SUPREME COURT OF QUEENSLAND

CITATION:	*Byrt v Aero Sth Pacific Pty Ltd* [2012] QCA 359
PARTIES:	**TERENCE JOHN BYRT** (appellant) **v** **AERO STH PACIFIC PTY LTD** ACN 114 467 060 (respondent)
FILE NO/S:	Appeal No 3419 of 2012 SC No 2624 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	21 September 2012
JUDGES:	Holmes and Fraser JJA and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – CONTROL OVER PROCEEDINGS – REFUSAL OF ADJOURNMENT – where the appellant was sued for amounts outstanding under his guarantee of an aircraft lease and sub-lease entered by a company he controlled – where the appellant applied for an adjournment of the trial on its first day – where the appellant applied to amend his defence and counter-claim – where the appellant had engaged new solicitors and contended that he needed more time to prepare his case in accordance with the proposed amendments – where the appellant did not depose to the reasons for the adjournment or the withdrawal of his previous solicitors, or the substance of the proposed amendments – where allowing the amendments would have required the adjournment of a trial to call a witness not presently available – where the appellant contended that any prejudice could be remedied by a costs order – where the learned trial judge refused the application for an adjournment – whether the decision to refuse the adjournment of the trial and the amendment of the pleadings were proper exercises of the learned judge's discretion

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – APPLICATION TO LEASES – where the learned trial judge found that the lessee company's non-payment of rent, receivership and renunciation through the receivers of any interest in the aircraft amounted to repudiation of the lease and sub-lease – where the appellant contended that the respondent had repudiated the lease and sub-lease by taking possession of the aircraft – whether the learned trial judge wrongly distinguished the decision in *Shevill v Builders' Licensing Board* – whether the trial judge erred in finding that the lessee company repudiated the lease and sub-lease

DAMAGES – GENERAL PRINCIPLES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT – REMOTENESS AND CAUSATION – LIABILITIES INCURRED – where the respondent sold the leased aircraft 18 months after repossessing it – where the learned trial judge found that the respondent had made reasonable efforts to re-lease the aircraft and had mitigated its loss by its sale for parts – where the appellant contended that the sale of the aircraft constituted a break in causation – where the appellant contended that loss of bargain damages should not have been awarded after the date of the aircraft's sale – where the appellant contended that loss of bargain damages should have been discounted to allow for the contingency of the aircraft's disposition – whether the learned trial judge should have curtailed or discounted the loss of bargain damages

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – ADEQUACY OF PLEADINGS – where the respondent pleaded non-payment of rent on the sub-leased aircraft beyond the termination date specified in the sub-lease – where the respondent unsuccessfully relied on the service of a termination notice after the sub-leased aircraft was repossessed as determining the lease – where in the alternative the respondent relied on a provision in the sub-lease defining "rental term" as continuing to the termination date, or the date on which the aircraft met its return conditions – where the return conditions were not complied with – whether the reliance on the failure to meet the return conditions was sufficiently pleaded

Trade Practices Act 1974 (Cth), s 87

Aero Sth Pacific Pty Ltd v Byrt [2012] QSC 62, related
Shevill v Builders' Licensing Board (1982) 149 CLR 620; [1982] HCA 47, distinguished

COUNSEL:	R Perry SC with M Alexander for the appellant A Duffy for the respondent
SOLICITORS:	ClarkeKann Lawyers for the appellant Warlow Scott Lawyers for the respondent

[1] **HOLMES JA**: The appellant, Mr Byrt, appeals from a judgment given against him in favour of the respondent, Aero Sth Pacific Pty Ltd, for amounts payable under his guarantee of a lease and sub-lease. At the same time, Mr Byrt's counterclaim for remedies under s 87 of the *Trade Practices Act* 1974 – an order that the guarantee he had given was unenforceable and a declaration that certain clauses of the lease and sub-lease were void – was dismissed.

Background

[2] The background, stated shortly, was that Mr Byrt controlled a company operating a regional airline, Macair Airlines Pty Ltd, which in late August 2008 entered into a lease and sublease with Aero Sth Pacific in respect of two aeroplanes. They were known for the purposes of the trial by their registration marks, UYH (the leased aircraft) and MYI (the subleased aircraft). Mr Byrt signed guarantees of Macair's obligations under the lease and sublease. The UYH lease was for five years from its commencement, while the termination date specified in the MYI sub-lease was 26 October 2008.

