SUPREME COURT OF QUEENSLAND

CITATION:	*7-Eleven Stores Pty Ltd v United Petroleum Pty Ltd & Anor* [2010] QSC 469
PARTIES:	**7-ELEVEN STORES PTY LTD** ACN 005 299 427 (applicant) **v** **UNITED PETROLEUM PTY LTD** ACN 085 779 255 (first respondent) **FINESSE PROPERTIES PTY LTD** ACN 119 991 329 (second respondent)
FILE NO/S:	SC No 9382 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	8 September 2010; 9 September 2010
JUDGE:	Peter Lyons J
ORDER:	
CATCHWORDS:	LANDLORD AND TENANT – TERMINATION OF THE TENANCY – REPUDIATION – WHAT AMOUNTS TO – where the first respondent operated a service station and shop pursuant to a sublease from the applicant – where the first respondent held a lease from the second respondent – where two underground fuel tanks installed at the service station failed testing – where the bowser lane was closed to further investigate the problems with the fuel tanks – where the first respondent alleged there was delay in the reinstatement of the driveway resulting in loss of business – where the first respondent gave notice to the applicant of termination of the sublease – where the first respondent subsequently vacated the premises – whether the first respondent was entitled to terminate the sublease by reason of delay in reinstating the driveway LANDLORD AND TENANT – COVENANTS – AS TO REPAIR – OBLIGATION ON LESSOR – where the first respondent requested that the roof of the store be replaced –

whether the applicants were in breach of any obligation to attend as expeditiously as possible to the condition of the roof – whether the first respondent was entitled to terminate the sublease by reason of the applicant's response to the request to repair the roof

LANDLORD AND TENANT – LEASES AND TENANCY AGREEMENTS – CONSENT OF THIRD PARTIES – where the applicant did not obtain consent from the mortgagee to the sublease – where clause 45 of the sublease stated that the sublease was conditional upon consent being obtained from the mortgagee - where clause 45 allowed for termination of the sublease by giving notice in writing – whether clause 45 is validly a term of the sublease - whether the first respondent validly terminated the sublease under clause 45

LANDLORD AND TENANT – RETAIL AND COMMERCIAL TENANCIES LEGISLATION – OBLIGATIONS, PROHIBITED TERMS AND PROTECTION FOR LESSEES – INFORMATION REQUIREMENTS – where the first respondent pleaded that it was entitled to terminate the sublease pursuant to s 22 of the *Retail Shop Leases Act* 1994 (Qld) – whether s 22 applies to a sublease – whether the first respondent validly terminated the sublease under s 22 of the *Retail Shop Leases Act* 1994 (Qld)

Retail Shop Leases Act 1994 (Qld) s 3, s 17, s 22, s 22A, s 43(1), s 43(2), s 43A

Austin v Bonney [1999] 1 Qd R 114, cited
Horne v Comino [1966] Qd R 202, cited
Johnstone v Milling (1886) 16 QBD 460, cited
Lustre Hosiery Ltd v York (1935) 54 CLR 134, applied
McCarrick v Liverpool Corporation [1947] AC 219, cited
Northern Sandblasting Pty Ltd v Harris (1997) 188 CLR 313; [1997] HCA 39, cited
Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17; [1985] HCA 14, applied
Shepherd v Felt and Textiles of Australia Ltd (1931) 45 CLR 359, cited
Sandra Investments Pty Ltd v Booth (1983) 153 CLR 153; [1983] HCA 46, applied
S.C.N. Pty Ltd v Smith [2006] QCA 360, applied

COUNSEL: P Franco for the applicant
R M Lawson for the first respondent
N H Ferrett for the second respondent

SOLICITORS: Shand Taylor for the applicant
Porter Davies for the first respondent

Swaab Lawyers for the first respondent

[1] A report dated 4 June 2009 (*June report*) provided by MassTech Australia Pty Ltd (*MassTech*) to the first respondent (*United Petroleum*) revealed that two underground fuel tanks installed at a service station and shop at 516 Compton Road, Runcorn, had failed testing conducted the previous day. United Petroleum operated the service station and shop pursuant to a sublease from the applicant (*7-Eleven Stores*). 7-Eleven Stores held a lease from the second respondent (*Finesse Properties*). Work was carried out in relation to the tanks in the latter part of June and early July, resulting in the closure of a bowser lane for the service station. On 22 July United Petroleum gave notice to 7-Eleven Stores of termination of the sublease. It subsequently vacated the premises. 7-Eleven Stores seeks an order that the sublease be specifically performed or alternatively compensation in lieu of specific performance, and damages for breach of the sublease. It seeks alternative relief against Finesse Properties. United Petroleum has counterclaimed against 7-Eleven Stores for damages.

Background

[2] The land on which the service station and store are located is described as Lot 7 on RP 207996, County of Stanley Parish of Yeerongpilly (*Lot 7*). At a time when it was owned by Thistle Investment Pty Ltd, a lease was entered into with 7-Eleven Stores. The lease was executed in August 2002. Its expiry date was 31 July 2014. The premises the subject of the lease were described as "Buildings A & B", no doubt referring to parts of Lot 7 marked as Lease A and Lease B on an attached plan.

[3] The lease was amended in August 2003, one of the amendments being to identify an area of Lot 7 over which a license was granted to 7-Eleven Stores, providing access to the adjacent roads.

[4] The lease and the amendment were both registered under the *Land Title Act* 1994 (Qld), on about 14 October 2002, and 16 September 2003, respectively. On 18 May 2007, a transfer of Lot 7 to Finesse Properties was registered. On 28 April 2008, Finesse Properties granted a mortgage over Lot 7 to the National Australia Bank, the mortgage being registered on 4 June 2008.

[5] In about October 2008, 7-Eleven Stores and United Petroleum entered into negotiations for the sublease. That resulted in a memorandum of understanding (*MOU*), recorded in a document dated 3 October 2008. Subsequently, they executed a sublease, towards the end of 2008, or early 2009. The sublease required the consent of Finesse Properties as head lessor. A letter of 19 December 2008 from solicitors then acting for Finesse Properties stated that it would consent to the sublease subject to a number of conditions, including the execution of a deed between all three parties, and some amendments to the sublease. 7-Eleven's solicitors responded on 12 January 2009, providing a copy of the signed sublease; a proposed deed between the parties; a lessor disclosure statement under the *Retail Shop Leases Act* 1994 (Qld) (*RSLA*), and comments on the amendments to the sublease proposed on behalf of Finesse Properties.

[6] On 13 March 2009 Finesse Properties' solicitors forwarded to the solicitors for 7-Eleven Stores an executed deed of consent, to be held in escrow pending the provision of evidence of insurance and payment of legal costs; and asking that the sublease not be registered until these conditions were satisfied. The sublease was registered on 15 July 2009.

[7] Some of the terms of the sublease are discussed in detail later in these reasons. It should be noted that it incorporated many of the provisions of the lease, with some specified amendments. Also, the premises the subject of the sublease were described only by reference to Building A. The term of the sublease was from 21 January 2009 to 30 July 2014. It, too, made provision for a licence over the licensed area.

[8] In the early part of 2009 (and probably in January) United Petroleum entered into possession pursuant to the sublease.

[9] On 16 January 2009 MassTech prepared a report relating to the service station. On this occasion, all of the underground fuel tanks passed the tests to which they were subjected.

