SUPREME COURT OF QUEENSLAND

CITATION:	*Pinehurst Nominees Pty Ltd v Coeur de Lion Investments Pty Ltd* [2014] QSC 25
PARTIES:	**PINEHURST NOMINEES PTY LTD ACN 007 826 717** (plaintiff) v **COEUR DE LION INVESTMENTS PTY LTD 006 334 872** (defendant)
FILE NO/S:	2588/12
DIVISION:	Trial
PROCEEDING:	Trial
DELIVERED EX TEMPORE ON:	20 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	17, 18, 19, 20 February 2014
JUDGES:	Jackson J
ORDER:	**Delivered ex tempore on 20 February 2014:** **1. Judgment given for the plaintiff against the defendant in the sum of $718,983 including $3983 interest.** **2. The defendant is to pay the plaintiff's costs of the claim on the standard basis.** **3. Dean Andary is to be released from his undertaking dated 27 February 2013 and filed on 1 March 2013.** **4. The plaintiff company is to be released from its undertaking dated 13 February 2014 and which is Exhibit 37 in these proceedings.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where parties entered into lease agreement for a locker and associated golfing rights – where the terms of the lease agreement included that the lessee would comply with the rules and regulations governing the premises and all reasonable directions and requirements of the lessor relating to the premises – whether a rule stating that

no person shall receive payments for the right to play on the golf course is a rule or regulation governing the premises – whether such a rule is alternatively a reasonable direction or requirement of the lessor relating to the premises

DAMAGES – GENERAL PRINCIPLES – MITIGATION OF DAMAGES – PLAINTIFF'S DUTY TO MITIGATE – plaintiff sought specific performance of a lease of a golf locker and associated golfing rights – defendant responded with significant counterclaim – defendant later offered to enter into new lease with plaintiff – whether plaintiff's failure to accept defendant's offer was a failure to mitigate its losses

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT – where plaintiff provided the only expert evidence as to the quantum of loss sustained – where that expert evidence not accepted in its entirely – where damages sought include loss of profits – whether plaintiff should receive the quantum of damages sought

DAMAGES – GENERAL PRINCIPLES – RECOVERY OF COSTS – plaintiff sought costs on an indemnity basis – plaintiff argued that conduct of defendant sought to "vex" the plaintiff – where defendant had some success in the trial in obtaining an award of damages lower than that originally sought by the plaintiff – whether an award of costs on indemnity basis is appropriate

COUNSEL:	LF Kelly QC with S Gerber for the plaintiff
	P Travis for the defendant
SOLICITORS:	Sykes Pearson Miller for the plaintiff
	HopgoodGanim for the defendant

JACKSON J: The plaintiff, Pinehurst Nominees Proprietary Limited, claims damages for breach of contract against the defendant, Coeur de Lion Investments Proprietary Limited, in the sum of $1,019,832. The claim is based on alleged breach of contract or breaches of contract constituting a repudiation of the contractual relations between the parties under a lease.

The issues that remain to be decided are limited to an assessment of Pinehurst's claim for damages, because the defendant no longer disputes that it was in breach of contract in notifying Pinehurst, originally on 5 January 2012, that it would not honour any requests from Pinehurst for golf bookings.

The lease is of an unusual kind because it purports to grant exclusive possession to a locker in a building on the defendant's land which is concerned with the operation of a golf course on part of the land. The substance of the lease is contained in rights of non-exclusive use, which it grants to Pinehurst as lessee, to have six people use and enjoy the premises at no charge whatsoever for green fees and the hire of one buggy for each such

people [sic] unless they are playing together, in which case it will be one buggy for each two such people.

To understand the nature of those entitlements, it is necessary to understand the genesis and the purpose of the transaction contained in the lease, which are also relevant to the disputed questions of construction of the lease that the defendant says affect the award of damages that should be made.

The golf course is part of the resort which is now known as the Palmer Coolum Resort. It was formerly known as the Hyatt Regency Coolum Resort. Before the resort was constructed a company, Yaroomba Beach Development Company Proprietary Limited, owned the land or some of the land on which the resort was constructed. Dr Andary, a director of Pinehurst, was the managing director of Yaroomba, as well as other relevant associated companies. Dr Andary is the director of Pinehurst, and he gave evidence in this proceeding. Yaroomba sold its land to CDLI, as I will call the defendant. In conjunction with that sale, it acquired shares in a company, Caerleon Limited. The shares were six A class shares.

