SUPREME COURT OF QUEENSLAND

CITATION:	*Pialba Commercial Gardens Pty Ltd v Braxco Pty Ltd & Ors* [2011] QCA 148
PARTIES:	**PIALBA COMMERCIAL GARDENS PTY LTD** ACN 065 452 146 (appellant) **v** **BRAXCO PTY LTD** ACN 100 521 711 (first respondent) **CORSER SHELDON AND GORDON SOLICITORS** (A Firm) (second respondent) **CAROLYN CONFORD (also known as CAROLYN ANN MCELLIGOTT and now known as CAROLYN ANN FRENCH)** (third respondent)
FILE NO/S:	Appeal No 9936 of 2010 SC No 3609 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	15 March 2011
JUDGES:	Margaret McMurdo P, Muir JA and Margaret Wilson AJA Separate reasons for judgment of each member of the Court, Margaret McMurdo P and Margaret Wilson AJA concurring as to the orders made, Muir JA dissenting
ORDER:	**1. That the appeal be dismissed;** **2. That the appellant pay the first and third respondents' costs of the appeal;** **3. That the parties have leave to file written submissions as to the second respondent's costs of the appeal in accordance with paragraph 52 of Practice Direction No 2 of 2010.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where appellant owned commercial complex of cinemas and a nightclub – where the first respondent entered into a lease of part of ground floor – where premises operated as a nightclub – where lease stated that the appellant warranted that the

premises could be used as a night club and sports bar – where no certificate of classification was obtained following alterations to the premises – where Queensland Fire and Rescue Service (QFRS) issued notice under s 69 of the *Fire and Rescue Service Act* 1990 (Qld) that trading be suspended until the premises was modified – where objective intention of the parties to be ascertained – whether it was the appellant's or the first respondent's responsibility to comply with the notice issued by QFRS and carry out requisite structural repairs – whether the appellant breached its warranty

DAMAGES – GENERAL PRINCIPLES – MITIGATION OF DAMAGES – PLAINTIFF'S DUTY TO MITIGATE – where appellant argued that any losses incurred or relating to the period from May 2005 were unreasonably incurred due to the first respondent's failure to mitigate its loss by rectifying defects and maintaining the business – whether the first respondent did not claim, and the trial judge did not award, damages relating to losses incurred from May 2005 – whether appellant fulfilled its onus of showing that the first respondent had not fulfilled this duty to mitigate

Building Act 1975 (Qld)
Building Code of Australia
Fire and Rescue Service Act 1990 (Qld), s 69
Standard Building Regulation 1993 (Qld), s 8, s 95

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99; [1973] HCA 36, cited
Braxco Pty Ltd v Pialba Commercial Gardens Pty Ltd [2010] QSC 259, affirmed
British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673, cited
Claremont Petroleum NL v Cummings (1992) 110 ALR 239; [1992] FCA 446, cited
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337; [1982] HCA 24, cited
Driver v War Service Homes Commissioner (1923) 44 ALT 130, considered
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
Konica Business Machines Australia Pty Ltd v Tizine Pty Ltd (1992) 26 NSWLR 687, cited
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451; [2004] HCA 35, cited
Smith v Federal Commissioner of Taxation (1987) 164 CLR 513; [1987] HCA 48, cited
TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd (1989) 16 NSWLR 130, cited
Thiess Services Pty Ltd v Mirvac Queensland Pty Ltd [2005] QSC 364, cited

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52, cited

COUNSEL: P J Davis SC, with M Gynther, for the appellant
R Morton, with B Wessling-Smith, for the first and third respondents
R P S Jackson for the second respondent

SOLICITORS: Deacon & Milani Solicitors for the appellant
Suthers Lawyers for the first and third respondents
DLA Phillips Fox for the second respondent

[1] **MARGARET McMURDO P:** I agree with Margaret Wilson AJA's reasons for dismissing this appeal.

[2] This appeal chiefly concerns the construction of cl 6.2 of the lease, particularly in light of cl 9 of the lease. As Muir JA demonstrates in his reasons, the lease is far from a model of clarity and there are competing persuasive arguments. But, not without hesitation, I have concluded that the primary judge's construction of cl 6.2 is preferable to that urged on this Court by the appellant.

[3] The relevant provisions of the lease between the appellant as landlord and the first respondent as tenant are set out in Margaret Wilson AJA's reasons at [53].

[4] In construing the arguably contradictory provisions of cl 6.2 and cl 9 and in determining the objective intention of the parties, the background to their entering into the lease is relevant: *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*.[1] That background is set out in Margaret Wilson AJA's reasons at [31]-[38]. Both the appellant and the first respondent knew when they executed the lease in 2002 that the premises had been used as a nightclub since 1997 and intended that it would continue to be used as a nightclub throughout the lease period. That background demonstrates that the knowledge of the parties was consistent with an intention, at the time they entered into the lease, that the premises could and would be lawfully used as a nightclub.

[5] It is now common ground that at the commencement of and throughout the duration of the lease the premises could not be lawfully used as a nightclub. That was for two reasons. First, the nightclub was operating in breach of s 95 *Standard Building Regulation* 1993 (Qld) as no certificate of classification was obtained following the 2002 alterations to the premises. Second, the premises required significant structural alterations pursuant to the notice dated 7 January 2005 under s 69 *Fire and Rescue Service Act* 1990 (Qld) to operate as a nightclub. The central question is whether, as a result, the appellant has breached its "Warranty as to Use" in cl 6.2 or whether the first respondent is responsible for the necessary structural alterations under cl 9.

[6] It is desirable to interpret cl 6 and cl 9 so that they can be harmoniously read together, but it is significant that they are contained in different parts of the lease. In my view this has the result that cl 6 and cl 9 are not closely linked. The lease is divided into seven parts. Clause 6 is contained in "Part 3 – Restrictions" which

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1 (1982) 149 CLR 337, Mason J (as his Honour then was), 350 – 353, Stephen and Wilson JJ agreeing; [1982] HCA 24.

contains only cl 5 "Assignment/Subletting" and cl 6 "Use of Premises". The term "use" is not defined in the lease other than that "Permitted Use" in cl 6 means "Night Club and Sports Bar". The clear terms of cl 6, headed "Use of Premises" and cl 6.2, sub-headed "Warranty as to Use" are that the appellant "warrants that the premises may be used for the purposes [of a Nightclub and Sports Bar]". By contrast, cl 9 is contained in "Part 4 – Tenant's Obligations" which contains cl 7 "Insurances"; cl 8 "Indemnities"; cl 9 "Compliance with Laws and Requirements"; cl 10 "Maintenance, Repair, Redecoration and Alteration of Premises"; cl 11 "Cleaning of Premises and Removal of Refuse"; cl 12 "Trading Hours"; and cl 13 "Tenant's General Covenants". It is self-evident that unlike cl 6.2, cl 9 is not a warranty.