[10] In May 2009, Mr Charles McCarthy, a plumber, was called to the site. In his view, heavy rain was not draining from the site properly. He observed that water was leaking from the ceiling of the shop. He noted corrosion in the roof. He provided a quotation for the cost of replacing the roof, dated 20 May 2009. There is no evidence that these matters were raised with 7-Eleven Stores at that time.

[11] After the June report, a representative of United Petroleum contacted Ms Maree Ball, the National Property Development Manager for 7-Eleven Stores. There was some uncertainty about whose responsibility it would be to repair the fuel tanks. Ultimately, Finesse Properties arranged for work to be done to investigate the condition of the tanks, and to carry out repairs. Further test results of 22 June 2009 (*the second June Report)* recorded that all tanks and fuel lines passed the tests. However, part of the service station driveway had been fenced off and broken up to enable work to be carried out. On 1 July 2009, instructions were given to re-instate the driveway. The work was carried out relatively shortly thereafter. That work had been completed (and fencing around the work area removed) by 23 July 2009, and possibly a little earlier than that.

[12] In the meantime, on 15 June 2009, United Petroleum wrote a letter to 7-Eleven Stores (received on 17 June 2009) calling for a total replacement of the roof at the store. The letter did not refer to drainage problems.

[13] On 22 July 2009 United Petroleum sent by email a letter to the solicitors for 7-Eleven Stores (*termination letter*) complaining about the time for which the lane in the driveway had been obstructed. The delay was said to have evinced an intention on the part of 7-Eleven Stores not to perform its obligations as required by the lease. United Petroleum stated that it accepted this conduct as discharging it from further performance of the lease, and otherwise reserved is rights. In another letter sent by email from United Petroleum to the solicitors for 7-Eleven Stores, United Petroleum stated that it was no longer financially available to conduct the business permitted by the sublease, and that it gave notice of its intention to terminate the sublease. This letter was sent approximately 30 minutes after the termination letter.

Areas of dispute

[14] The claims made by the parties have previously been mentioned. Of significant importance are the allegations made on behalf of United Petroleum that the sublease was terminated. At the hearing, United Petroleum relied on the following grounds for the terminations:

(a) delay in re-instatement of the driveway;
(b) failure to repair the roof of the store;
(c) failure to obtain the mortgagee's consent to the sublease; and
(d) a right to terminate under s 22 of the RSLA.

[15] Two other grounds, relating to re-instatement of the premises after the previous occupation ("debranding"), and the failure to register the sublease, though pleaded, were abandoned at the hearing. Further, the solicitor who appeared for United Petroleum conceded that he was not in a position to prove any of the damages alleged in the counterclaim.

Repair obligations in lease and sublease

[16] It is convenient first to refer to the obligations found in the sublease. Its provisions, resulting from the amendments to clauses of the lease, as agreed in the sublease, included the following (brackets indicate changes to clauses of the head lease, as a result of the amendments):

> "**18 (Sub-Lessor's) Repairs**
>
> 18.1 At all reasonable times and on giving reasonable notice to the (Sub-Lessee) the (Head Lessor) and/or its agents may enter the (sub-leased) Premises for any one or more of the following purposes:
> …
> (b) to carry out any structural works or repairs which the (Head Lessor) reasonably determines should be carried out;
> …
> (d) to carry out any other repairs to the (sub-leased) Premises which the Head Lessor reasonably determines should be undertaken;
> (e) to remedy any defects which the (Head Lessor) reasonably determines require attention;
> (f) to remedy any defects of which the (Sub-Lessor and/or Head Lessor) has notified the Lessee under the immediately preceding Clause and which the (Sub-Lessee) has not remedied within the required time).
>
> Provided that in doing anything pursuant to this Clause the (Head Lessor) must (use its reasonable endeavours to) ensure that the (Sub-Lessee) suffers the minimum of inconvenience or disruption as is reasonably possible in all the circumstances."
>
> "**23 (Sub-Lessor's) Covenants**

> The (Sub-Lessor) covenants with the (Sub-Lessee) that subject to the (Sub-Lessee) paying the Rent and complying with the covenants applicable to the (Sub-Lessee):
>
> …
>
> (b) The (Sub-Lessor) will at all times and as expeditiously as possible attend in a proper and workmanlike manner-
>
> (i) to all items of repair and maintenance in relation to the (sub-leased) Premises which become necessary from time to time (and which are not otherwise the responsibility of the (Sub-Lessee) under this (Sub-Lease)),
>
> (ii) to such works as are necessary to keep and maintain the (sub-leased) Premises wind and water tight and in a sound structural condition
>
> (iii) (except in relation to plant and equipment which is the property of the (Sub-Lessee)) to the replacement, overhaul or restoration of any items of plant and equipment or any major parts or components therein where that plant and equipment ceases to effectively function, becomes inoperarable, unserviceable or incapable of economic repair and in the event of any failure on the part of the (Sub-Lessor) to attend at the earliest practicable time to any replacement, overhaul or restoration of plant and equipment as required by this clause then, subject to the provision of five (5) days prior notice by the (Sub-Lessee) to the (Sub-Lessor) the necessary replacement, overhaul or restoration (as the case may be) may be undertaken by the (Sub-Lessee) and the cost of such works shall be immediately recoverable from the (Sub-Lessor) or may, at the option of the (Sub-Lessee), be offset against rental and other payments otherwise due or becoming due to the (Sub-Lessor) under this (Sub-Lease)."

[17] Although clause 24 of the Head Lease contained a warranty about the condition of buildings and improvements, it was expressly excluded from the sub-lease by clause SL 3.1(g) (clauses of the sub-lease which are in addition to clauses taken from the lease will be identified by the letters "SL").

[18] Some additional clauses of the sub-lease should be mentioned. They include:

> "**Repairs And Maintenance**
>
> 15.1 Subject to Sub-Clause (b) of Clause 22 the (Sub-Lessee) must at all times keep the (sub-leased) Premises in good repair having regard to their condition at the commencement of the (Sub-Lease) but is not required to carry out:
>
> (a) any structural works, unless they have been made necessary by negligence or misconduct of the (Sub-Lessee) or the employees of or other persons for whom the (Sub-Lessee) is responsible;
>
> (b) repairs needed in consequence of fair, wear and tear of the (sub-leased) Premises; or

(c) repairs which become necessary in consequence of some accident or other event which is beyond the reasonable control of the (Sub-Lessee)."

[19] Clause 20 of the sublease required United Petroleum to give written notice to 7-Eleven Stores at the earliest practicable opportunity of any damage to or defect in the subleased premises, or any of the services to those premises.

[20] The sublease also included the following:

"**Damage Or Destruction Of Premises**

28.1 If at any time during the term (or any further term):-

(a) some natural disaster, fire or other serious event occurs which is beyond the reasonable control of the (Sub-Lessee);

(b) as a result, the (sub-leased) Premises are destroyed or damaged, wholly or in part or the usual access to them is obstructed wholly or in part; and

(c) by reason of the destruction or damage or obstruction of access the (Sub-Lessee) cannot reasonably conduct its business on the (sub-leased) Premises to its full extent;

the (Sub-Lessee's) obligation to pay Rent and to pay or reimburse the (Sub-Lessor) for Charges and Operating and Common Area Expenses shall be suspended or shall abate proportionately to the effect on the (Sub-Lessee's) business until the (sub-leased) Premises or access to the (sub-leased) Premises are reconstructed or restored to a condition in which the (Sub-Lessee) can reasonably conduct its business on the (sub-leased) Premises to the full extent.