[3] Macair got into financial difficulties and did not meet the hire payments on either aircraft; at the end of January 2009 it went first into administration and then into receivership. In early February 2009, the administrator and the receivers in turn gave notice that they did not propose to exercise rights in relation to UYH and MYI. The respective owners of the planes, Aero Sth Pacific in the case of UYH and Aviation Services Australia Pty Ltd, the company from which Aero Sth Pacific had leased MYI, promptly repossessed them. On 11 March 2009, Aero Sth Pacific served notices of termination on Macair under the lease and sub-lease. Each agreement provided that if the aircraft were not returned within seven days of such a notice, Aero Sth Pacific was entitled to claim liquidated damages represented by a stipulated loss value.

The trial judge's findings

[4] Mr Byrt did not give or call any evidence at the trial. The trial judge found that he had not established unconscionable conduct in the procuring of his execution of the guarantee, which was valid and effective. His Honour held Macair liable for unpaid rent and reserves under both the lease and the sub-lease up until the repossession dates. The later notices of termination had no effect because the respective agreements had already been terminated upon the repossessions, and it was impossible for Macair to comply with the clause requiring return of the aircraft; consequently it had no obligation to pay the stipulated loss value in either case. Macair's failure to pay rent for UYH in the circumstances of the receivership and the receivers' renunciation of rights in the aircraft amounted to a repudiation of the lease, subsequent to which Aero Sth Pacific had terminated it. Aero Sth Pacific had made reasonable efforts to re-lease the plane, but had ultimately been forced to sell it for parts. It was entitled to damages for loss of bargain in respect of the rent forgone over the balance of the original term of the lease.

The appeal grounds

[5] Mr Byrt raised five points in his appeal. They were that the learned trial judge had made errors in: refusing an application for an adjournment made on the first day of the trial; refusing him leave to amend, essentially because allowing the amendments sought would require the trial's adjournment; finding that the lease of UYH had been repudiated by Macair rather than by Aero Sth Pacific; failing to take into account, by way of discount of the damages awarded for loss of bargain in respect of UYH's lease, the sale proceeds of the aircraft; and holding that Aero Sth Pacific was entitled to claim for loss of rent for MYI beyond 26 October 2008, the "termination date" as defined in the sub-lease.

The refusal to adjourn the trial

[6] Counsel for Mr Byrt conceded that the fate of the application for leave to amend the defence and counterclaim went hand in hand with the outcome of the application for adjournment of the trial. That was because, as his Honour had observed, to permit the amendments sought would involve so radical a change in the case as to make inevitable an adjournment to allow the parties to replead and assemble further evidence.

[7] The following chronology gives some of the context in which the adjournment was sought:

11.03.2009	Aero Sth Pacific commences proceedings.
07.05.2009	Aero Sth Pacific obtains judgment in default of filing of the defence.
17.12.2009	Default judgment set aside.
05.01.2010	Mr Byrt files notice of intention to defend and defence.
09.06.2010	Aero Sth Pacific files amended statement of claim.
17.06.2010	Mr Byrt files amended defence.
28.06.2010	Aero Sth Pacific files amended reply and answer.
August-October 2010	Disclosure and inspection takes place.
28.02.2011	Unsuccessful mediation.
March-July 2011	Aero Sth Pacific amends pleadings and gives further disclosure.
02.08.2011	Mr Byrt confirms no more amendments to his defence and counterclaim intended.
02.09.2011	Mr Byrt files and serves further amended defence and counterclaim and provides a signed request for trial date.
22.12.2011	Mr Byrt's present solicitors approached to take file over from existing solicitors; case by then is listed for a three day trial commencing on 30 January 2012.
09.01.2012	Notice of change of solicitors filed.
19.01.2012	Application for vacation of the trial date heard and adjourned, but the material is described as "not sufficient".
30.01.2012	First day of trial; application to adjourn it refused.