From about December 1989, pursuant to rights which were conferred by the shares, Yaroomba conducted a business under which it discreetly marketed to people who were not members of the resort to play rounds of golf. The rights equated to the ability for there to be six players. Yaroomba managed the use of those rights and in a cooperative relationship with the resort's golf shop made bookings for people to play golf in exercise of the rights. Dr Andary initially organised or managed that process from Yaroomba's point of view. Some years later, he nominated an agent to perform the task. Mr Shannon, who took over from the first of those agents, started to do so from about 1992.

Because of a company reorganisation that is not relevant otherwise, on 29 September 1995 Yaroomba transferred the A class shares to Pinehurst for $90,000. Pinehurst continued to carry on the business that Yaroomba had previously carried on, with Mr Shannon remaining as the person nominated to manage the use of the rights under the shares.

The lease which is the source of the dispute in the present proceedings was entered into on 9th March 2000. The circumstances under which it came to be the instrument governing Pinehurst's rights in relation to use of the golf course are that Dr Andary was approached by lawyers associated with the resort to change the structure of the rights in a way that involved Pinehurst surrendering or transferring the A class shares and, instead, accepting a lease which would grant and protect the rights.

On 9 April 1999 Baker & McKenzie, acting for relevant companies in the resort group which included CDLI, proposed to Dr Andary that the most effective way of securing the rights in a way that they were on title would be for CDLI to lease a locker in the golf club locker room so that the lease "will incorporate your existing usage rights in relation to use of the resort and its facilities."

On 3 November 1999 Baker & McKenzie wrote further to Dr Andary asking the following question about the drafting of the lease:

> "In drafting this document I wonder whether we should put some restriction on public advertising of the golfing rights? Whilst I understand that you've been very discreet in the manner of marketing them, I have some concern that if you sell those rights the future

> owner may market them publicly, which I suspect would not in the interests of the lake's owners, the club members nor the resort if they are marketed at a lower rate than the members rate. I'd be pleased to have your thoughts on this."

Dr Andary's response was that he would not agree to a restriction on public advertising.

At the time that the lease was entered into, accordingly, the genesis of the transaction, in my view, was the proposal to enter into the lease in substitution for or instead of the rights which, up to that time, had been held by Pinehurst as a holder of the A class shares. The purpose of the transaction was to confer the same or similar rights, in effect, on Pinehurst under the lease in substitution for the rights previously enjoyed by Pinehurst as holder of the six A class shares.

The lease provides at clause 1 that CDLI as lessor wishes to lease the locker to Pinehurst as lessee and to grant the lease and associated rights, and the lessee wishes to take the lease of the locker and accept the associated rights for the term subject to the terms and conditions of the lease. At clause 3, the lease provides as follows:

> "3 Lease
> 3.1 The lessor grants to the lessee the exclusive right and privilege to use the locker for the permitted use on and from the commencement date.
> 3.2 The lessee is entitled to access and use the premises and the locker for the term.
> 3.3 The lessee's entitlement in clause 3.2 includes the right subject to availability for six people to use and enjoy the Premises at no charge whatsoever for green fees and the hire of one buggy for each such people (as I see) unless they are playing together, in which case it will be one buggy for each two such people.
> 3.4 CDLI will ensure that the same booking procedures for tee off times that apply to guests of the resort apply to the lessee.
> 3.5 Where the lessee is a company, it may by authority under its common seal nominate a natural person to exercise all the rights and benefits of the lessee under this lease and may alter such nomination at any time."

Pursuant to that grant and the rights and obligations of the parties under the lease, Pinehurst carried on business in a similar way to that which it had done prior to the grant of the lease as holder of the six A class shares. Mr Shannon continued to be the manager or agent of Pinehurst for the purpose of marketing the rights of use held by Pinehurst to play on the course.