28.2 If the events referred to in the immediately preceding clause occur and after six months the (sub-leased) Premises and/or access to the (sub-leased) Premises have not been reconstructed or restored to a condition in which the (Sub-Lessee) can reasonably conduct its business on the (sub-leased) Premises to the full extent, either the (Sub-Lessor) or the (Sub-Lessee) may notify the other of its intention to end the (Sub-Lease) and the (Sub-Lease) will end one month after the date of notification.

…

40 Maintenance of Storage Tanks Etc.

The (Sub-Lessee) shall maintain in good and proper repair and condition of the (Sub-Lessor's and/or Head Lessor's) fuel equipment (if any) provided however that nothing in this clause shall be construed as imposing on the (Sub-Lessee) any obligation to replace, renew or repair the equipment if the same has become unserviceable by reason of age, general deterioration, fair wear and tear or events or causes not referable to any neglect or fault on the part of the (Sub-Lessee) its servants, agents, customers or invitees."

[21] The term "(Sub-Lessor's) Fuel Equipment" was defined in the sub-lease to include underground fuel storage tanks, piping equipment and associated fittings and fixtures (if any), installed by the Sub-Lessor.

Contentions as between 7-Eleven Stores and United Petroleum regarding the repair of fuel tanks

[22] In its counterclaim, United Petroleum alleges that on about 2 June 2009, it discovered that some of the fuel tanks on the premises were leaking and had taken in water. In its reply and answer, 7-Eleven Stores does not admit this allegation, and asserts that the tanks were not defective.

[23] United Petroleum then asserts that pursuant to the sublease, and the deed of 19 December 2008, it was the responsibility of 7-Eleven Stores to carry out any testing and effect any repairs to the tanks or alternatively, to do all things necessary to cause any testing and to effect any repairs required to those tanks. 7-Eleven Stores has denied this allegation. Although it may be said that there is no coherent explanation of the denial, it has not been submitted for United Petroleum that its allegation is accordingly deemed to have been admitted.

[24] United Petroleum then pleads that 7-Eleven Stores took steps to cause the testing and repairs to the tanks to be carried out, including excavation of part of the driveway, with the result that, from about 22 June 2009, it was unable to use that part of the driveway and associated fuel bowsers, with disruption to its business; and that, at about 22 July 2009, 7-Eleven Stores had failed to repair the defective tanks or reinstate the driveway. In its reply and answer, 7-Eleven Stores alleges that the steps it took are set out in an affidavit from Ms Ball, and otherwise does not admit these allegations on the ground of uncertainty.

[25] United Petroleum then alleges that it was a breach of the sublease that the repairs and reinstatement had not been completed by 30 June 2009, or alternatively 22 July 2009, or in the further alternative, as expeditiously as possible. This allegation is denied by 7-Eleven Stores on a number of grounds. It is said that clause 18 of the sublease (identified in particulars provided by United Petroleum) had no application. It is further said that clause 23 had no application to the work, as the work was investigative. The applicability of clause 24 is denied, on the ground it was expressly excluded from the sub-lease. Further, 7-Eleven Stores alleges the work was attended to expeditiously and in a proper and workmanlike manner. It further alleges that there was no breach of the sublease by it; or if there was, that it did not entitle United Petroleum to terminate the lease. It further relies on clause 28.1; and alleges that the delay amounted to "a matter of days or, alternatively, weeks".

[26] The submissions made on behalf of United Petroleum point to the lack of activity, particularly between 24 June 2009 and 9 July 2009, to restore the driveway. It submits that by reason of the delay in that period, whether by 7-Eleven Stores or by Finesse Properties, it was entitled to terminate the sublease pursuant to clauses 18 and 23.

[27] The submissions made on behalf of 7-Eleven Stores to a significant extent simply reflect its pleading. It submits that it was not proven by the evidence led at the trial that Finesse Properties' consultant entered the premises pursuant to clause 18.1, the

entry being consensual rather than in the exercise of any power. It also submits that 7-Eleven Stores was not in breach of clause 18.1, which simply requires it to use reasonable endeavours to have Finesse Properties carry out repairs, which 7-Eleven Stores did. It submits that the difficulty in the tank was detected on 3 June 2009 with the June report prepared the following day; but that it was not until 12 June that United Petroleum raised the matter with 7-Eleven Stores; and not until 15 June that it provided a written notice. It also draws attention to the fact that in the period between 22 June and 9 July, there was a view that United Petroleum might need to remove the fuel from the E10 tanks, before the hardstand was reinstated. Moreover, when United Petroleum asked for the hardstand to be reinstated, 7-Eleven Stores wrote to Finesse Properties the next business day, asking that the matter be attended to urgently. It also submits that by 22 July 2009, the alleged breach had been remedied, so that there was no basis for asserting repudiation. The submissions point out the failure of United Petroleum to call evidence establishing the period of time for which use of the driveway was restricted. The submissions draw attention to authorities to the effect that a covenant to repair, like a covenant for quiet enjoyment, is not a condition of the lease, in the sense that it is not a term, any breach of which amounts to repudiation; and that otherwise, repudiation is not lightly to be inferred. The submissions also draw attention to clause 28, for the purpose of demonstrating that it would be unlikely that any breach of the covenant to repair would justify termination. It was further submitted that any obligation imposed by clause 23 was expressly made subject to United Petroleum's compliance with its covenants in the sublease, one of which (found in clause 20) was to give written notice to the sublessor of any damage to or defect in the premises.

[28] 7-Eleven Stores also submits that the onus fell on United Petroleum to establish that it validly terminated the sub-lease. It is convenient to record at this point that I accept that submission; and that the onus extended to the proof of facts said to justify termination of the sub-lease. As will become apparent, one such fact is the cause of the problem with the E10 fuel tanks.

Cause of problem with fuel tanks

[29] Although United Petroleum was operating the service station at the beginning of June 2009, and has called evidence from Mr Hayden Burge, whose position is described as Manager of Asset Management & Operations, and from Ms Kelly Tenant whose is the Queensland State Manger for United Petroleum, it has not led evidence of the discovery of the problem with the E10 tanks. It seems to be accepted that on 3 June 2009, MassTech carried out the testing which resulted in the June report, in the course of which the E10 tanks failed some tests. It seems to me that the only sensible inference to be drawn in those circumstances is that at some unspecified time prior to 3 June 2009, United Petroleum became aware of some problem with these tanks.

[30] No witness was called to establish the cause of this problem. In particular, the author of the June report did not give evidence. The June report was exhibited to an affidavit relied upon by 7-Eleven Stores, but as an attachment to a letter dated 11 June 2009 giving notice that the tanks had failed.

[31] On 26 June 2009, the solicitors for Finesse Properties sent to 7-Eleven Stores a letter enclosing the second June report. The letter asserted that the tanks had passed

the testing; and the lines associated with these tests had passed the testing. It also recorded advice that the likely cause of the water getting into the fuel tanks was a failure to replace the cap to the fuel tanks, amounting to negligence by United Petroleum; and also asserting a liability imposed on 7-Eleven Stores by clause 40 of the lease. On 29 June 2009, the solicitors for 7-Eleven Stores sent to United Petroleum a copy of that letter and the 2 June report, noting that the tanks had passed the test, and that the cause of the initial adverse test result was United Petroleum's failure correctly to replace the fuel tank caps.

[32] United Petroleum replied by an email of 2 July, with an attached letter. That letter stated that the report itself did not identify the cause for the failure of the tanks. It asserted that the author of the report had attributed the failure to faults in the check valves in the tanks, and that those valves had been replaced. Later the letter asserted, "the causes of water entry into the tanks remain undetermined. The allegation that caps were left unfastened is speculative".