[8] In seeking the adjournment of the trial on its first day, Mr Byrt's counsel argued that the matter was not ready for trial: no advice on evidence had been obtained, and a number of areas of enquiry were now identified. One concerned whether the claim for a stipulated loss value amounted to a penalty, which would require a further exchange of particulars and an expert report as to whether some claims represented a genuine pre-estimate of the plaintiff's loss. A second concerned amendments to the pleading: a proposed pleading of misleading and deceptive conduct relating to the entry of the leases would, according to Mr Byrt's counsel, require joinder of Macair, by then in liquidation, so that the company itself could seek an order under s 87 that the leases were unenforceable. There was also a proposed allegation that Aero Sth Pacific had failed to meet obligations to disclose certain matters before Mr Byrt entered the guarantee.

[9] The third ground for the adjournment was that Mr Byrt wanted to seek disclosure from Macair's liquidator of its books and records to establish what payments had been made under the lease. (Some documents of that kind were in fact obtained by subpoena during the trial.) Finally, it was said that he had expected that Aero Sth Pacific would call as a witness a Mr Cipolla, a representative of Aviation Services Australia Pty Ltd. That was because of some pleading about him: Mr Byrt had alleged that Mr Cipolla acted as agent for Aero Sth Pacific in making representations, which the latter had denied in its amended reply and answer, leading Mr Byrt to expect that Mr Cipolla would be called to make the denial himself. Aero Sth Pacific had indicated, however, that it was not calling Mr Cipolla, leaving Mr Byrt in the position of endeavouring to locate him in the United States. If Mr Cipolla were not to give evidence Mr Byrt would seek disclosure from Aviation Services Australia Pty Ltd.

[10] Mr Byrt submitted that an adjournment would occasion Aero Sth Pacific no prejudice which could not be met by fixing costs to be paid within a certain period. Significantly, he did not swear any affidavit relied on for the purposes of the adjournment application, nor was there any explanation of why there had been a change in his solicitors: his current solicitor said he did not know why Mr Byrt's former solicitors had withdrawn.

[11] The trial judge set out the history of the application and recorded the reasons given for seeking the adjournment. He noted the absence of any evidence about how Mr Byrt came to be in the position that he was in. There was, his Honour observed, no reason to suppose that fault should be attributed to his former solicitors; it was entirely possible that they had conducted the case precisely as he had required. It could be inferred that the letter which had advised that there would be no further amendment to the defence was written on his instructions. The omission of any explanation for the solicitors' unwillingness to continue to act was, his Honour said, "critically important". It was not explained why the other issues now identified were not raised earlier and Mr Byrt himself had provided no affidavit to explain his role. That was a relevant factor.

[12] There was also uncontradicted hearsay evidence of Mr Byrt's telling an employee of Aero Sth Pacific that he had transferred the beneficial ownership of his assets to his daughter. In addition to that aspect, there was the more general prejudice which an adjournment would produce. Mr Byrt was in his present position as a result of his own conduct. His Honour accepted that the full contents of the check list attached to Practice Direction No 9 of 2010 had not been complied with and noted Mr Byrt's

willingness to pay the costs thrown away. Nonetheless, he concluded that the interests of justice were best served by refusing the application for the adjournment.

The refusal to permit amendment

[13] After the application for adjournment was dealt with, Mr Byrt sought leave to amend the defence and counter-claim in a number of ways. Leave was granted for some of those proposed amendments, but not for others of more substance. The latter included alleging that he did not know the terms or legal effect of the guarantee; and that he had executed the guarantee in circumstances in which Aero Sth Pacific should first have brought material or unusual provisions in the lease and sub-lease to both his and Macair's attention and explained their significance. Counsel for Aero Sth Pacific pointed out that Mr Cipolla was present when the documents were executed, so that if the amendments were allowed, it would be necessary to call him. Previously, there had been an admission of the execution of the guarantee and indemnity and of their terms.

[14] The learned judge agreed that were the amendment to the defence to be allowed, it would be necessary for Aero Sth Pacific Pty Ltd to call Mr Cipolla to give evidence of the circumstances in which the lease and guarantee documents were executed. The consequent need for an adjournment would inevitably prejudice Aero Sth Pacific. For that reason, he refused the application for amendment.