[7] I cannot accept the appellant's contention that the Warranty as to Use in cl 6.2 refers to use only in the town planning legislation sense and that this construction is necessary for cl 6.2 to be read harmoniously with cl 9. True it is that the second sentence of cl 6.1 provides that, in the event that the first respondent assigned, transferred or sub-let the premises, the appellant could "not unreasonably withhold or delay its consent to a change in the permitted use which is not in contravention of any town planning legislation relating to the use of the land". But the terms of cl 6.2 neither state nor suggest that the use there referred to is limited to use under town planning legislation. If the parties intended that the Warranty as to Use in cl 6.2 be limited to use in the town planning legislation sense, they could have very easily stated it. They did not. I do not consider that the second sentence in cl 6.1 informs the meaning of use in cl 6.2. In my view, the word use throughout cl 6 must be given its ordinary meaning. The noun "use" has a number of ordinary meanings but the most apposite in the context of cl 6 is "*History, Law* a. the enjoyment of property, as by employment, occupation, or exercise of it".[2] Similarly, the verb "use", as in "warrants that the premises may be used for the purposes [of a Nightclub and Sports Bar]" in the first sentence of cl 6.2, has its ordinary meaning: "1. to employ for some purpose; put into service; turn to account".[3] In cl 6.2, the appellant warranted to the first respondent that the premises could be used as a nightclub.

[8] This construction of cl 6.2 can sit sympathetically with cl 9 without straining the language of cl 6.2 to limit the appellant's Warranty as to Use to use in the town planning legislation sense. For example, the second sentence of cl 6.2 requires the first respondent in running the nightclub to meet its lawful obligations under legislation such as the *Liquor Act* 1992 (Qld) concerning matters such as underage and excess drinking and opening hours. The exception in cl 9.2(a) to the general opening statement in cl 9.2 (that the first respondent need not carry out structural alterations) would cover structural alterations arising from the first respondent's use of the premises as a nightclub during the term of the lease. It follows that, if the first respondent, say, required a full sized grand piano, wider than any doorway or window in the premises, to be delivered for a nightclub act, and the piano had to be craned into place requiring the temporary removal and subsequent replacement of sections of the roof, the first respondent would be liable for carrying out those structural alterations and resulting repairs.

[9] In my opinion, cl 6.2 expressed the objective intention of the appellant and the first respondent that, in entering into the lease, the appellant warranted the premises

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2 *The Macquarie Dictionary*, Federation ed (2001) at 2068.

3 *The Macquarie Dictionary*, Federation ed (2001) at 2068.

could be used as a nightclub and sports bar. It is true that this construction of cl 6.2 placed onerous obligations on the appellant during the term of the lease but in my view that was the intent of both parties, apparent from the clear and ordinary meaning of the terms of cl 6.2 and its sub-heading. It follows that, from the time the lease commenced on 1 June 2002, the appellant was in breach of its Warranty as to Use in cl 6.2 and the first respondent was entitled to claim resulting damages.

[10] For these reasons, as well as those given by Margaret Wilson AJA, the appeal should be dismissed.

[11] The appellant joined the second respondent as a party to the appeal on the limited basis that, if the appeal were allowed, the order at first instance (that the second respondent's costs be paid by the first respondent) may be altered by this Court. The second respondent did not make written submissions in the appeal but was represented by counsel at the appeal hearing. The second respondent's counsel made brief oral submissions, limited to maintaining a costs order in its favour relating to the proceedings at first instance. Counsel did not ask for its costs of the appeal.[4] I have misgivings as to whether, in those circumstances, it was necessary for the second respondent to be represented at the appeal hearing. A common practice adopted by parties in the position of the second respondent is to write to the court stating their intention not to make submissions or appear at the appeal hearing, but to abide the order of the court; to reserve their position as to costs at first instance; and if necessary to make submissions as to the appropriate costs orders after the delivery of this Court's reasons for judgment in accordance with Practice Direction No 2 of 2010, para 52. This practice has the obvious and commendable advantage of limiting the incurring of further and unnecessary costs. As the appeal is to be dismissed, the costs orders in favour of the second respondent at first instance remain apposite. I am not presently disposed to make any order as to the second respondent's costs of the appeal. If it considers that the appellant should pay its costs of the appeal, it and the appellant should make submissions in accordance with the Practice Direction.

[12] I agree with the orders proposed by Margaret Wilson AJA.

[13] **MUIR JA:** I am indebted to Margaret Wilson AJA for her careful statement and analysis of relevant facts and principles which has enabled me to state my reasons briefly. I regret, however, that I am unable to share her Honour’s opinion on the proper construction of cl 6.2 of the lease. My reasons for preferring the construction advanced by the appellant are as follows.

[14] The background to the entering into of the lease is contained in paragraphs [41] to [48] inclusive of reasons of the primary judge. Mr Kelly, a director of the first respondent, had been a director of a company which had conducted a nightclub business in the subject premises between 1997 and late 2001. That company failed and the appellant took possession of the premises. A director of the first respondent assisted Mr Kelly to prepare the premises for a new nightclub business to be conducted by the first respondent. Mr Kelly assumed responsibility for making alterations to the premises to make them suitable for the proposed new business and for the cost of those alterations. The appellant lent Mr Kelly the money to pay for the refurbishment and the first respondent gave the appellant a mortgage debenture over its assets to secure the loan.

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4 Transcript appeal hearing 1-44, lines 3 to 35.

[15] If cl 6.2 is construed as a warranty that the premises may be used as a nightclub and sportsbar throughout the term of the lease, unqualified by cl 9.1 and 9.2, it is necessary to read down the words of cl 9.1 and 9.2. Under cl 9.1 **the tenant is obliged to comply with** "all requirements and orders of competent authorities and **all laws in connection with the premises**…**and** the use **or** occupation of the premises." (emphasis added). Under cl 9.2, "in complying with [such] requirements, orders of authorities and…laws", the tenant has an obligation to "carry out structural alterations…or additions of a capital nature to the premises…required because of the nature of the Tenant's business **or** the Tenant's use **or** occupation of the premises" (emphasis added).