[33] Finally, in this context, reference should be made to a letter from the solicitors for 7-Eleven Stores which accompanied an email to the solicitor for Finesse Properties of 6 July 2009. It stated that MassTech and Mr David Batchelor had advised that there was no definitive cause for the water entering the fuel tanks. It continued, "Our client understands that the 'valve poppets' were replaced prior to the second test being carried out and it was the faulty valve poppets that appear to be the cause of the adverse result of the first test." It was asserted that replacement of the valve poppets was an obligation which fell on Finesse Properties under clause 23(b)(iii) of the lease.

[34] It should be noted that the second June report recorded that in preparation for the testing the subject of that report "the tank check valves associated with E10 Tank 1 and E10 Tank 2 were exposed and isolated."

[35] It is necessary to consider whether a finding may be made, on the basis of this material, as to the cause of the failure of the tanks identified in the June report, in the case between 7-Eleven Stores and United Petroleum. It might first be observed that the second June report does not express a view about the cause of the identified failure of these tanks. However, it might be argued that the letter from the solicitors for 7-Eleven Stores to Finesse Properties of 6 July 2010 contains an admission, which may be regarded as an admission against interest, namely, that faulty valve poppets were the cause of the failure of the tanks; it being an admission against its interest, because, for United Petroleum to justify its termination of the sublease it must establish that the failure of the tanks gave rise to an obligation on 7-Eleven Stores which it failed to discharge.

[36] At least in Australia, an admission made by a party as to the correctness of a fact is admissible in evidence against that party, notwithstanding that the party has no direct knowledge of the fact, and relies upon the statements of others.[1] In *Lustre Hosiery* it was also said that to constitute an admission, the words used must "disclose an intention to affirm or acknowledge the existence of a fact whatever be the party's source of information or belief."

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1 See *Lustre Hosiery Ltd v York* (1935) 54 CLR 134, 138-139, cited in Heydon, *Cross on Evidence* (7th Aust Ed) at [33 460]; see also *Horne v Comino* [1966] Qd R 202, 207.

[37] However, it was said in *Lustre Hosiery*:[2]

> "… such an admission may indicate a state of mind varying from a firm belief based upon a thorough investigation of the existence or occurrence of the fact down to a wavering preference for one of two or more possible hypotheses none of which have been tested or determined. It is apparent that the admissibility of the evidence must be distinguished from its sufficiency to establish or support an affirmative conclusion in favour of the party who tenders it, when the burden of proof lies upon that party. It does not follow that, because such evidence is admissible, it is enough to prove the issue."

[38] It should also be noted that where a statement said to constitute an admission forms part of a larger statement, the entire statement is to be received.[3]

[39] The first question therefore is whether the letter of 6 July 2009 evinces an intention to affirm that the faulty valve poppets were the cause of the test results recorded in the June report. It seems to me that the letter of 6 July 2009 does not have that effect. It notes that the information received by 7-Eleven Stores does not establish a "definitive cause" for the entry of water into the fuel tanks. That does no more than assert that the fault valve poppets "appear to be the cause" of the negative results. In my view, the tentative and qualified nature of the statement in the letter does not amount to an affirmation or acknowledgement that faulty valve poppets were the cause of the entry of the water.

[40] If that view of the letter of 6 July 2009 were not correct, it would then be necessary to consider whether the evidence supports a conclusion that the faulty valve poppets were the cause of the entry of water into the E10 tanks. It seems to me that, assuming the letter to contain an admission, it is necessary for me to take into account the statement that no definitive cause had been identified for the problem; and that there is no reason to think that a relevant representative of 7-Eleven Stores knew what was the cause of the problem. There is no evidence whether in truth Mr Batchelor or MassTech carried out any investigations intended to determine the cause of the entry of water into the tanks. In those circumstances, it seems to me that the evidence is insufficient to establish that the entry of water into the tanks was caused by faulty valve poppets.

Events associated with reinstatement of E10 tanks

[41] As has been mentioned, on 12 June Mr Morgan, described as a manager of United Petroleum, contacted Ms Ball about the problem with these fuel tanks. No explanation was given on behalf of United Petroleum for the absence of earlier contact about this matter. Ms Ball, in the course of the telephone call, stated that she considered this matter to be the responsibility of Finesse Properties, whom she intended to contact. She then made attempts to contact appropriate persons associated with Finesse Properties, and advised Mr Morgan that she had done so.

[42] On 15 June 2009 Ms Ball received the letter from United Petroleum which enclosed the June report. On the same day she was advised by Ms Digiglio, a solicitor acting

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2 At 139.

3 *Cross* at [33455].

for Finesse Properties, that Mr Batchelor of MassTech had been engaged to investigate the problem. She again advised Mr Morgan of this. On the same day, Ms Ball contacted Mr Batchelor, who advised he had carried out preliminary investigations of the tanks, but could not find any fault.

[43] On 17 June 2009, Mr Batchelor informed Ms Ball by telephone that he had been authorised by Finesse Properties to break up the hardstand so that further investigations could be carried out.

[44] By email from Mr Morgan to Ms Ball of 17 June 2009, United Petroleum called for a firm proposal as to the further investigation of the precise point of failure of the tanks and lines; the repair or replacement of the failed tanks; and income support or a rebate of rent while investigation and repair work affected its business, by 5pm the following day. The e-mail stated that otherwise, United Petroleum would consider that 7-Eleven Stores had repudiated its fundamental obligations under sub-lease, and it was likely that this would result in its termination. The solicitors for 7-Eleven Stores responded on 18 June 2009, stating it was expected that the breaking up of the hardstand would commence on Monday 22 June 2009; and that without further investigation it was premature to identify what rectification was required.

[45] On Friday 26 June 2009, Ms Ball received a copy of the second June report from the solicitors for Finesse Properties. As previously mentioned, a copy of this was sent by the solicitors for 7-Eleven Stores to United Petroleum on 29 June 2009, including the letter from the solicitor for Finesse Properties asserting that the cause of the problem had been the failure to replace the cap to the fuel tanks; together with reliance on clause 40 of their lease.

[46] On Friday, 3 July 2009, 7-Eleven Stores received a letter from Finesse Properties (erroneously dated 17 June 2009), which complained that, although the work relating to the fuel tanks had been completed "before 22 June", the driveway had not been reinstated; and that as a consequence there had been some loss of sales by United Petroleum.

[47] On the morning of Monday 6 July 2009, Ms Ball visited the service station and took some photographs. They show that a substantial part of one of the driveways was significantly obstructed by fencing, apparently associated with works. The same day, the solicitors for 7-Eleven Stores sent a letter (previously mentioned) to the solicitor for Finesse Properties, discussing the cause of the problem with the fuel tanks. That letter enclosed the photographs taken by Ms Ball, and requested urgent reinstatement of the hardstand. On the same day, the solicitors for 7-Eleven Stores sent to United Petroleum a letter asserting that by virtue of clause 40 of the sublease, it was the responsibility of United Petroleum to maintain the fuel tanks; and that the presence of water in the tanks was logically explained either by the tank caps not being properly secured or sealed; or the presence of water in the fuel before the fuel was placed in the tanks.

[48] On 9 July 2009, the solicitor for Finesse Properties wrote to the solicitors for 7-Eleven Stores advising that reinstatement had not been completed, so as to permit United Petroleum to pump out the fuel tanks; but that instructions would now be given for the reinstatement of the hardstand.