The appellant's contentions as to the refusals of adjournment and amendment

[15] Here it was argued for Mr Byrt that when he sought its adjournment, the case was generally not ready to proceed. Aero Sth Pacific's pleading was inadequate. In the result, the trial judge had found that Macair had repudiated the UYH lease, giving rise to a right to damages at common law for loss of bargain, when no such case had been pleaded. He had given judgment for rent in respect of MYI after the date on which the reply pleaded that its lease had expired in October 2008, although there was no pleading that it was entitled to rent as long as conditions for return of the plane remained unmet. (That pleading was in issue in respect of another ground of appeal and I will return to it later.) The fact that the trial judge's findings went beyond what was pleaded indicated that the case was not ready for trial.

[16] Mr Byrt had, he said, been precluded from putting his case in accordance with the amendments which he had proposed, and had been prevented from exploring the case properly to establish a basis under which the claim under the guarantee might properly be defended. The trial judge had described the absence of any explanation as to why Mr Byrt's former solicitors withdrew as "critically important", which amounted to speculation as to the reasons. In circumstances where: the claim involved some millions of dollars; Mr Byrt was prepared to pay the costs of the adjournment, assessed by the court; and there was no identified prejudice to Aero Sth Pacific beyond being kept out of its trial date; the interests of justice required that Mr Byrt not be forced on in a trial which he could not properly defend, through lack of preparedness.

Conclusions on amendment and adjournment

[17] The learned judge was entitled to start from the premise that when Mr Byrt signed the certificate of readiness for trial in September 2011, he and his legal representatives saw no further steps required by way of preparation for trial. And in

the absence of any evidence to the contrary, the learned trial judge was also entitled to proceed on the basis that Mr Byrt's former solicitors had acted on his instructions; and that the omissions to provide an advice on evidence and take steps by way of amendment, seeking disclosure and particulars or joinder of Macair were the result. In that respect, the failure to offer any evidence from them was critically important.

[18] There is some obvious difficulty in Mr Byrt's argument that the trial should not have proceeded because Aero Sth Pacific's pleadings were not ready, given that it is based on the learned judge's later findings. It could hardly be an error for his Honour not to have regard to those matters when no issue was raised about them in seeking the adjournment. As to Mr Cipolla's availability, the defence had no entitlement to assume that Aero Sth Pacific would call him or any other witness. If Mr Byrt wanted to be sure of Mr Cipolla's evidence it was plainly necessary for him to subpoena him, and the fact that he had not done so could not be laid at anyone else's door. But if anything were to be raised in the defence about lack of disclosure before the guarantees were entered, one would have expected it to be supported by the evidence of Mr Byrt. There was nothing of that kind.

[19] There was, in sum, nothing to show that the need for an adjournment was attributable to anything other than Mr Byrt's lack of preparation; the context was one in which he had previously affirmed readiness for trial; he offered nothing by way of sworn evidence to confirm that any of the steps to be taken, including amendment, had real point; and the application came at the last possible moment. Those were ample reasons to refuse an adjournment. And it is glib to say that the prejudice inherent in the loss of the trial date could be mended by a costs order. As counsel for Aero Sth Pacific submitted, unless the payment were to be made *instanter*, the adjournment could only have been granted on the prospect of compliance with a costs order, with the possibility that the costs were never in fact paid. The learned judge was right in all those circumstances to refuse the adjournment.

[20] In the absence of an affidavit, there was nothing to establish that the proposed amendments to the defence and counter-claim could be substantiated by evidence. The learned judge identified the obvious prejudice to Aero Sth Pacific in permitting the very late amendment. Whether considered independently of, or as logically following from, the decision to refuse the adjournment of the trial, the refusal of leave to amend was a proper exercise of discretion.

The finding of repudiation

[21] Mr Byrt contended that the trial judge had wrongly distinguished the decision in *Shevill v Builders' Licensing Board*,[1] when, following that case, he should have found that Mr Byrt had not repudiated the lease and sub-lease and that, instead, Aero Sth Pacific had repudiated the lease by taking possession of the aircraft.

[22] The facts in *Shevill* were that the lessee of a business property was constantly late with its rent payments and, on occasions, its rent cheques were dishonoured. It was evident that it was experiencing financial difficulty, but, as Wilson J observed, it was making a "serious and consistent effort … to meet its obligations".[2] The

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1 (1982) 149 CLR 620.