On 18 April 2002, CDLI wrote to Dr Andary requesting that Pinehurst formally nominate a natural person to exercise its rights and benefits in accordance with clause 3.5 of the lease.

Clause 3.5 provides that:

> "Where the lessee is a company, it may by authority under its common seal nominate a natural person to exercise all the rights and benefits of the lessee under this lease and may alter such nomination at any time."

On 21 May 2002, Dr Andary responded to the letter by email sent to Mr Randall Jenvey, the financial controller of CDLI and the author of the letter requesting the nomination. By the email, Dr Andary said:

> "In accord with clause 3.5 of the lease agreement, we have nominated Chris Shannon as the natural person to exercise the golfing rights until further notice."

The outcome of that nomination was that as between the parties, CDLI raised no objection, either in substance or in form. That was conduct on its part consistent with the resolution of the operations meeting (or committee) of the Hyatt Regency Coolum on 22 May 2002, attended by Mr Jenvey and by Mr Smith (who gave evidence at the trial) which recorded by its minutes that Pinehurst had nominated Mr Shannon as natural person to exercise rights. On 24 June 2002,the meeting noted that C. Shannon had been nominated to exercise the rights and to delete the item from any future agenda.

From there, matters proceeded relatively calmly and cooperatively until early 2012 when CDLI repudiated the arrangement.

Over the period of years, there have been some changes in the way in which it appears that the golf course has been operated. Up until 2008, general public access to the course appears to have been restricted to two days per week. From 2008, evidence was given at the trial that although public access was, in a formal way, limited to two days per week, bookings were taken for the other days at relatively short notice from members of the public. As at the present time – the precise date of the change is not clear on the face of the evidence – the course is operated in such a way that the public has access seven days per week.

Mr Shannon, on behalf of Pinehurst, continued to operate Pinehurst's business. His evidence was that the hours of work required by him to obtain relevant bookings for the purpose of Pinehurst's business appeared to increase in such a way that at 2012 they were approximately 12 hours per week, having been only six to 10 hours per week in the 1990s.

The evidence on either side, though, did not descend into detailed analysis of the operation of the golf course, or the relative aspects of operation of the businesses of either Pinehurst or CDLI in relation to the golf course, except to identify categories of resorts or apartment buildings from whom contractual relationships were obtained for the purpose of making books for guests of those resorts or apartments to play on the course. A number of different and some well known resorts and apartments or places of accommodation were identified, but no particular analysis was made of their financial significance to the operation of either Pinehurst's business or the business of CDLI.

From its original construction, the resort was managed under the Hyatt name, but the owner was a corporation associated with the well known Japanese construction company, Kumagai Gumi. The evidence did not establish precisely when, but Kumagai Gumi's position as owner of the resort was replaced by a company or companies associated with the Lend Lease Group when that group acquired the resort. More recently, the resort has been acquired by entities associated with Professor Clive Palmer, and hence, the resort now bears his name. It was after the acquisition by entities associated with Professor Palmer that both the change of branding from Hyatt to Palmer occurred, with the departure of the Hyatt organisation from management of the resort.

Mr Holland, the general manager of the resort before the departure of Hyatt, advised Mr Shannon that the owning company would not allow any requests from Pinehurst for golf bookings. That advice by email on 5 January 2012 was followed by a letter written by Ms Singh, the corporate counsel of CDLI, to Mr Miller of Pinehurst's lawyers dated 19 January 2012 in which Ms Singh stated:

> "We do not recognise your clients have any rights whatsoever and it is our view that their alleged rights relate to dealings which are not certain and which may have been done for an improper purpose."

CDLI has not sought in any shape or fashion to justify that allegation of improper purpose which was made by a lawyer employed in-house on its behalf.

The exclusion of Pinehurst from the golf course included, for a reason which does not emerge in the evidence, the destruction of the locker which was identified in the lease. Again, no reason or justification for that is offered by CDLI.

Pinehurst started this proceeding on 20th March 2012 claiming primarily specific performance of the lease. It's not necessary to discuss whether the appropriate remedy would have been by way of specific performance or injunction. The context was an absolute repudiation of the lease, for no articulated or justifiable reason by CDLI.