[49] On 14 July 2009, United Petroleum wrote to the solicitors for 7-Eleven Stores further complaining about the delay in reinstating the hardstand. The solicitors for 7-Eleven Stores responded the following day, stating that they had contacted the consultant for Finesse Properties "first thing this morning", who had confirmed that the hardstand had been reinstated, but that some time was required for the concrete to cure. That letter also stated that a reason for delay was to permit United Petroleum to pump out the E10 fuel tanks. The next communication from United Petroleum was the termination letter.

Was termination justified by events relating to fuel tanks?

[50] In part, United Petroleum seeks to justify its termination by reference to clause 18 of the sublease. Its submissions however failed to recognise the modifications made to clause 18 when it was incorporated into the sublease. I have previously set out clause 18 in a form which reflects those modifications. It will be seen that the provision of clause 18 relate, not to 7-Eleven Stores, but to Finesse Properties. The effect of the clause is to permit Finesse Properties to enter the subleased premises for a number of stated purposes.

[51] There then follows a proviso. It may be argued that the amendments to clause 18 identified in SL clause 3.1(d) do not have the effect that the word "lessor" is replaced by "head lessor" in the proviso. That seems an unlikely view, for it operates in respect of the exercise of the right of entry conferred by clause 18.1, which is, in the sublease, conferred on the head lessor (Finesse Properties); and not on the sub-lessor (7-Eleven Stores). Hence I consider the effect of SL clause 3.1(d) to be the modification to clause 18.1 set out earlier. If that view be correct, then it would follow that it could not be said that, assuming the proviso imposes an obligation on someone, that obligation is imposed on 7-Eleven Stores.

[52] Even if that view be wrong, it would not give a basis for termination by United Petroleum. Any obligation which is imposed by the proviso to clause 18 relates only to doing something pursuant to clause 18.1. It could not be said that 7-Eleven Stores was acting pursuant to clause 18.1 at any relevant time.

[53] Accordingly, in my view, in United Petroleum cannot justify its termination of the sublease by reference to clause 18.1.

[54] United Petroleum also seeks to justify its termination by reference to clause 23 of the sublease. To do so, it seems to me that it is necessary for United Petroleum to establish that repair and maintenance became necessary, which was not otherwise the responsibility of United Petroleum; or that works were necessary to keep the sub-leased premises water tight.

[55] United Petroleum has not established what led to the presence of water in the E10 fuel tanks. It has therefore not established that clause 23 of the sublease imposed an obligation on 7-Eleven Stores in relation to the problem encountered with the fuel tanks. In those circumstances, it is unnecessary to consider the scope of the obligation imposed by clause 23, no doubt affected by clauses 15.1 and 40 of the sublease.

[56] In any event, it is a well established principle that a landlord's covenant to repair does not come into operation unless the landlord has knowledge of the defect, or

knowledge of facts which would put it on inquiry as to whether works of repair as needed.[4]

[57] Clause 20 of the sublease required United Petroleum to give written notice to 7-Eleven Stores of any damage to or defect in the premises. It seems to me that, if anything, this clause confirms the applicability of the principle just mentioned. Accordingly, no obligation fell on 7-Eleven Stores in relation to the fuel tank problem, before (at the earliest) the telephone call from Mr Morgan to Ms Ball on the afternoon of Friday 12 June 2009. It should be noted that the information conveyed in that telephone call was inaccurate. The information was that all of the fuel tanks at the service station had taken water. It would be more correct to say that notice of the problem was given when Ms Ball received the letter enclosing the June report, on 15 June 2009.

[58] It seems to me that the nature of any obligation imposed on 7-Eleven Stores by clause 23 is to be considered in the context of the sublease as a whole. Moreover, the sublease was entered into against the background of the head lease. Indeed, the form which the sublease took was as a document to which the head lease was annexed, many provisions of head lease being incorporated into the sublease, often with modifications. Both 7-Eleven Stores and United Petroleum must therefore be taken to know that Finesse Properties owed an obligation to 7-Eleven Stores, expressed substantially in the same terms as clause 23 of the sublease. Moreover, the sublease did not expressly confer on 7-Eleven Stores a right to enter the premises and carry out repairs. The clause of the head lease which conferred that right on Finesse Properties was significantly modified in the sublease, as has been mentioned, only permitting entry by Finesse Properties. It seems to me that the only sensible way to understand the operation of these provisions is to conclude that United Petroleum and 7-Eleven Stores envisaged that it was intended that if defects were discovered in the premises, and an obligation to carry out repair or other remedial work fell on 7-Eleven Stores, then it would call on Finesse Properties under the head lease to perform its obligations, Finesse Properties being granted a right of entry to enable it to do so, by clause 18.1 of the sublease. What in fact happened was, in my view, in accordance with what the parties intended by the terms of the sublease.

[59] The events which occurred thereafter have already been set out. Those events suggest that it was by no means obvious that the responsibility for attending to the problem fell on either 7-Eleven Stores or Finesse Properties. Nevertheless, Ms Ball attempted to arrange for Finesse Properties to attend to the problem with the fuel tanks. Her evidence, which was not challenged, shows that she made attempts to do this, commencing on the afternoon of Friday 12 June 2009. She was made aware of the action being taken on behalf of Finesse Properties, including that on 17 June 2009 the hardstand was to be broken up.

[60] When Ms Ball received a communication from United Petroleum on 17 June 2009, Finesse Properties was notified promptly. When on Friday 3 July 2009, United Petroleum complained about delay, Ms Ball visited the service station on the following Monday; and later that day the solicitors for 7-Eleven Stores wrote to Finesse Properties requesting urgent reinstatement of the hardstand. When United

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[4] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 370-371; *McCarrick v Liverpool Corporation* [1947] AC 219, 224, 228; *Austin v Bonney* [1999] 1 Qd R 114, 118, 127, 130-131.

Petroleum again wrote on 14 July 2009 complaining about delay, action was taken promptly by 7-Eleven Stores. None of this suggests that, if any obligation fell on 7-Eleven Stores under clause 23(b) of the sublease to attend as expeditiously as possibly to matters of repair and maintenance, it was in breach of that obligation.

[61] Although it was submitted on behalf of United Petroleum that it was entitled to terminate the lease by reason of a breach of clause 23 of the sublease, having regard to the time taken to reinstate the driveway, no attempt was made on its behalf to demonstrate that the sub-lease made clause 23 a condition, any breach of which would justify termination. As the submissions for 7-Eleven Stores record, in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*[5] Mason J[6] said:

> " … The appellant points out, correctly, that repudiation of a contract is a serious matter and is not to be lightly inferred and that neither a breach of a covenant to pay rent nor a breach of a covenant to repair, without more, constitutes a breach of a fundamental term, nor amounts to a repudiation of a lease."

[62] This passage appears to be based on *Johnstone v Milling.*[7] It would follow that, if 7-Eleven Stores were in fact in breach of clause 23 of the sublease, that, of itself, would not be sufficient to justify termination by United Petroleum. United Petroleum, beyond a bare assertion of a right to termination, made no attempt to demonstrate that the time taken to reinstate the driveway (assuming that to be a breach of clause 23) amounted to repudiation of the sub-lease. In my view, 7-Eleven Stores was not in breach of its obligations under clause 23 of the sub-lease; and even if it were, its conduct was not repudiatory. It is unnecessary to refer to clause 28 of the sub-lease to reach this conclusion.