[16] Clause 9 is closely linked with cl 6.2 as cl 9.1 overlaps with cl 6.2. Clause 9.1 may impose wider and more onerous obligations on the tenant. The obligations in cl 9.1 are not confined to compliance with requirements, orders and laws in connection with the tenant's "use or occupation of the premises". Compliance with "all requirements…and all laws in connection with the premises" is required. The words "relating to" in cl 6.2 are capable of wide meaning[5] and it has frequently been observed that the phrase "in connection with" is of wide import.[6]

[17] Clause 9.2 limits the obligation imposed by 9.1 by excluding any obligation to carry out alterations, maintenance, repairs, replacements or additions which are structural or capital in nature. The exclusion assumes that, in its absence, the tenant would be responsible for such works. The exception to cl 9.2, which defines the extent of the tenant's obligations in respect of structural work, makes it plain that alterations, maintenance, repairs, replacements or additions which are structural or capital in nature, fall outside the exclusion and remain the tenant's responsibility where relevantly, they are "required because of the nature of the Tenant's business or the Tenant's use or occupation of the premises."

[18] Clause 9.2, making as it does, specific provision for the circumstances in which the tenant has responsibility for structural or capital works cannot be qualified by the more general words of cl 6.2. It is necessary to read cl 6.2 together with cl 9.1 and cl 9.2 so that, if possible, the words of the two provisions are "construed so as to render them all harmonious one with another."[7]

[19] What obligation, then, is imposed by the first sentence of cl 6.2? In my view, it warrants that, under the relevant Local Authority laws and regulations, the use designated in item 14 is a permitted use. That construction enables it to be construed harmoniously with cl 9.1 and cl 9.2. A construction of cl 6.2 which obliges the landlord to comply with all requirements, orders and laws in connection with the premises in order to meet its warranty, conflicts with the plain words of cl 9.1 and 9.2 and deprives those provisions of much of their effect.

[20] It follows from the foregoing that the appellant was not in breach of cl 6.2. The first respondent, on the other hand, was in breach of its obligations under cl 9.2 and its claim against the appellant was unsustainable.

[21] The primary judge found that "occupation of the premises without a certificate of classification based on the 2002 alterations to the premises was unlawful" as being

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5 See eg, *Smith v Federal Commissioner of Taxation* (1987) 164 CLR 513, 533.

6 See eg, *Claremont Petroleum NL v Cummings* (1992) 110 ALR 239, 280; [1992] FCA 446.

7 *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99, 109 per Gibbs J.

in breach of s 95 of the *Standard Building Regulation* 1993 (Qld). She also found that the premises "never complied with the [*Fire and Rescue Service Act* 1990 (Qld)] in relation to the distances to fire exits."

[22] There was also evidence that the work done by the appellant after the premises were vacated by the first respondent was necessary in order to render lawful the use of the premises for purposes within its classification under class 9B of the Building Code of Australia. There was no evidence, however, that the premises could not be occupied and used for any purpose. Having regard to these considerations, it is my view that the alterations under consideration, which were undoubtedly structural in nature, were "required because of the nature of the [first respondent's] business" or because of the first respondent's "use or occupation of the premises". Even if the first respondent had no obligation under cl 9.2 to effect the structural changes, it would not follow, having regard to cl 9.1, that the appellant assumed the obligation.

[23] The appellant sought an order that judgment be entered in its favour against the first respondent in the sum of $282,445.36. How this sum was calculated was not explained.

[24] Paragraph 9 of the appellant's notice of appeal stated the judgment should have been given at first instance:

> "…for the appellant against the first respondent as lessee and the third respondent as guarantor for $123,560.79 as well as $102,561.36, which was ordered to be paid in respect of the debt owing under the mortgage debenture."

[25] There was almost no attention paid in the outlines of argument to the appellant's counterclaims against the first and third respondents. Moreover, the reasons of the primary judge assessed the moneys payable on the counterclaim only on the basis that the lease had come to an end "by a surrender by operation of law". On this basis her Honour held that the appellant was entitled to recover against the first and third respondents $14,254.88 and that interest was payable on that sum pursuant to the terms of the lease. Her Honour observed that there did not appear to be any defence to the claim for $92,646.88, being the moneys owing under the mortgage debenture, together with interest at 14 per cent per annum from that date until the date of judgment.

[26] Having regard to the absence of findings in respect of the appellant's claims and the cursory way in which those claims were dealt with in submissions, it is, I think, desirable that the parties be invited to submit agreed minutes of order and, in the event of failure to agree, the parties be required to exchange and file brief further outlines of submissions in respect of the counterclaim.

[27] It follows from the above reasons that I would order that the appeal be allowed. I would, however, defer making any formal orders until the processes just identified have been completed.

[28] **MARGARET WILSON AJA**: The appellant owned a commercial complex of cinemas and a nightclub[8] at Pialba, Hervey Bay. It leased part of the ground floor to

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[8] The subject property is located within a showroom/warehouse local shopping precinct of Pialba. The subject property aggregation includes showrooms, shops, *et cetera*. See Supplementary appeal record volume 3, tab 7.1, page 13.

the first respondent, which conducted a night club called the Bermuda Triangle Nite Club there until 7 January 2005. On that date the night club was closed in response to a notice served by the Queensland Fire and Rescue Service ("the QFRS) that it must cease trading pending structural alterations to reduce the risk to patrons in the event of a fire.

[29] The first respondent successfully sued the appellant for damages for breach of warranty and other relief. The appellant succeeded in part in its counterclaim for outstanding rent and outgoings and other moneys owing. The first respondent also sued the second respondent, its former solicitors, for professional negligence, but it failed in that claim.

[30] In this appeal the appellant challenges the findings and orders made on the first respondent's claim. Although there is no appeal against the dismissal of the first respondent's claim against the second respondent, the second respondent was represented on the hearing of the appeal to seek costs against the first respondent and the third respondent (a guarantor of the first respondent's obligations) in the event the appeal succeeded.

The facts

[31] The building was constructed in about 1997.

[32] On 14 October 1997 a certificate of classification issued for the relevant part of the building, which was classified as "Class 9b (Night Club)". The certificate was "subject to the 120minute Fire Rated Door between Cinema & Night Club being locked at all times."[9]

[33] It was common ground that the applicable classification was class 9b under the *Building Code of Australia* –

> "**Class 9**: a building of a public nature –
>
> (a) ….
>
> (b) **Class 9b** an *assembly building*, including a trade workshop, laboratory or the like in a primary or secondary school, but excluding any other parts of the building that are of another Class."

[34] Hollywood Legends Pty Ltd, a company of which Mr Kelly was then a director, conducted the Incas Niteclub from the premises between 1997 and late 2001. That company went into administration on 14 December 2001 and subsequently into liquidation.