CDLI has defended the proceeding up until the trial on bases which have shifted. The defences, in general, relied upon alleged breaches of the lease on the part of Pinehurst which extended over a number of different subject matters. Thus, for example, it was alleged that Mr Shannon's nomination was a purported nomination and that it was not in accordance with clause 3.5 of the lease, notwithstanding the period of time during which Mr Shannon's nomination had been accepted by CDLI without interruption or complaint.

Secondly, it was alleged that Pinehurst breached clause 3.2 of the lease on the footing that the provision that Pinehurst had an entitlement for six people to use the golf course "at no charge whatsoever" was a positive promise by Pinehurst not to charge. That allegation was abandoned at the trial. No explanation for having ever made it was offered by CDLI.

Thirdly, CDLI defended the proceeding on the ground that Pinehurst breached clause 5.2 of the lease. That clause provides as follows:

> "The lessee must not interfere in any way with the lessor's occupation and use of the premises."

CDLI alleged that clause was breached by Pinehurst's "sale" of its right for six people to use the golf course to members of the public at a price lower than the green fees and cart hire charged by CDLI, by Pinehurst advertising discounted rounds of golf on the golf course to the public, by Pinehurst approaching guests at CDLI's resort to play discounted rounds of golf, by Pinehurst approaching nearby resorts and hotels and their guests to play discounted rounds of golf and by Pinehurst approaching two operators for the purpose of having tour members play a discounted rate and playing rounds of golf. All of those allegations were abandoned during the course of the trial, though only clearly at the time of addresses, by CDLI. There was no explanation for that conduct.

Further, the defence alleged that Pinehurst's conduct of the business breached clause 6.1(f) of the lease in that the Pinehurst sold or offered for sale or distributed contractual right to

play contrary to rule 4.1(c) of the Hyatt Regency Coolum Country Club Rules. By its last or one of its later amended defences, CDLI changed that reference to clause 4.2(c) for a reason that will become apparent in due course. However, the proposition was, as pleaded in the defence until that amendment, that it was a breach of the lease by Pinehurst to conduct its business as previously described because of clause 6.1(f). That clause provides:

> "The lessee must:
> (a) …
> (f) comply with any rules and regulations governing the premises and all reasonable directions and requirements of the lessor relating to the premises."

A voluntary association described as the "Coolum Country Club" was created under the auspices of an exercise of the power of the directors of a corporation, Coolum Country Club Limited, on 24 September 1992.

It is unnecessary to discuss all of the details of the constitution of the voluntary association for the purposes of these reasons. However, it will be necessary to return to some aspects of its constitution and rules and regulations in due course. For present purposes, (and until an amendment made on 20 December 2012) rule 4.1(c) provided that:

> "4.1 No member or member's visitors shall without the approval of the resort administrator:
> (a) …
> (c) sell, offer for sale or distribute any article or thing."

The allegation that it was a breach of that rule for Pinehurst to conduct its business was abandoned by CDLI by amendment made to paragraph 3(a)(v) 4 of the defence. Again, there was no explanation for ever having made the allegation.

By the defence, up until a point in the trial which is not clear, CDLI disputed Pinehurst's allegation that it had suffered any loss and damage, relying on the alleged breaches of contract set out above and describing them as breaches of fundamental terms or fundamental breaches of intermediate terms of the lease. There was no explanation why those allegations were made or why they were abandoned at some point after the commencement of the trial.

At the outset of these reasons, I explained that Pinehurst's claim is for damages for breach of contract and that CDLI no longer disputes the question of Pinehurst's entitlement to some damages.

However, it has been necessary to outline the conduct of CDLI in relation to those alleged breaches by Pinehurst because it bears on a plea that was added by CDLI in an amendment made on 26 December 2013. CDLI alleges that Pinehurst has failed to mitigate its losses because it has failed to accept offers by CDLI to enter into another lease in the same terms as the one upon which Pinehurst relied at the time of starting proceeding.

As well as the defences as set out above, CDLI made a counter-claim for damages in response to Pinehurst's claim for specific performance and alternative claim for damages. Originally, the sum of the alleged loss in the counter-claim was $7,194,150. The basis of the counter-claim was that CDLI suffered loss and damage because of the breaches of contract by Pinehurst, as identified in the summary of the defences set out above.

