relies on the fact that there has never been any express agreement between the plaintiff and Decipha with respect to the occupation by Decipha of the premises. The assertion is made by Mr Miller that the plaintiff "merely permits Decipha to occupy the leased premises on its behalf." This has been facilitated since December 2003 by Decipha being a wholly owned subsidiary of the plaintiff. The plaintiff has unequivocally asserted in its negotiations with the defendant during 2006 and 2007 that it remains the tenant of the premises. The activities undertaken by Decipha at the premises are related to the plaintiff's postal service activities. There is nothing documentary that relates to the actual arrangement between the plaintiff and Decipha that has been disclosed in connection with this proceeding that undermines the position the plaintiff has maintained as to its ultimate right of possession to the premises vis-a-vis Decipha. The payments of rent and outgoings under the lease have always been remitted to the defendant by or on behalf of the plaintiff. The fact that Decipha may have put the plaintiff in funds to indemnify the plaintiff in respect of all or part of these payments does not alter the fact that the plaintiff takes responsibility for the payment of the rent and outgoings to the defendant under the lease. Five D manages the premises on behalf of the plaintiff and not Decipha. Maintenance issues in respect of the premises were raised by Five D on behalf of the plaintiff with the defendant, such as the corrosion of the pipework under the floor slab that was brought to Mr Homewood's attention by Mr Morley on 15 September 2006 (doc 111) and damage to ceiling tiles caused by water leaks from rain which was raised by Mr Morley with Mr Homewood on 10 November 2006 (doc 139).

[91] The defendant argues that the plaintiff has no interest in any practical or commercial sense in the premises after Decipha occupied the whole of the premises for the purpose of conducting Decipha's business. The defendant relies on the reimbursement that Decipha has made to the plaintiff for the 2002 renovations to the premises and the rent and outgoings paid by the plaintiff attributable to the

occupation by Decipha of the premises. In addition, the defendant points to the fact that the renovations that were commenced in late 2006 were undertaken pursuant to a building contract entered into by Decipha with Mr Ryan and Decipha attended to the formalisation of Council approval for those works. The defendant submits that the option under the lease for the further term of five years was exercised by the plaintiff only at the instigation of Decipha. The defendant also relies on the concessions made by Mr Miller and Mr Rosano of their preference for Decipha to have a lease of the premises from the defendant or a sublease of the premises from the plaintiff.

[92] The fact that Mr Miller and Mr Rosano expressed that preference from their positions in Decipha cannot displace the arrangement that actually existed between the plaintiff and Decipha that is supported by the evidence, as the arrangement must involve both the plaintiff and Decipha. The fact that the plaintiff is the holding company of Decipha has facilitated the control over the lease and the premises that the plaintiff has been careful not to relinquish. Despite the indications in the evidence that suggest that the occupation of Decipha of the premises was consistent with exclusive possession of the premises, I am satisfied that the plaintiff has shown that it retains the right to control the possession of the premises and there has not been any parting of possession of the premises by the plaintiff to Decipha or sublease or licence in favour of Decipha in breach of clause 7.1 of the lease.

[93] The basis of the occupation of the premises by Decipha, so that its possession remains under the control of the plaintiff, means the relationship between the plaintiff and Decipha can be distinguished from that of the tenant and subtenant in *Alamdo Holdings Pty Limited v Australian Window Furnishings (NSW) Pty Ltd* [2006] NSWCA 224 which allowed for the observation to be made at [134] that the tenant's use was subletting the premises and the use made of the premises by the subtenant could not be characterised as the tenant's use of the premises. The control exercised by the plaintiff over the possession of the premises by Decipha means that the use that the plaintiff is making of the premises is that which it allows Decipha to conduct from the premises. In view of my conclusion that the activities of Decipha conducted from the premises fell within the uses permitted under the lease, it follows that the plaintiff's use of the premises was permitted under the lease.

Whether the defendant consented to the renovations

[94] Clause 9.1 of the lease provides:

> "The Lessee must not carry out work to the Premises without the Lessors's approval.
>
> If the Lessor gives approval it may, when giving it, impose conditions to apply when the Lessee vacates the Premises, including specifying:
>
> 9.1.1 which parts of the Premises need not be reinstated and which parts must be
> 9.1.2 which items of Lessee's Property installed as part of the work may not be removed."

[95] Clause 18 of the lease specifies that the approval that is required under provisions of the lease, such as clause 9.1, must not be unreasonably or capriciously withheld by

the landlord. The rationale for a covenant regulating the carrying out of works by a tenant is that the works may adversely affect the value of the premises or the ability of the landlord to lease the premises on the expiry of the term. Clause 9.1 gives the landlord the opportunity to impose conditions at the time that its approval is sought to the works that will cover the situation when the tenant vacates the premises. Clause 9.1 of the lease has to be considered in conjunction with clause 14 of the lease which otherwise regulates the condition that the tenant must leave the premises in at the end of the lease. As it turned out, the defendant proposed in February 2007 in the first draft of the amendment to the lease (doc 156) that the completed renovations became part of the landlord's property. That proposal was the subject of negotiations until the parties agreed not to make any special provision for those renovations and let the position be regulated by clause 14 of the lease (doc 206).