[35] The appellant retook possession of the premises in March 2002 and appointed Mr Kelly as its nominee/manager. Refurbishment and alterations were organised by Mr Kelly. There was an arrangement between Mr Kelly and Mr Liuzzi (the

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[9] Supplementary Record of Proceedings vol 2 tab 3.1 page 1. The *Building Code of Australia* provided a system of classification of buildings or parts of buildings according to the purpose for which they were designed, constructed or adapted for use. The *Code* was incorporated into the *Standard Building Regulation* 1993 (Qld) under the *Building Act* 1975 (Qld): *Regulation* s 8. By s 95 of the *Regulation* it was unlawful to occupy or use any part of a building for which a certificate of classification was required until a certificate had issued and remained in force.

principal of the appellant) that Mr Liuzzi's company would pay for the refurbishment, but Mr Kelly would eventually repay it.

[36] No classification certificate ever issued in relation to the refurbishment and alterations.

[37] The first respondent was incorporated on 13 May 2002, with Mr Kelly as its sole director. It gave the appellant a mortgage debenture to secure repayment of the refurbishment expenses.

[38] The appellant leased the premises to the first respondent for 10 years from 1 June 2002. The lease was executed by the first respondent on 31 May 2002 and by the appellant on 2 December 2002.

[39] The liquor licence was transferred to the first respondent on 18 October 2002.

[40] Mr Kelly ceased to be a director of the first respondent and Ms Carolyn French became its sole director on 4 December 2002.

[41] The nightclub traded profitably until November 2004. By then it was open only on Friday and Saturday nights, except where there was a special event on.

[42] In November 2004 a Government liquor licensing officer raised the spectre of a cap being placed on the number of patrons who might be in the premises at any one time. There were discussions between the licensing authority and the QFRS.

[43] On 7 January 2005 the QFRS issued a notice under s 69 of the *Fire and Rescue Service Act* 1990.[10]

> "THE QUEENSLAND FIRE AND RESCUE SERVICE HAS IDENTIFIED THE FOLLOWING HAZARD;
>
> The premises are being used as a night club and the means of escape are not adequate for that purpose and they may not be safely and effectively used at all material times in the event of fire, namely travel distances are excessive and alternative exit paths are not readily or easily accessible.
>
> YOU ARE HEREBY NOTIFIED, pursuant to Section 69 of the *Fire and Rescue Service Act 1990*, for the purpose of reducing the risk of fire occurring on the premises or reducing potential danger to persons, property or the environment in the event of a fire occurring on the premises, you must take the following measures namely;
>
> 1. From 1700 hours on 07/01/05 suspend trading upon and within the above mentioned premises;
> Do not recommence trading unless and until the means of escape, including travel distances and alternative exit paths for the proposed use have been approved in writing by the relevant local authority and the Queensland Fire and Rescue Service Prosecutions Section has been provided with a copy of the approval."

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[10] Supplementary appeal record volume 2, CSG tab, page 80.

[44] Barlow Gregg and Associates, consulting engineers, prepared plans for modifications involving the demolition of a glass enclosed smoking room and the installation of a further fire exit. These were approved by the Hervey Bay City Council on about 23 February 2005.

[45] On 15 March 2005 a liquor licensing officer informed the defendant that the licence would be renewed only after satisfactory completion of the rectification works required by the s 69 notice. He notified the defendant of proposed conditions for the renewal of the licence, including a limit of 600 persons who might be in the premises at any one time and extra security staff.[11]

[46] On 5 May 2005 the appellant served a notice to remedy breach of covenant on the first respondent.[12] The breaches particularised were failure to pay arrears of rent owing between 31 December 2004 and 30 April 2005 ($47,597.08), Council rates ($6,353.48) and an insurance premium ($2,907.60).

[47] On 23 May 2005 the first respondent (by its solicitors) claimed that the breach notice was invalid.[13] It claimed that its inability to pay the rent was a result of the appellant's fundamental breach of the lease – that the appellant had warranted that the premises could be used for the purposes of a night club and that it was the appellant's responsibility to comply with the notice issued by QFRS and carry out requisite structural repairs. It gave reasons for not having paid the rates and the insurance premiums, and claimed never to have disputed its obligations under the lease.

[48] On 8 June 2005 the appellant entered the premises and took possession, purporting to terminate.[14]

[49] The trial judge found –

> "[84] On the basis that the [appellant] should not have given the breach notice because of its breach of the warranty in clause 6.2 of the lease, the taking of possession of the premises by the [appellant] on 8 June 2005 which was accepted by the [first respondent] brought the lease to an end. It is not appropriate to characterise those events as a termination or forfeiture of the lease by the [appellant]. It is properly characterised as the bringing of the lease to an end by a surrender by operation of law: *Konica Business Machines Australia Pty Ltd v Tizine Pty Ltd* (1992) 26 NSWLR 687, 694."[15]

[50] Between June and October 2005 the appellant undertook works to meet the concerns of QFRS. On 14 October 2005 a certificate of classification was issued.

[51] On 1 November 2005 the appellant granted a new lease to a third party. The appellant sold chattels the subject of the mortgage debenture in reduction of the loan.

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11 Supplementary appeal record volume 2, CSG tab, pages 189-190, 181-182.

12 Supplementary appeal record volume 3, tab 5, pages 32-33.

13 Supplementary appeal record volume 3, tab 5, pages 34-35; Supplementary appeal record volume 3, tab 5, page 31.

14 See the letter at supplementary appeal record volume 3, tab 5, pages 36-37.

15 [2010] QSC 259, [84].

The lease

[52] Who was responsible for the structural alterations to meet the requirements of the QFRS?

[53] Relevantly the lease provided:-

> "**6. USE OF PREMISES**
>
> **Permitted Use**
>
> 6.1 The Tenant may not carry on a business at or from the premises other than a permitted use without the consent of the Landlord (such consent not to be unreasonably withheld or delayed). In the event that the Tenant assigns, transfers, subleases or otherwise deals with or parts with possession of the premises or this lease, the Landlord will not unreasonably withhold or delay its consent to a change in the permitted use which is not in contravention of any town planning legislation relating to the use of the land.
>
> **Warranty as to Use**
>
> 6.2 The Landlord warrants that the premises may be used for the purposes set out in Item 14. The Tenant will comply with any laws and requirements relating to its use of the premises."
>
> "**Item 14 Clause 6 Permitted Use**
>
> Night Club and Sports Bar"
>
> "**9. COMPLIANCE WITH LAWS AND REQUIREMENTS**
>
> 9.1 The Tenant must comply on time with all requirements and orders of competent authorities and all laws in connection with the premises, the [T]enant's property and the use or occupation of the premises.
>
> 9.2 Notwithstanding clause 9.1, in complying with the requirements, orders of authorities and all laws, the Tenant need not carry out structural alterations, maintenance, repairs, replacement or additions or any alterations, maintenance, repairs, replacements or additions of a capital nature to the premises except:
>
> (a) those required because of the nature of the Tenant's business or the Tenant's use or occupation of the premises; and
>
> (b) those which are required because of the Tenant's employees and agents
>
> 9.3 The Landlord shall carry out, at the Landlord's expense, all structural repairs to the premises, in particular and without limiting the generality of the foregoing, the Landlord shall carry out repairs to the guttering and down pipes of the premises whether internal or external to the premises and shall maintain the roof to the premises in a leak-proof and wind-proof condition. The Landlord shall also

maintain the services and the exterior walls of the premises in good and substantial repair."