By the time of the version of the counter-claim filed on 26 December 2013, the amount of the counter-claim had been reduced to $1,326,926.88. That amount was based on the allegation that CDLI was unable to charge green fees and cart hire for golf rounds since the commencement of the lease until 2012, which CDLI alleged it would otherwise have sold to the Pinehurst's players or other players.

In the circumstances as I have already briefly outlined them, that seems a surprising allegation, given that the resort did not operate the golf course as available generally to members of the public for many years. The counter-claim was abandoned without prior notice on the first day of the trial. No explanation was given for having made it or why it was withdrawn.

One of the primary defences which is now relied upon by CDLI has been described in submissions as the mitigation issue. The specific allegation in paragraph 6C of the defence is that on 9 and 12 December 2013, CDLI's solicitors advised Pinehurst's solicitors that CDLI is ready, willing and able to perform the lease and that Pinehurst should contact Paul Crangle at the Palmer Coolum Resort to make arrangements for any further bookings pursuant to the lease.

The offer was that if Pinehurst would prefer a new lease CDLI would enter into a new lease on the same terms, other than the commencement date, as the lease. It is alleged to have been a failure to mitigate its loss that Pinehurst, despite the invitations made on 9 and 12 December 2013, failed to contact Mr Crangle or any other representative of CDLI or to take reasonable steps to exercise its rights under the lease.

The relevant context against which that allegation must be assessed appears partly in the circumstances I've outlined above. As well, importantly, Pinehurst had before 9 December 2013, by letter dated 28 November 2013, accepted CDLI's repudiation and elected to terminate the lease. That termination is no longer challenged. Accordingly, the plea in mitigation can be seen to be that it was a failure to mitigate for Pinehurst to decline to enter into a new lease, the existing lease having been terminated and the parties discharged from their executory obligations by Pinehurst's election on 28 November 2013.

The offer was made by the letter from HopgoodGanim to Sykes Person Miller, dated 9 December 2013. It was made in the context that the first part of the letter disputed and rejected Pinehurst's entitlement to terminate the lease for the ongoing repudiation of CDLI. It continued:

> "Further, and without admission as to any allegation made by your client in the proceedings, we are instructed that our client:
> (1) is ready, willing and able to perform the lease and, in that regard, your client should contact Paul Crangle at the Palmer Coolum Resort… to make further arrangements for any further bookings pursuant to the lease; or
> (2) alternatively offers to enter into a new lease with your client on the same terms (other than the commencement date) as the lease…
> As you are no doubt aware, your client has an obligation to mitigate its alleged loss. Continuing with the lease or entering into a new lease with our client on the same terms, is an obvious and reasonable step for your client to take in mitigation of its claimed losses.

…
Furthermore, without any acceptance of liability and purely for commercial reasons, our client is willing to pay to your client:
(1) the amount of $93,000;
(2) interest on the amount referred to in paragraph 1 in the amount of $3280; and
(3) your client's costs to date in respect of the proceedings to be assessed on the standard basis or as agreed between the parties."

By the letter of 12 December 2013, the following was added to the proposed terms of the offer:

"In addition (and separately) to the above, without acceptance of any liability for client's allegations in the proceedings, in an effort to resolve your client's proceedings against our client, our client is also willing to offer on an open basis to pay your client the sum of $93,000, interest of $3280 and your client's costs in respect of the proceedings to be assessed on the standard basis or as agreed between the parties.
For the avoidance of doubt, the above proposal does not affect our client's counter-claim against your client."

In other words, the offer or offers made were made at a time when CDLI maintained its entitlement to claim damages for breach of contract as against the Pinehurst for the matters which have been summarised above. That is a position CDLI no longer maintains, having abandoned the counter-claim.

Secondly, it will be noticed that the proposal contained absolutely no comfort as to the ongoing relationship between Pinehurst and CDLI, notwithstanding the matters that I have outlined above.

In support of the allegation that Pinehurst failed to mitigate, CDLI submits that it offered to Pinehurst that which Pinehurst had been seeking through orders of specific performance until the date that it terminated the lease. That may be right or not, but, for present purposes, the proposition is moot because when the offer was made it was perfectly plain that Pinehurst had terminated the lease, as it was entitled to do, on 28 November 2013.