[63] In support of its right to terminate the sub-lease, the particulars of United Petroleum's defence make reference to clause 24, no doubt a reference to that clause as it appeared in the head lease. However, it was excluded from the sublease by SL clause 3.1(g). Accordingly, it provides no support for United Petroleum.

[64] Those particulars also make reference to clause 1.2(o) of the deed of consent. The submissions made on behalf of United Petroleum made no attempt to establish the relevance of the provisions of this deed to the rights and obligations of the parties under the sublease, and in particular to any potential right to terminate the sublease. In any event, clause 1.2(o) is found in an interpretation clause for the deed. Its obvious intent is to modify requirements found in that deed. No breach of the operative provisions of the deed being relied upon, it seems to me the clause is of no relevance in the present case.

[65] In my view, United Petroleum has failed to establish it was entitled to terminate the sublease by reason of matters relating to the problems with the leaking fuel tanks.

[66] I should add that, on my analysis of this matter, the evidence from Mr Tazzyman, a witness called by United Petroleum, about the time within which the work on the driveway might have been carried out, is of no significance.

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5 (1985) 157 CLR 17, 32-33.

6 With the support of Wilson, Deane and Dawson JJ: see pp 38, 51 and 56.

7 (1886) 16 QBD 460, 474; see *Tabali* at 19.

The roof

[67] I have previously mentioned the inspection carried out by Mr McCarthy in May 2009. He provided a quotation dated 20 May 2009 to United Petroleum for the replacement of the roof of the store.

[68] The unchallenged evidence of Ms Ball is that, on 17 June 2009, 7-Eleven Stores received a letter from United Petroleum complaining about the roof, and calling for its replacement. The solicitors for the 7-Eleven Stores replied the same day, stating that their client had contacted the representative of Finesse Properties, and asking for "a copy of the report in relation to the roofing corrosion". There was no reply to this letter. Ms Ball had in fact sent an email on that date to the solicitors for Finesse Properties, enclosing a copy of the letter from United Petroleum relating to the roof, and confirming the instruction to the solicitors for 7-Eleven Stores to request a copy of the report relating to the roof. There is no direct evidence that Ms Ball had been told by anyone associated with United Petroleum that it had obtained a report about the roof. Nevertheless, Mr McCarthy had inspected the roof in May 2009, and provided United Petroleum with a document dated 20 May 2009, describing its condition and the work required.

[69] For United Petroleum it is submitted that the failure by 7-Eleven Stores to "rectify the roof defects" amounted to repudiation of the sublease, justifying the termination letter.

[70] Against the background of the request from 7-Eleven Stores for a copy of the report relating to the roof, and the absence of a reply to that request, in my view, it could not be said that 7-Eleven Stores was in breach of any obligation to attend "as expeditiously as possible" to dealing with the condition of the roof. Moreover, it had promptly notified Finesse Properties of the complaint made by United Petroleum. I have earlier indicated that, in my view, that was what the parties to the sublease had contemplated would happen. I therefore do not consider that 7-Eleven Stores was in breach of clause 23 by reason of its response to the complaint about the condition of the roof. Even it were, for reasons expressed earlier, this of itself does not amount to repudiatory conduct.

[71] In my view, United Petroleum was not entitled to terminate the sublease on 22 July, by reason of the response of 7-Eleven Stores to the complaint about the condition of the roof.

Clause 45: Mortgagee's consent

[72] United Petroleum has pleaded that it was a "condition precedent" of the sublease, by virtue of clause 45, that 7-Eleven Stores obtain from any mortgagee of the premises, its consent to the sublease. On the second (and final) day of the hearing, after 7-Eleven Stores had closed its case, the solicitor for United Petroleum sought leave to amend its defence and counterclaim, to allege that the termination letter, and the email sent shortly after the termination letter, were each a notice given under clause 45.3 of the sublease. I refused this application.

[73] The defence and counterclaim further alleged that, as at 20 July 2009, and unbeknown to United Petroleum, 7-Eleven Stores had failed or neglected to obtain the consent of the mortgagee to the sublease. 7-Eleven Stores' reply and answer

admitted that the mortgagee's consent to the sublease had not been obtained by 22 July 2009.

[74] The defence and counterclaim went on to allege that if, prior to 22 July 2009, it had been aware that the consent of the mortgagee had not been obtained, it would not have entered into the sublease, or alternatively would not have entered into possession of the premises, or alternatively would have terminated the sublease.

[75] There was evidence from Mr Burge that he became aware that the consent of the mortgagee to the sublease had not been obtained in late December 2009; and that had he been aware of this fact prior to United Petroleum entering into possession of the premises, it would not have done so; and had he subsequently become aware of that fact, in the period 21 January 2009 to 22 July 2009, United Petroleum would have terminated the sublease and vacated the premises.

[76] In its reply, 7-Eleven Stores alleges that clause 45 was not a term of the sublease. It further alleges that the only right of termination based on the fact that consent of the mortgagee was not obtained was that found in clause 45, and that there is no allegation that the notice for which clause 45.3 makes provision, was in fact given. It further alleges that the right to terminate was lost when 7-Eleven Stores entered into possession, or by its continuing possession of the premises up to 22 July 2009.

[77] Notwithstanding the state of the pleadings, the written submissions for United Petroleum contend that the termination letter, notwithstanding its identification of a different basis for termination, may be regarded as effective under clause 45, by reference to the principle identified in *Shepherd v Felt and Textiles of Australia Ltd*.[8] These submissions also make reference to the allegations in the defence and counterclaim, to the effect that 7-Eleven Stores knew, and United Petroleum did not know, that the mortgagee's consent to the sublease had not been obtained, in the period up to and including 22 July 2009. It is also submitted that the notice requirement in clause 45.3 did not apply. The significance of obtaining the mortgagee's consent was said to be supported by reference to s 66 of the *Land Title Act* 1994 (Qld) (*LT Act*).

[78] The submissions made on behalf of 7-Eleven Stores support the allegation in its reply and answer that clause 45 did not form part of the sublease. They also contend that, no notice having been given under clause 45.3 of the sublease, there has been no effective termination under clause 45. They also contend that the clause required the obtaining of the mortgagee's consent prior to commencement of the sublease; and that any right to terminate which arose under the clause was lost by the election made by United Petroleum to enter into the sublease, without making any inquiry about the mortgagee's consent.

[79] Clause 45 of the sub-lease (incorporating amendments to clause 45 of the head lease) is as follows:

> "**45 Mortgagee's Consent**

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8 (1931) 45 CLR 359.

> 45.1 This Sub-Lease is conditional upon consent thereto being obtained from any Mortgagee or Mortgagees of the (sub-leased) Premises;
>
> 45.2 The (Sub-Lessor) must at its own cost apply for and obtain the written consent to this (Sub-Lease) of any such Mortgagee or of each such Mortgagees.
>
> 45.3 If such consent is not obtained within 30 days of the date of this (Sub-Lease) or by the commencement date (which ever is the earlier) the (Sub-Lessee) shall be entitled to avoid this (Sub-Lease) by giving notice in writing to the (Sub-Lessor) of its election in that regard)."

[80] For 7-Eleven Stores, it is submitted that clause 45 is not included in the sublease, when one has regard to clause SL 2.1. Relevantly it provides:

> "The terms and conditions of this Sub-Lease will, *mutatis mutandis*, be the same as the terms and conditions contained in the Head Lease save to the extent that the contrary is provided for in the Sub-Lease."