...

Alterations to the Premises

10.7 The [T]enant may not make any alteration or addition to the premises without the Landlord's consent which consent must not be unreasonably withheld or delayed. In carrying out alterations or additions the Tenant must comply with all requirements of authorities and all laws. Alterations or additions must be completed within a reasonable time and in accordance with plans and specifications approved by the Landlord."

...

"**INTERPRETATION**

1. DEFINITIONS

1.1 The following words have these meanings in this lease unless the contrary intention appears.

...

'Permitted Use' means the use set out in Item 14 of the lease particulars.

'Premises' means the land and the improvements on the land including without limitation the Landlord's property, but excluding the structure and the roof and not including the Tenant's property.

'Tenants Property' means any equipment, fixtures, fittings or other property not owned by the Landlord or any predecessor in title to the Landlord which the Tenant brings onto the premises or fixes to the premises."

Reasons for judgment

[54] The trial judge said –

"[76] The [first respondent] asserts that the warranty in clause 6.2 of the lease covered the defects identified by the s 69 notice. The [appellant] asserts that the warranty in clause 6.2, as a matter of construction of the clause within the lease, applied only as at the date of commencement of the lease... The warranty in clause 6.2 is expressed in clear language and there is nothing in its terms or arising from the circumstances in which the lease was granted that justifies limiting its application to the commencement date of the lease."

[55] Her Honour found –

(a) that the premises never complied with s 104C of the *Fire and Rescue Service Act* 1990 (Qld) in relation to distances to fire exits;

(b) that the alterations effected in 2002 required building approval, and a certificate of classification should have been sought;

(c) that the premises were always vulnerable to being closed down for lack of compliance with the *Fire and Rescue Service Act* 1990 (Qld), with the consequence of being unable to be used for the permitted purposes under the lease or for any other purposes that would be covered by the class 9b classification; and

(d) that occupation without a certificate of classification based on 2002 alterations was unlawful under s 95 of the *Standard Building Regulation* 1993 (Qld).[16]

[56] She said –

"[79] It is not necessary to decide in this matter whether the s 69 notice was validly issued. The issue of the s 69 notice brought to the attention of the [first respondent] and the [appellant] the defect in the premises that could have been the subject of a proper requisition by QFRS or action by the Council. That defect amounted to a breach of the warranty in clause 6.2 of the lease by the [appellant].

Which party was obliged to alter the premises to comply with s 69 notice?

[80] Although there may have been means by which the QFRS could have taken action in relation to the deficient fire exit distances applying to the premises, other than the issue of the s 69 notice, the s 69 notice had the effect of initiating remedial action in respect of the premises.

[81] It is common ground between the [first respondent] and the [appellant] that the nature of the works required to comply with the s 69 notice was structural. The effect of clauses 9.1 and 9.2 of the lease is that the [appellant] was not required to undertake the structural works to comply with the s 69 notice. Although the structural alterations did not fall strictly within the description of the works that the [appellant] was obliged to undertake pursuant to clause 9.3 of the lease, as between the [appellant] and the [first respondent], the [appellant's] responsibility for undertaking those structural alterations arose, because it was otherwise in breach of the warranty contained in clause 6.2 of the lease."

[57] Her Honour considered that the breach notice was not properly issued. The appellant could not forfeit the lease for non-payment of rent and outgoings, because it was in breach of the warranty in clause 6.2. The first respondent was entitled to set-off damages for breach of clause 6.2 against the claim for rent and outgoings.[17]

[58] Her Honour concluded that the lease was brought to an end by surrender by operation of law.[18]

Damages

[59] The trial judge found that had a maximum occupancy limit been imposed, the first respondent would have continued trading with adjustments to its *modus operandi*. The loss of the first respondent's business was caused by the business being closed on 7 January 2005 due to the appellant's breach of warranty.[19]

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16 [2010] QSC 259, [78] – [79].
17 [2010] QSC 259 at [82].
18 [2010] QSC 259 at [83] – [84].
19 [2010] QSC 259 at [85] –[91].

[60] Her Honour assessed the damages as follows –

(a) On the first respondent's claim against the appellant -

Damages for loss of business due to appellant's breach of warranty	$353,594.00
Less value of plant and equipment	$140,000.00
	$213,594.00
Plus interest from 7 January 2005	$114,615.13
	$328,209.13[20]

(b) On the appellant's counterclaim against the first respondent –

Rent and outgoings up to 7 January 2005	$ 14,254.88
Interest in accordance with lease	$ 8,055.70
The amount owing pursuant to the mortgage debenture and guarantee for refurbishment and alterations	$ 92,646.88
Interest from 12 November 2009 to judgment	$ 9,914.48
	$124,871.94[21]

(c) Her Honour gave judgment for the first respondent against the appellant for $203,337.19, being $328,209.13 minus $124,871.94.[22]

The construction of clauses 6 and 9 of the lease

[61] The lease is to be interpreted in accordance with well established principles for the interpretation of commercial contracts. The parties' respective obligations under clauses 6 and 9 must not be considered in isolation from one another or from the provisions of the lease as a whole. Their intention is to be ascertained objectively[23] from the words of the lease, considered in the context of the purpose and object of the transaction, including its genesis, background context and the market in which the parties were operating.[24] The lease is to be construed with a view to making commercial sense of it, as a commercially sensible construction is more likely to give effect to their intention.[25]

The appellant's submissions

[62] Counsel for the appellant submitted that the two sentences of clause 6.2 should be read together and clause 6 should be read with clause 9. They submitted that on the proper construction of clauses 6 and 9 of the lease –

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20 [2010] QSC 259, [92] –[97]; Further reasons 19 August 2010 Appeal record 1348 – 1349.