2 At 634.

lessor's case was that the lessee's conduct amounted to a repudiation of the contract or, alternatively, that its breach of the covenant to pay rent was a breach of an essential term of the contract, either being sufficient to entitle the lessor to damages for the loss resulting from the failure to perform.

[23] All members of the Court held that, on the evidence in that case, the lessee had not repudiated the contract; it had not evinced an intention no longer to be bound by it but rather, while wishing to fulfil it, was unable to do so. Non-payment of rent did not go to the root of the contract so as to make its further commercial performance impossible. The mere fact that the contract gave the lessor the right to terminate the contract and re-enter the premises, did not, the majority said, mean that there had been a breach giving a right to damages. Under the contract, the lessor's rights were limited to recovering the arrears of rent.

[24] The trial judge in the present case observed that *Shevill* was to be distinguished, because the contract there was terminated under an express term of the contract when the lessor would not have been entitled to terminate at common law. By contrast the learned judge characterised what occurred here as follows:

> "I find that by 8 February 2009 Macair's continued failure to pay rent amounted, in the circumstances then prevailing and having regard to the rental history, to repudiation by it of the lease. No rent had ever been paid. The payment schedule agreed to in December had been dishonoured. Macair could not even afford the parts for the repair of MYI. In late January the hoped-for $7 million payment from the Queensland government was refused. Thereupon, an administrator was appointed to Macair, presumably by the directors. Receivers and managers were immediately appointed by a major creditor. Both the administrator and the receivers disclaimed any intention to exercise rights in relation to the aircraft. As counsel for Mr Byrt conceded, the receivers' renunciation was (or included doing so) as agent of the company. Macair demonstrated its intention not to be bound by the lease. Aero did not repudiate the lease by taking possession of the aircraft. It terminated the lease by reason of Macair's repudiation."[3]

[25] Mr Byrt contended that *Shevill* could not be distinguished on the basis the trial judge had identified; the present case also involved a plaintiff which chose to rely on a contractual term permitting termination. And, it was argued, having found that the payment of rent was not an essential term under the contract, his Honour could not then correctly characterise the non-payment of rent as repudiatory. But that is to conflate two issues. A party to a contract can make it clear that he does not intend to perform it without breaching an essential term. The facts in *Shevill* were, in my view, entirely distinguishable. The lessee there was constantly in debit but was also making payments to reduce the arrears; and continued both before and after forfeiture to attempt to meet its obligations under the lease.

[26] In the present case, the monthly rent payment under the UYH lease was $46,200, payable on the 25th of the month. In a week in early October 2008, two payments were made totalling $21,200, presumably against the September rent due. Thereafter, the due dates for payment of rent for October, November, December and

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[3] *Aero Sth Pacific Pty Ltd v Byrt* [2012] QSC 62 at [57].

January came and went without payment, culminating, at the end of January, in the appointment first of an administrator and then of receivers to Macair, all of whom disclaimed any interest in UYH. The receivers did so, as his Honour observed, as agents for Macair. Against this wall of evidence to the contrary, nothing was put forward to suggest that the company did have any intention of meeting its obligations under the UYH lease.

[27] The learned judge's finding contains this slight error: there were the two October rent payments made in respect of the aircraft, so that the statement "no rent had ever been paid" requires qualification. But it is correct that from that point nothing was being paid, despite attempts at further repayment arrangements. In all of the circumstances, his Honour correctly distinguished *Shevill* and properly inferred that Macair had evinced an intention not to meet its obligations under the lease by the beginning of February. Any contrary inference on the evidence here would have been perverse.

Loss of bargain damages and sale of UYH

[28] The second aspect of Mr Byrt's argument was that the loss of bargain damages should have been reduced in light of the sale of UYH for $600,000 about 18 months after Aero Sth Pacific re-took possession of it. In the interim, UYH had been widely advertised, without success, for sale or lease and its condition was deteriorating. The trial judge found that Aero Sth Pacific had made reasonable efforts to re-lease the aircraft and mitigated its loss by selling it for parts. The submission at first instance was that damages should not be awarded after the date of the aircraft's sale in November 2010. His Honour noted that no authority had been advanced for such a limit on damages and he could see none in principle.