[81] 7-Eleven Stores argues that the rationale for such a clause does not apply in the present case, the mortgage having been granted subsequent to the grant of the lease; and the sublease being granted by virtue of the head lease. Moreover, it submits that since it was not in a contractual relationship with any mortgagee, any obligation of the kind referred to in clause 45 fell on Finesse Properties.

[82] It seems to me that there is some force in the submission made on behalf of 7-Eleven Stores that the position of United Petroleum as sublessee was not at risk by virtue of s 66 of the *LT Act*. However it is not necessary to decide that question.

[83] It seems to me that 7-Eleven Stores faces a formidable hurdle in its submission that clause 45 was not included in the sublease. Those clauses of the head lease which were to be excluded from the sublease were expressly identified in clause SL 3.1(g). Clause 45 is not one of them. The importance of express provision for the omission of some clauses of the head lease is apparent from the expression "save to the extent that the contrary is provided for in the Sub-Lease", found in clause SL2.1.

[84] The expression "*mutatis mutandis*" in clause SL2.1 is, it seems to me, designed to pick up any modifications of expression found in clauses in the head lease which are incorporated into the sublease, to accommodate the changes in parties, the changes expressly made to terms of the head lease incorporated in the sub-lease, and the nature of the sublease. The fact that 7-Eleven Stores was not in a contractual relationship with the mortgagee does not, in my view, make some change necessary to clause 45. It is by no means uncommon that a party to a contract undertake to obtain consent from a third party with whom it has no contractual relationship. In any event, this is not an argument which supports the conclusion that clause 45 did not form party of the sublease.

[85] In my view, clause 45 is a term of the sublease.

[86] The admission made by 7-Eleven Stores has the consequence that I accept that the consent of the mortgagee to the sublease had not been obtained by 22 July 2009.

[87] Although the defence and counterclaim alleges that the obtaining of this consent was a "condition precedent" to the sublease, in my view that is not correct. Its terms record that a right to terminate the sublease was conferred, if the condition was not fulfilled. That is inconsistent with the notion that the mortgagee's consent was a condition precedent to the sublease.

[88] However, there is no allegation, nor is there any evidence, that United Petroleum exercised its rights under clause 45.3.

[89] It is well established that the terms of the contract may state that a breach of a term justifies termination of the contract, regardless of the fact that the term itself, or the breach, is of little importance. It seems to me inevitably to follow that parties to an agreement might specify the manner by which any right consequent on a breach of contract is to be exercised.

[90] An analogy may be drawn from *Sandra Investments Pty Ltd v Booth.*[9] The contract under consideration in that case included a clause (clause 24) which made the contract subject to obtaining a subdivision approval; and provided that if the approval were not obtained within a specified period, the purchaser might cancel the contract. Of this clause, Gibbs CJ said[10]:

> "Clause 24 does expressly deal with the situation that arises when the approval of the council is not obtained within the stipulated time. It provides that in such an event the purchaser at its option may cancel the contract. These words, which are in all material respects the same as those that govern the consequences of the dishonour of a cheque given in payment of a deposit, gave the purchaser the choice of cancelling the contract or allowing it to remain on foot. The plain implication is that if the purchaser does not choose to cancel the contract the vendor has no right to treat it as being at an end."

[91] In *S.C.N. Pty Ltd v Smith,*[11] the Court had to determine whether a contract for the sale of land had been terminated, under a clause relating to the making of development applications and obtaining development approvals. The clause made the contract conditional upon the purchaser "lodging an application for material change of use application, development application and operational works" within a specified time, and obtaining approval within a further specified time. It also provided:

> "If the Purchaser fails to lodge the material change of use application with the local authority within 60 days of the date hereof then the Vendor may by notice in writing terminate the contract."

[92] It was held that the vendor's right to terminate was limited to a case where the purchaser had failed to lodge the material change of use of application within the 60 day period, and did not extend to a failure to lodge any other application. Two members of the Court relied on the reasoning in *Sandra Investments*. In particular,

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9 (1983) 153 CLR 153.
10 At 157-158.
11 [2006] QCA 360.

McPherson JA noted the limitation on termination of the contract to a "notice in writing" from the vendor.[12]

[93] The parties, by their agreement, specified the right conferred on United Petroleum in the event that the consent of the mortgagee to the sublease was not obtained by the date determined by reference to clause 45.3. It was a right to terminate the lease "by giving notice in writing to the (Sub-Lessor) of its decision in that regard".

[94] In the present case, there is no allegation that the right was exercised. As has often been noted,[13] a term like this does not automatically bring a contract to an end; rather, at the very least, some act by one party is required to achieve that result. Indeed, in my view, where the contract specifies what act is to have that effect, then the carrying out of that act, and nothing else, will end the contract. United Petroleum has not pleaded that such an act has occurred in the present case.

[95] In any event, I do not think that the termination letter could be regarded as an exercise of the right conferred by clause 45.3. The clause, in terms, requires an election by United Petroleum to terminate the contract because the mortgagee's consent has not been obtained. Since this fact was not known to United Petroleum at the time when the termination letter was sent, it is difficult to see how it carried out an election. Moreover, the notice required is "notice in writing …of its election in that regard." Not surprisingly, the termination letter makes no reference to the failure to obtain the mortgagee's consent, and, it seems to me, is not a notice of the kind specified by clause 45.3.

[96] In my view, United Petroleum has not terminated the contract under clause 45 of the sublease. It is unnecessary to consider the other matters raised by the parties.

Retail Shop Leases Act

[97] The evidence discloses, and it was not challenged, that on 12 January 2009, a lessor's disclosure statement under s 22 of the *RSLA* was executed on behalf of 7-Eleven Stores. It related to the sublease to United Petroleum. That document was sent to United Petroleum by e-mail the same day.

[98] In its defence and counterclaim, United Petroleum pleaded that it was entitled to terminate the sublease pursuant to s 22 of the *RSLA*, by reason of the failure of 7-Eleven Stores to provide it with a lessor's disclosure statement pursuant to s 22(1).

[99] It is necessary to note some difficulties with United Petroleum's defence and counterclaim. As mentioned, the allegation pleaded is a failure to provide the notice required by s 22 of the *RSLA*. Particulars were sought of this allegation, the response simply being a repetition of the allegation that 7-Eleven Stores had failed to provide United Petroleum with a disclosure notice pursuant to the *RSLA*. No facts were alleged to establish the applicability of s 22 of the *RSLA*. It is also notable that United Petroleum did not allege that a lessor's disclosure statement had been provided, but that it had not been provided within the time specified by the Act.

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12 See S.C.N. at [5].

13 See for example S.C.N. at [5].

[100] In its reply and answer, 7-Eleven Stores alleged that a disclosure statement was provided on 12 January 2009. It did not admit that s 22 of the *RSLA* applied, on the ground that the first respondent, despite requests, had failed to identify the basis for alleging that s 22 of the *RSLA* applied. It further alleged that s 22 did not apply to a sublease.

[101] In its evidence, United Petroleum proved delivery of the lessor's disclosure statement on 12 January 2009. It submitted, somewhat obscurely, that 7-Eleven Stores had pleaded that it executed the sublease on 24 December 2008, and that United Petroleum had executed it on 6 January 2009. Rather curiously, in light of its own evidence, it then referred to the allegation made by 7-Eleven Stores that it provided the disclosure statement to United Petroleum on about 12 January 2009. It appears to submit it was entitled under s 22 of the *RSLA* to terminate the sublease by written notice given within six months after it entered into the sublease; and by reason of the fact that the head lessor's consent the sublease had not been obtained by 13 March 2009, that the termination letter came within that six month period.