21 [2010] QSC 259, [98] – [100]; Further reasons 19 August 2010 Appeal record 1349.

22 Judgment 19 August 2010, Appeal record 1353-1354; Further reasons 19 August 2010, Appeal record 1349.

23 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 352; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, [22]; [2004] HCA 35; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, [40]; [2004] HCA 52; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151, [53].

24 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 350 per Mason J, citing *Reardon Smith Line Ltd v Hansen Tangen* [1976] 1 WLR 989; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, [40]; [2004] HCA 52.

25 *Thiess Services Pty Ltd v Mirvac Queensland Pty Ltd* [2005] QSC 364, [36] - [37]; (2006) 22 BCL 218, citing *L Schuler A G v Wickman Machine Tool Sales* [1973] 2 All ER 39, 45 per Lord Reid.

(a) the appellant warranted that the building might be used as a nightclub and bar (first sentence of clause 6.2), but

(b) the first respondent (relevantly here) was obliged to carry out any structural alterations (clause 9.2) necessary to "comply with any laws and requirements relating to [the use of the premises as a nightclub and bar]" (second sentence of clause 6.2).[26]

[63] They submitted –

(a) In other words, if, to be used as a nightclub and bar, the premises needed another fire door, then by force of both the second sentence in clause 6.2 and clause 9.1 that obligation fell squarely on the first respondent.

(b) Section 104C of the *Fire and Rescue Service Act* 1990 (Qld) was a law relating to the use of the premises within clause 6.2 and a law in connection with the premises and their use or occupation within clause 9.

(c) Section 95 of the *Standard Building Regulation* 1993 (Qld) was a law or requirement for the purposes of clauses 6 and 9.

(d) Reading the two sentences of clause 6 together, the appellant warranted that the premises might be used as a night club and bar so long as the first respondent complied with all laws and requirements relating to its use of the premises.

(e) The first sentence of clause 6.2 would incorporate, for example, town planning requirements. A hint that this intended was to be found in clause 6.1 which referred to town planning requirements.

(f) Clause 9.1 was not limited to non-structural alterations. But clause 9.2 restricted the scope of clause 9.1. By clause 9.2 the first respondent need not carry out structural alterations unless (relevantly) they were required because of the nature of the first respondent's business or its use or occupation of the premises.

(g) This construction would give limited content to the warranty in clause 6.2. But that would be consistent with the historical position under which a landlord gave no warranty.

(h) Unless this construction were adopted, effect could not be given to the exception in clause 9.2 – because, on a literal interpretation of clause 6.2, those matters would have been the appellant's responsibility.

(i) The obligation under s 104C rested on the occupier of the building. The obligation to obtain a certificate of classification was an obligation under the lease to "comply with...all laws...relating to the use of the premises" even though the compliance required structural alteration; it was an obligation of the first respondent.[27]

(j) The trial judge should have –

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[26] Appellant's Outline of Argument, [35].

[27] Appellant's Outline of Argument, [36] – [43], transcript 1-19 – 1-21.

(a) found that the part of the building demised to the first respondent "[might] be used for the purposes of a nightclub and bar"; therefore

(b) the appellant was not in breach of the warranty in clause 6.2; and

(c) the obligation to install the fire door was a "structural alteration" (clause 9.2), which arose by a "law" (clause 9.2) applying "because of the nature of the tenant's business or the tenant's use or occupation of the premises"; therefore

(d) the obligation to install the door fell upon the first respondent; so

(e) the failure of the first respondent to pay rent after the issue concerning the fire door had been identified was a breach of the lease by it; and

(f) the lease was therefore properly determined by the appellant; and

(g) there was no valid claim against the appellant for damages for breach of lease; and

(h) the unpaid rent was owed by the first respondent and the third respondent (as guarantor) to the appellant;

(i) as was the sum owing for the fit-out as secured by the mortgage debenture; and

(j) damages for the period after the lease was terminated by the landlord, until reletting.[28]

The respondent's submissions

[64] Counsel for the respondent submitted –

(a) The first sentence of clause 6.2 was a warranty that the premises might lawfully be used as a nightclub and bar.

(b) The premises could not lawfully be used for that purpose at any time the lease was on foot, because of the absence of a certificate of classification. On the proper construction of clause 6.2, it does not matter who was required to obtain the certificate of classification.

(c) The effect of the second sentence of clause 6.2 was that if, in the course of operating that business, the first respondent wished to do something, then it had to do so lawfully; it had to comply with any laws and requirements relating to its use of the premises. [29]

(d) Clause 9.1 was to the same effect as the second sentence of clause 6.2.

(e) But, by clause 9.2, in complying with such laws and requirements, the first respondent need not carry out any structural alterations unless they were required because of the nature of its business or its use or occupation of the premises.

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[28] Appellant's Outline of Argument, [44].

[29] Counsel provided a number of examples – (a) to hang a crystal ball from the ceiling: this might require structural alterations so that the ceiling could bear its weight; (b) to erect a stage for the band to perform on: this might require a barricade at the edge of the stage; (c) to increase the number of patrons; (d) to use glass rather than polystyrene cups; (e) to change the use of the premises.

(f) Here, the need for structural alterations arose from the inherent nature of the building on and from its construction in 2002. It could not be used for any purpose which required a certificate of classification. The structural alterations were not required for reasons particularly attaching to the operation of a nightclub. They would have been required in order that the premises be used for any of the uses in classification 9b.

(g) The unlawfulness commenced when a certificate of classification ought to have been issued, namely when the building works were substantially completed.[30] The trial judge found that the works were completed in about June 2002. Although the lease was executed by the first respondent in May 2002, it was not counter-signed by the appellant until December 2002, with a commencement date of 1 June 2002. Therefore, by the time of the commencement of the lease the use of the premises was unlawful.

(h) The construction of clauses 6 and 9 for which the appellant contended was contradictory. On the one hand it asserted that there was a warranty that the premises might be used as a nightclub but on the other it asserted that if laws and requirements relating to that use stipulated structural alterations, then it was the first respondent's obligation to carry them out. Either the premises could be lawfully used as a nightclub, or they could not. If structural alterations were required to comply with laws, then the appellant had breached its warranty that the premises could be so used.

(i) There was no inconsistency between the first and second sentences of clause 6.2. By the first sentence the appellant warranted that the premises might be used as a nightclub and bar. By the second sentence the first respondent promised to comply with the law or the requirements of authorities relating to that use.

(j) That clause 6.1 referred to the appellant's entitlement to refuse consent to change of use where that was not lawful under the town planning legislation did not affect the clear and unfettered warranty in clause 6.2.