[29] On appeal, the same suggestion was made in oral submissions, on the basis that the sale of the aircraft constituted a break in causation. It was suggested that the lessor might notwithstanding be entitled to make a claim for a loss of value on sale. In my view, however, the sale of UYH was a continuation of the chain of causation, not a break in it. An alternative approach to damages might well have involved factoring in the loss which Aero Sth Pacific had actually made on the sale of $1.5 million. There was no obvious reason why Aero Sth Pacific should have been required to re-cast its claim for loss of bargain in the way suggested by Mr Byrt.

[30] The appeal ground was that there should have been some (unidentified) discounting of the loss of bargain damages. But in the absence of evidence of any likelihood Aero Sth Pacific would have disposed of the aircraft if Macair had been able and willing to meet its obligations for the full term of the lease, there is no identifiable contingency which would warrant such a discounting. And as counsel for Aero Sth Pacific pointed out, to reduce damages by the amount obtained from the sale of the aircraft would have been to impose a double penalty on Aero Sth Pacific, reducing its damages for the loss of its bargain while depriving it of the benefit of ownership of the property. Mr Byrt has not offered any compelling rationale for discounting or curtailing damages on account of the sale of UYH.

Entitlement to rent after expiry of MYI lease

[31] Aero Sth Pacific had pleaded that between September 2008 and 11 March 2009 Macair had failed to pay rent and reserves by the due date as required by the sub-lease, particularising the unpaid amounts up to and including rent for February

2009. The sub-lease described a rental term during which the sub-lessee had the exclusive right of use of the aircraft; "rental term" was defined as meaning from the commencement date to the termination date (26 October 2008) or the date on which the aircraft met its return conditions, whichever was the later. The trial judge inferred that the obligation to make the lease payments continued through the rental term until the date at which the aircraft met the return conditions. The return conditions were a variety of requirements, legal and technical, to be met when the aircraft was returned to its owner; they were never in fact complied with. But the trial judge held that the lease was determined when the aircraft was repossessed on 8 February 2009, and Macair was liable for rent only for the intervening period.

[32] Mr Byrt contended, however, that Aero Sth Pacific Pty Ltd had not pleaded that MYI did not meet the return conditions on the termination date, 26 October 2008, so the pleading could not be read as claiming rent after that date. The trial judge however, rejected the submission:

> "The two end dates referred to in the definition of 'rental term' are true alternatives. Either may apply. It is implicit in the claim that rent for periods after 26 October 2008 was due and payable and that Aero's case relied on the proposition that the aircraft did not meet the return conditions during those periods. Perhaps the pleading was elliptical in that it bundled that implication into that assertion. An application made before the filing of a request for trial date might have succeeded in forcing Aero to spell out the implication. No such application was made and in my judgment it is now too late to complain about the form of the pleading. Its meaning was clear and it would have been (and, I am sure, was) understood by Mr Byrt's lawyers."

To the extent that the assertion in the reply that the sub-lease had expired on 26 October 2008 appeared contradictory, his Honour said, it was open to Mr Byrt to seek to have the pleading struck out.

[33] In fact, Aero Sth Pacific did, in its statement of claim (as amended) plead that Macair had failed to return the MYI aircraft in accordance with its return conditions within the seven days required by the notice of 11 March 2009 "or at all". In summary, the pleadings alleged these things, among others: that Macair had failed to pay rent under the sub-lease for the period to the end of February 2009; that it had breached the sub-lease by not returning MYI in accordance with the return conditions; and that Macair was "in the premises" liable to pay the amount outstanding by way of rent. Certainly the pleadings were not as clear as they might have been in linking the claim for rent beyond the termination date as defined in the sub-lease with the allegation that the return conditions had not been met, but the underpinnings were there. Mr Byrt was not left uncertain as to the claim; in submissions, Aero Sth Pacific's entitlement to rent was put squarely on the basis that the return conditions were not met (the trial judge having indicated his view that the leases were terminated on repossession) and the point was thoroughly argued. This ground of appeal must be rejected.

Order

[34] I would dismiss the appeal with costs.

[35] **FRASER JA:** I agree with the reasons for judgment of Holmes JA and the order proposed by her Honour.

[36] **HENRY J:** I have read the reasons of Holmes JA. I agree with those reasons and the order proposed.