It is submitted by CDLI that the lease was a commercial contract and did not involve ongoing personal contact between the parties. In my view, that is wrong. The evidence given both by Dr Andary and Mr Shannon showed that there was an ongoing cooperative relationship throughout the period both before and after the lease was made. Secondly, the terms of the lease specifically refer to matters which show that there must be ongoing contact and there must be ongoing cooperation. For example, clause 3.4 provides that CDLI will ensure that the same booking procedures for tee off times that apply to guests of the resort apply to the lessee.

That obligation is a day by day obligation to be carried out so as to permit Pinehurst to conduct its business, and the lessee is reliant upon not only the fact of the conduct but also the way in which it is done by CDLI. Similarly, the obligations in relation to use upon Pinehurst are obligations which at their outer limits must involve contact between the parties and examination of what the content of the obligation is and what is reasonable, in that context, by way of activity which could, for example, interfere in any way with the

lessor's occupation and use of the premises as provided by clause 5.2, or the lessor's acknowledgement that it will replace the locker or relocate it under clause 5.4, or the lessor's power to restrict access to the locker under clause 5.3. It is unnecessary to detail further points.

In reality, the description of the contract as one that does not involve any ongoing personal contact, in my view, is erroneous. And absent that kind of interest on the part of Pinehurst, it is difficult to see how an offer to renew contractual relations without any admission whatsoever made by CDLI could be an offer which it was not reasonable, in the sense of a failure to mitigate loss, for Pinehurst not to accept.

In support of its plea, CDLI relied on *Payzu Limited v Saunders* (1919) 2 KB 581. There are also other cases of that kind which raise the question whether a seller in particular fails to mitigate loss in circumstances where the buyer who was in breach makes an offer of recompense and to perform the contract which up until that time they have failed to perform. It must be remembered, in that context, that the seller's primary interest and that which it is contracting to receive from the buyer is a sum of money.

That is vastly different from the interest of a plaintiff such as Pinehurst in ongoing relations with a lessor that give it access of a non-exclusive kind and an entitlement to use the lessor's land for particular purposes. No case of that kind was identified by CDLI as a comparator against which to assess Pinehurst's conduct as being not reasonable.

On 20 December 2013, CDLI and Coolum Country Club Proprietary Limited, by their directors respectively, made resolutions amending or adopting new rules of the voluntary association identified as the Coolum Country Club. The timing of the amendments and the absence of any other evidence about them leads to the plain inference which I draw that they were made for the purposes of defeating Pinehurst's rights and in the face, specifically, of Pinehurst's claim. No other evidence was offered as to why the amendments were made. There was a spirited, at times slightly frustrating, dispute between the parties in the course of the trial as to whether the documents recording the relevant resolutions should be admitted into evidence in the absence of a witness to prove them. And it was frankly admitted by counsel for CDLI that the insistence on proof without calling such a witness was strategic, I infer, that was so the witness would not be cross-examined about the circumstances when and the reasons why the resolution was adopted.

Similarly, there was a dispute in the trial about the admissibility of an email which had been received by the Mr Crangle identified in the letter set out above as the person to receive bookings from Pinehurst on the footing that the communications involved were part of legal advice given to CDLI by their lawyers. The communication was about the taking of steps in order to promulgate the relevant rule change and was one made by the solicitor instructing counsel for CDLI in the trial of this proceeding. I held that CDLI had elected to waive privilege by leading evidence of the instruction and its source from Mr Crangle as a witness. Once the document was produced and received into evidence it contained nothing in the way of advice except the words, "we recommend to take steps to notify the change of the rules."

It was a communication made in the course of making the rule change which was effected by the resolutions made by CDLI and Coolum Country Club Pty Limited on 20 December

2013. The relevant amendments appear in what is now clause 4.1 of the rules and regulations as follows:

> "4.1 No person, entity, member or member's visitor other than the owner or Palmer Coolum Resort Proprietary Limited may charge or receive any payments from any party in respect of playing golf on the golf course or using the resort facilities."