(k) There was no need to revert to clause 9 to illuminate the meaning of the phrase "may be used" in clause 6. The warranty was made about the fitness of the premises for use at the start of the lease.

(l) To afford some protection to the appellant, clause 6 further required the first respondent to comply with any laws and requirements relating to its use of the premises. This would prevent an argument by the first respondent that the warranty had been breached when the reason the premises could not be so used lay in its own conduct – for example, if the business were closed by the police because it was too noisy.[31]

Discussion

[65] By clause 6.1 the first respondent was not permitted to conduct any business at or from the demised premises other than that of night club and bar without the appellant's consent.

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30 "Substantially completed" was defined in s 92 of the *Standard Building Regulation* 1993 (Qld).

31 Respondent's Outline of Argument, [3] – [5]; [9] – [10]; transcript 1-35 – 1-38.

[66] The warranty that the appellant gave in the first sentence of clause 6.2 was expressed in the present tense. But as the trial judge said, there was nothing in its terms or arising from the circumstances in which the lease was granted that justified limiting its application to the commencement date of the lease. Nor is there any reason to restrict the warranty as to use to use in the town planning legislation sense. On the plain meaning of the words used, the appellant gave an enforceable undertaking that there was no impediment to the use of the demised premises as a night club and bar.

[67] The warranty was expressed in unequivocal terms. It was not expressed to be subject to or conditional upon the first respondent's meeting its obligations under the second sentence of clauses 6.2 and 9.

[68] At the commencement of the lease, and at all material times thereafter, the demised premises could not lawfully be used as a night club and bar because no classification certificate had issued after the refurbishment and alterations in 2002 and because of the non-compliance with s 104C of the *Fire and Rescue Service Act* 1990 (Qld). These were matters within the scope of the appellant's undertaking.

[69] The first respondent's obligation under the second sentence of clause 6.2 was expressed in the future tense, and necessarily related only to matters within its power or control. Similarly, clause 9.1 was concerned with the first respondent's conduct during the term of the lease. Clause 9.2 qualified the first respondent's obligations under clause 9.1, and accordingly, it, too, was concerned with the first respondent's conduct during the term of the lease.

[70] It would have been contrary to commercial sense for the parties to have intended that the first respondent should become responsible for matters the subject of the appellant's undertaking.

[71] The trial judge was correct in holding that the appellant was responsible for undertaking the structural alterations to comply with the notice issued by the QFRS under s 69 of the *Fire and Rescue Service Act* 1990 (Qld). Its failure to fulfil that responsibility was a breach of the warranty in clause 6.2 of the lease.

The foreshadowed limit of 600 patrons

[72] The first respondent ceased to trade on 7 January 2005 in response to the notice from the QFRS. The trial judge's assessment of the loss caused to it by the appellant's breach of warranty reflected her finding as the value of the business at that date.

[73] The liquor licence was due for renewal in March 2005. By the time the business closed, the liquor licensing authority had foreshadowed placing a limit on capacity of 600 persons and requiring additional security staff as conditions of renewal.

[74] The appellant's complaint is that the trial judge did not discount the damages on account of the likely imposition of those conditions.

[75] Her Honour found –

> "[87] The [first respondent's] business at the time it was forced to cease trading was a valuable asset. The real consequences of the maximum occupancy

> was to stop the practice of putting on a band which required sales greater than 600 tickets either to attract the band or to make a profit after allowing for the additional costs of the band and to require some system for controlling the number of patrons within the premises at any one time. Most of the time the nightclub operated with less patrons than the proposed limit, but I accept the evidence of Ms French and Mr Kelly that if a maximum occupancy were imposed they would have continued with adjustments to their manner of operation of business, rather than abandon a valuable business. Their success to that stage in trading supports this conclusion."[32]

[76] Her Honour was satisfied that the business would have continued to trade at pre-closure levels, and that its earnings would have continued at their level for the year ended 30 June 2004 and the period ended 31 January 2005.[33] Counsel for the appellant submitted that that finding was not reasonably open on the evidence.

[77] The "adjustments to their manner of operation of business" which her Honour accepted could have been made were the imposition of a cover charge or increasing drink prices.[34]

[78] The only evidence to this effect was that of Mr Kelly and Ms French, which her Honour must have accepted. There was also a suggestion by Mr Kelly that the business could trade more than two nights a week, but Ms French said that although in the early days it had traded an additional night, this had ceased because it was not busy enough to justify doing so.

[79] Counsel for the appellant submitted that it was not open to the judge to find that the first respondent would have increased the drink charges and imposed a cover charge. They submitted that the evidence that the first respondent would have made adjustments to its business was contrary to compelling inferences and contemporary materials which objectively established that limitations on the numbers of patrons would have left the business unviable.[35]

[80] Counsel for the appellant criticised her Honour for accepting the oral evidence of Mr Kelly and Ms French in the face of prior inconsistent statements and conduct by them.

(a) Several times in the period between receipt of the s 69 notice from the QFRS and June 2005 when the lease came to an end, Mr Kelly and Ms French told their solicitor Mr Cooper and Mr Liuzzi that limitations on the numbers of patrons would leave the business unviable.

(b) There was no evidence that during that period either Mr Kelly or Ms French ever indicated to anyone that imposing a cover charge and or raising drink prices could overcome difficulties with limits on the number of patrons.

(c) There was no attempt to impose a cover charge or increase drink prices while the business was trading.

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32 [2010] QSC 259, [87].
33 [2010] QSC 259, [93], [94], [96], [97].
34 [2010] QSC 259 , [85], [87],[97].
35 *Fox v Percy* (2003) 214 CLR 118.

[81] As counsel for the appellant said, there was no evidence that the business could sustain competition without losing customers if a cover charge were imposed or drink prices were raised, and there was no evidence as to the level to which prices might be increased and whether or not such increased prices would sustain profitability if a restriction on patronage were imposed. However, there was evidence that there was no other business in Hervey Bay in competition with the first respondent's.

[82] Two accountants (Mr Hains and Mr Box)[36] gave evidence about the value of the business as at 7 January 2005. They agreed that, were it not for the foreshadowed limit on capacity, its value would have been $353,594.

[83] There were two principal points on which they disagreed -

(a) Mr Hains considered that the first respondent would maintain profitability by providing "an operational response".[37] I have already discussed her Honour's finding that they would have imposed a cover charge or raised drink prices.