[96] From the time that Mr Allan informed the defendant on 26 July 2006 that the plaintiff would be undertaking the renovations, rather than expecting the defendant to fund them, the parties contemplated that the requirements of clause 9.1 of the lease would be observed. That was consistent with how the parties had ensured compliance with the terms of the lease up until that time. The enthusiasm that Decipha had for undertaking the renovations overtook the prudence of ensuring that compliance with clause 9.1 was completed before the works commenced.

[97] I find that the renovations, as constructed, substantially accorded with the plans and the scope of works that the parties had negotiated about in June 2006 for the defendant to undertake at the plaintiff's request. Even though the plaintiff did not disclose to the defendant the details of the contract that Decipha had entered into with Mr Ryan for those works on 25 September 2006, the defendant was aware of the extent and approximate value of the works proposed to be carried out.

[98] By 1 November 2006 when Mr Homewood was aware that the renovations had commenced, he did not respond to the plaintiff's request for formal approval to the works either by proceeding with the steps to ascertain whether he would approve the works or to inform the plaintiff that it should not proceed on the basis that the approval would be forthcoming. Instead, Mr Homewood allowed the works to continue and deferred his inspection of the premises until the works were almost completed in January 2007.

[99] Because of the expectation of both parties that written approval would be sought and obtained under clause 9.1 of the lease, it is not appropriate to characterise the conduct of Mr Homewood as amounting to approval under clause 9.1 of the lease. The conduct of the defendant between 1 November 2006 and the inspection of the works in January 2007 was consistent only with a representation that the defendant would not withhold its approval to those works.

[100] Although the renovations were paid for and managed by Decipha, the plaintiff adopted Decipha's conduct as its own in its dealings with the defendant, such as by seeking the defendant's approval to the works. The renovations can be characterised for the purpose of the lease as the plaintiff's works.

[101] There is no question that the plaintiff breached clause 9.1 of the lease by commencing the renovations in late September 2006, without the defendant's prior approval. I am satisfied, however, that the defendant's conduct from 1 November

2006 in allowing those renovations to continue at significant expense which the plaintiff relied on by completing the renovations means that the defendant must be estopped from relying on the breach of clause 9.1 of the lease that was committed when the renovations commenced and continued without the defendant's approval. In any case, the defendant was fully acquainted with the breach of the lease, when it negotiated a resolution with the plaintiff between February and September 2007 as to how those works would be dealt with under the terms of the lease that came into existence on the exercise of the option. If it were necessary to consider waiver, the defendant unequivocally waived its right to act on the breach of clause 9.1 of the lease.

Legal costs

[102] Although the tax invoice for the legal costs of $2,941.71 that are the subject of the notice describes the costs as those incurred in respect of the "lease renewal for period of 09 November 2007 to 24th June 2008 as per attached documents from Nicol Robinson Halletts Lawyers" (doc 258), a letter of explanation from the defendant's solicitors sent to the plaintiff's solicitors on 4 September 2008 (doc 267) specified that the costs related to work that the defendant's solicitors were instructed to undertake in relation to breaches of the lease by the plaintiff.

[103] The plaintiff disputes its liability to pay these costs on the basis that either it was not in breach of the lease or the defendant is estopped from contending to the contrary. In view of the conclusions I have reached in respect of the other three breaches alleged in the notice, the plaintiff is not liable under the lease for these legal costs incurred by the defendant between 9 November 2007 and 24 June 2008.

Conclusion

[104] The key finding that I have made in this proceeding is that the plaintiff has not sublet, licensed or parted with the possession of the premises to Decipha, but has permitted Decipha to occupy the premises, subject to retention by the plaintiff of control of possession of the premises. I have therefore found that Decipha's use of the premises can be characterised as the plaintiff's use and the renovations to the premises that were paid for by the plaintiff for its business have been treated by the plaintiff as its works for which it is responsible under the lease.

[105] I have therefore found that the plaintiff did not commit three of the breaches of the lease that are alleged in the notice and, in relation to the fourth breach, that the defendant is estopped from asserting that the plaintiff breached the lease by not obtaining the defendant's approval under clause 9.1 of the lease to the renovations undertaken in 2006 and 2007. The defendant is therefore not entitled to rely on the notice to terminate the lease. It is therefore unnecessary to consider the alternative claim made by the plaintiff of relief from forfeiture.

[106] The relief that was sought by the plaintiff was declaratory. I will give the parties an opportunity to consider these reasons and to make submissions as to the terms of the orders that should be made to reflect the success of the plaintiff in this proceeding. I will also hear submissions on the appropriate order as to costs.