[102] The effect of the submissions made on behalf of 7-Eleven Stores was that United Petroleum had not established the date on which it entered into the sublease for the purposes of s 22 of the *RSLA;* it had not established that s 22 had been breached by 7-Eleven Stores, by reason of its failure to give to United Petroleum a disclosure statement under s 22, at least seven days before United Petroleum entered into the retail shop lease; and United Petroleum had failed to establish that the termination letter was given within six months after it entered into the sublease. It also submitted that s 22 of the *RSLA* did not apply to a sublease of a retail shop. In the course of the hearing, its Counsel accepted that s 17 of the *RSLA* did not prevent the application of s 22; and that, save for its submission about the applicability of s 22 a sublease, that section would otherwise apply.

[103] The following provisions of the *RSLA* are relevant:

> "**11 Application of Act**—when lease entered into
>
> A retail shop lease is entered into on whichever is the earlier of the following dates—
> (a) the date the lease becomes binding on the lessor and lessee;
> (b) the date the lessee enters into possession of the leased shop."
>
> "**22 Lessor's disclosure obligation to prospective lessee**
>
> (1) At least 7 days before a prospective lessee of a retail shop enters into a retail shop lease (the *disclosure period*), the lessor must give to the person a draft of the lease and a disclosure statement.
>
> (2) Subsections (3) and (4) apply if—
> (a) the lessor does not comply with subsection (1); or
> (b) the disclosure statement when given to the prospective lessee under subsection (1) is a defective statement.
>
> (3) The lessee may terminate the lease by giving written notice to the lessor within 6 months after the lessee enters into the lease."

[104] The following definitions are found in the schedule to the *RSLA*:

disclosure statement, for part 5, means a statement in the approved form containing the particulars prescribed under a regulation.

lease means an agreement under which a person gives or agrees to give to someone else for valuable consideration a right to occupy premises whether or not the right is—
(a) an exclusive right to occupy the premises; or
(b) for a term or by way of a periodic tenancy or tenancy at will.

leased shop means the retail shop leased, or to be leased, under a retail shop lease.

lessee—
(a) in relation to a retail tenancy dispute, includes the former lessee; and
(b) for part 6, division 7, includes—
(i) a lessee who is holding over under the lease or with the lessor's consent; and
(ii) a sublessee or franchisee entitled to occupy the retail shop under the lease or with the lessor's consent.

lessor means the person who, under a lease, is or would be entitled to the rent payable for the leased premises regardless of the person's interest in the premises, and includes—
(a) a person acting under the lessor's authority; and
(b) in relation to a retail tenancy dispute—the former lessor.

retail shop means premises that are—
(a) situated in a retail shopping centre; or
(b) used wholly or predominantly for the carrying on of 1 or more retail businesses.

retail shop lease means a lease of a retail shop, other than a lease of—
(a) a retail shop with a floor area of more than 1000m2 by a listed corporation or a listed corporation's subsidiary; or
(b) a retail shop within the South Bank corporation area if the lease is a perpetual lease or another lease for a term, including renewal options, of at least 100 years entered into or granted by the South Bank Corporation; or
(c) premises in a theme or amusement park; or
(d) premises at a flea market, including an arts and crafts market; or
(e) a temporary retail stall at—
(i) an agricultural or trade show; or
(ii) a carnival, festival or cultural event; or

> (f) premises that, if the premises were not leased, would be premises within a common area of a retail shopping centre, but only if the premises are used for 1 or more of the following—
> (i) information, entertainment, community or leisure facilities;
> (ii) telecommunication equipment;
> (iii) displaying advertisements;
> (iv) storage;
> (v) parking; or
> (g) another type of premises prescribed by regulation.

[105] 7-Eleven Stores' submission that s 22 does not apply was based upon the definition of "lessee", and in particular the inclusion in it of an extension of the term to a sublessee for the purposes of Part 6, Division 7. That Division has the effect of including certain terms in a retail shop lease.[14] The first of those terms, found in s 43(1), requires a lessor to pay reasonable compensation to a lessee in certain circumstances likely to affect the operation of the business conducted in a retail shop. Section 43(2) makes a lessor liable to compensate a lessee for a misleading statement which resulted in the lessee entering into a lease; or if the shop was not available on the date specified in the disclosure statement given to the lessee under s 22, by reason of the lessor's default. Section 43A provides for the payment of compensation by a lessee (amongst others) for a misleading statement in a disclosure statement under provisions including s 22A.

[106] Section 22A requires a prospective lessee of a retail shop to give the lessor a disclosure statement. The effect of the extension of the term "lessee" in Part 6, Division 7, therefore, would include imposing on a sublessee a liability to pay compensation for making a false or misleading statement or representation in a disclosure statement given under s 22A. That extension can only make sense if s 22A applies to a sublease. If s 22A applies to a sublessee, it would rather strongly appear that s 22 also applies to a sublessor.

[107] The effect of the extended definition of the term "lessee" on the operation of s 43(1) is not easy to understand. However, its effect on the operation of s 43(2) assumes that a sublessor is required to give a disclosure statement under s 22.

[108] The object of the *RSLA* is found in s 3. It is "to promote efficiency and equity in the conduct of certain retail businesses in Queensland". The focus therefore is on the conduct of those businesses. Where there is a sublease, it is the sublesee who conducts the business. It is a little difficult, in those circumstances, to consider that the Act, including s 22, is not intended to apply to a sub-lease.

[109] In my view, s 22 applies to a sublease.

[110] Otherwise, it seems to me that the submissions for 7-Eleven Stores must be accepted. As has been mentioned, a disclosure statement was given to United Petroleum on behalf of 7-Eleven Stores, on 12 January 2009. Because United Petroleum has not established that it did not enter into the sublease within the

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[14] See s 42(1) of the *RSLA*.

following seven days, it does not establish a breach of s 22(1) of the *RSLA*. Further, if there were a breach, it must be because the sublease was entered into before 19 January 2009. In that event, the six month period for termination under s 22(3) had expired before the termination letter of 22 July 2009. No other document was relied upon as giving written notice of termination under s 22(3).

[111] It follows that United Petroleum has not validly terminated the sublease under s 22 of the *RSLA*.

Counterclaim of United Petroleum

[112] This depends upon an alleged breach of the repair obligations under the sublease, in respect of the fuel tanks and the roof; together with an allegation of loss. As none of these allegations have been made out, the counterclaim of United Petroleum must fail.

Claim against Finesse Properties

[113] At the end of the hearing, 7-Eleven Stores sought to deliver a reply to the defence of Finesse Properties. I reserved the question whether it should be given leave to do so, and provided an opportunity for Finesse Properties to identify prejudice if leave were granted. No relevant prejudice having been identified, I grant leave to 7-Eleven Stores to deliver its reply.

[114] The claim made by 7-Eleven Stores against Finesse Properties, in effect, seeks to transfer responsibility for breaches alleged against it by United Petroleum, to Finesse Properties. Its claim for relief against Finesse Properties is in the alternative to its claim for relief against United Petroleum. The claim for relief against United Petroleum being successful, and United Petroleum's counterclaim having failed, it is unnecessary to deal with the claim made by 7-Eleven Stores against Finesse Properties.

Conclusion

[115] United Petroleum has not established that it validly terminated the sublease. Accordingly, it remains bound by its provisions. I shall hear further submissions from the parties in relation to appropriate orders, and costs.