(b) Mr Box considered that, based on a maximum of 600 patrons on Friday and Saturday nights, its value was only $200,595.[38] There was evidence that up to 700 patrons attended the premises on Saturday nights, but some of them came and went during the night, and Mr Hains' criticism that that notional maximum was achieved only on rare peak evenings was supported by the evidence of Mr Kelly. Her Honour was satisfied that most of the time the night club operated with fewer patrons than the proposed limit.[39]

[84] It was open to her Honour to prefer the opinion of Mr Hains for which there was an adequate foundation in the evidence.

[85] It was open to her Honour to accept the oral evidence of Mr Kelly and Ms French despite what they had said when trying to dissuade the liquor licensing authority from imposing the foreshadowed conditions. As her Honour accepted, the business had been trading profitably: there had not been any need to consider imposing a cover charge or raising drink prices when the business had been trading profitably and there had not been any occupancy limit.

Losses after surrender

[86] The business ceased to trade in response to the notice from the QFRS on 7 January 2005, and the trial judge assessed the damages for breach of warranty as the value of the business as that date. In arriving at that valuation a capitalisation rate was applied to future maintainable earnings and an asset based approach was adopted for assets and liabilities surplus to the operation of the business.

[87] Her Honour's finding that there was a surrender by operation of law on 8 June 2005 was not challenged in the notice of appeal. The fifth ground of appeal was –

"5. Having found that the lease was surrendered by the first respondent and that the surrender was accepted by the appellant on 8 June 2005, the trial judge should have:

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36 As well as a valuer, Mr Eales, whose opinions the trial judge rejected.

37 [2010] QSC 259, [93].

38 Supplementary appeal record volume 2, tab 7.10, page 304.

39 [2010] QSC 259, [87].

a. Found that any losses suffered by the plaintiff from 8 June 2005 flowed from the surrender, not from any alleged breach of the lease by the appellant.

b. Not included in the calculation of damages any losses suffered from 8 June 2005."

[88] Counsel for the appellant submitted that the damages for breach of warranty should have been limited to the period during which the business could not trade until the surrender of the lease. They submitted that what should have been allowed was $49,434 (for 22 weeks' lost trading) against which the moneys owing under the mortgage debenture and the arrears of rent (up to the date of surrender) should have been offset, resulting in a net amount payable to the appellant.

[89] However, as counsel for the first respondent submitted, the breach of warranty led to the loss of the business. The business was lost when the premises were closed on 7 January 2005, five months before the surrender of the lease. The trial judge was correct to assess the damages for breach of warranty as at 7 January 2005.

Failure to mitigate

[90] In paragraph 17 of its Fifth Amended Defence and Counterclaim the appellant alleged (inter alia) that any loss suffered by the first respondent did not extend to the loss of the business. One of the particulars provided was that after ceasing occupation of the premises the first respondent was not precluded from applying to the appellant for consent to carry out the works necessary to effect the alterations, applying to the Hervey Bay City Council (and the QFRS) for consent, and carrying out the necessary works.

[91] One of the grounds of appeal was that the trial judge erred in not considering whether the first respondent failed to mitigate its losses by rectifying the defects and maintaining the business. Its counsel submitted that any losses incurred or relating to the period from May 2005 were unreasonably incurred due to the first respondent's failure to mitigate its loss.

[92] The trial judge did not deal with this in her reasons for judgment.

[93] The submission is curious in that the first respondent did not claim, and her Honour did not award, damages relating to losses incurred from May 2005. The loss claimed was the loss of the business which occurred in January 2005, and the damages awarded were for the loss of the business.

[94] The first respondent was advised by its then counsel that it was obliged to carry out the relevant works – but it did not receive that advice until after the appellant had served a Notice to Remedy Breach of Covenant.[40] The first respondent would have required the appellant's permission to carry out the work, and there was no evidence the appellant would have allowed the first respondent to carry out the work on the basis it would subsequently be sued by the first respondent for the cost. The first respondent would have had to borrow money, and although there was evidence of a friendly lender, without the business the first respondent had no income stream, and it may well have been unable to salvage the business or otherwise service a debt

[40] Supplementary appeal record volume 3, tab 5, pages 32-33.

[95] In *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd*[41] Viscount Haldane LC referred to compensation as the basic principle of damages and continued:

> "But this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."

[96] Depending on the circumstances, what would be reasonable steps to mitigate loss caused by non-performance of a contractual obligation may include seeking substitute performance.

[97] Although it is commonly said that an injured party has "a duty" to mitigate its loss, as Irvine CJ said in *Driver v War Service Homes Commissioner*:[42]

> "...This expression, I think, does not mean that he is under any duty in the ordinary sense, towards the party breaking the contract, but that he cannot be said to have really incurred any loss which might have been avoided by his taking such steps as a reasonably prudent man in his position would have taken to avoid further loss to himself; and the best test is, what would such a man do to avoid such a further loss to himself, supposing that, from insolvency of the other party, or from some other reason, he could not get any damages."

[98] The onus is on the defendant to show that the plaintiff has not fulfilled this duty, and the extent to which it has not.[43] That onus was not satisfied in this case.

Conclusion

[99] The trial judge was correct in holding that the appellant breached its warranty that the premises might be used for a night club and bar, and that it was obliged to effect the requisite structural alterations. Further, her Honour did not err in her assessment of damages. Accordingly the substantive appeal should be dismissed, and the appellant should pay the first respondent's costs of the appeal.

[100] The second respondent was a successful defendant at trial. The trial judge made a *Sanderson* order[44] with respect to its costs, ordering that they be paid by the unsuccessful defendant (the first respondent).[45] The appellant joined the second respondent as a party to the appeal on the basis that if the substantive appeal were allowed, it would ask this Court to interfere with that costs order. As it has failed in the substantive appeal, there is no reason to interfere with the costs order below. I respectfully agree with what the President has written about the second respondent's costs of the appeal.

[101] The third respondent guaranteed the first respondent's obligations. She was not a party to the claim, but was joined as second defendant by counterclaim. Had the appellant succeeded on its appeal with respect to the assessment of damages, there would have been a net amount owing to it, and it could have expected to obtain judgment against the both the first and third respondents. Accordingly it joined the third respondent as a party to the appeal.

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41 [1912] AC 673, 689.

42 (1923) 44 ALT 130, 134.

43 *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130, 158.

44 *Sanderson v Blyth Theatre Co* [1903] 2 KB 533.

45 Judgment 19 August 2010 [5]; Appeal Record page 1354.

Orders

[102] I would order –

(a) that the appeal be dismissed;

(b) that the appellant pay the first and third respondents' costs of the appeal;

(c) that the parties have leave to file written submissions as to the second respondent's costs of the appeal in accordance with paragraph 52 of Practice Direction No 2 of 2010.