The validity of making the change to the rules and regulations is disputed. But for present purposes, I can put the question of validity to one side. In submissions, it is said by CDLI that the amendment is relevant to the assessment of damages. No specific submission is made as to the consequence in terms of the quantification of loss. As I understood the case advanced by CDLI, it is that because clause 4.1 of the amended rules contains a relevant prohibition, Pinehurst will suffer no loss from the time of the making of the amendment by reason of the inability to conduct its business.

This plea or submission harks back to clause 6.1(f) of the lease set out previously. The contentions made, alternatively, are that the amendments in clause 4.1 are "rules and regulations governing the premises" or "reasonable directions and requirements of the lessor relating to the premises." These arguments are a matter of construction and application of clause 6.1(f) to the relevant facts.

The first question to be resolved is whether the amendments are rules and regulations governing the premises. In the lease, "Premises" means the existing 18-hole golf course which forms part of the resort and includes the clubhouse and all other amenities and facilities incidental to the 18-hole golf course, including the golf buggies.

In other words, the subject matter of clause 6.1(f) is restricted to those premises and does not include the whole of the resort. In contrast, the Coolum Country Club constitution and rules and regulations relate to the resort and the resort facilities as identified by the definitions and by reference to the text of the constitution and rules and regulations.

Within the meaning of those rules and regulations (and the constitution), it appears that it was assumed that the golf course was at least an additional facility to which "founder resort members", as they are identified, gained an entitlement. However, in general, the rules and regulations and the constitution are not concerned with the golf course as such.

Returning to clause 6.1(f), that clause appears in its context in clause 6.1 with other obligations imposed on the lessee. They include that the lessee must keep the locker clean and tidy and in a good state of repair, ensure that nothing is done that might prejudice any insurance which the lessor has in relation to the premises, notify the lessor promptly of any loss, damage or defect in the locker, not store anything in the locker which is flammable, explosive, toxic, hazardous or injurious to health and not store food or other perishables in the locker.

In that context, the expression "rules and regulations governing the premises" would appear to be concerned with rules or regulations of that kind which may come into play in the exercise of the lessee's entitlement to access and use the premises and the locker for the term of the lease, including the right to use and enjoy the golf course, for six people. In other words, on the face of it, clause 6.1(f) creates an obligation for the lessee to comply with the rules and regulations that might concern those subject matters, not any rules and regulations that might be otherwise of interest to or adopted by any body or

person. It also needs to be taken into account that the lessee, Pinehurst, was not a member of the Coolum Country Club.

CDLI's contention is that the amendments in clause 4.1 creates a rule or regulation "governing" the premises because of the connection in the rule between charging and playing golf on the golf course, or using the resort facilities or, alternatively, the connection between receiving payments and those things.

It will be observed at once that it is not conduct on the golf course or the premises to which the prohibition in clause 4.1 is directed. Nevertheless, CDLI contends that, within the meaning of clause 6.1(f), a prohibition against charging in respect of playing golf on the golf course or using the resort facilities is a rule or regulation "governing the premises". In particular, reliance is placed by CDLI on what is described as the ordinary meaning of the word "govern". That meaning is: "to exercise a directing or restraining influence over". In my view, to construe clause 6.1(f) by reference to the widest operation of the meaning of the word "govern", divorced from its context, would be erroneous.

CDLI submits that the rules in general govern all or part of the premises, but in my view, neither is that correct, nor is it the relevant question. The question is whether clause 4.1, an amendment adopted on 20th December 2013 in the circumstances I've previously outlined, is one which governs in the relevant sense. It will be recalled that at the outset of these reasons, I explained the genesis and the purpose of the transaction under which the lease was entered into. In my view, those facts also may be taken into account in determining whether the amendment to clause 4.1 is one which is a rule or regulation governing the premises within the scope of clause 6.1(f) of the lease. My conclusion is that it is not.

The alternative contention which is made is that the amendment to the Coolum Country Club rules and regulations should be treated as or is a "reasonable direction and requirement of the lessor relating to the premises". In my view, it is not a direction or requirement of the lessor relating to the premises, as such. The direction or requirement which is envisaged by clause 6.1(f) is a direction or requirement to an unidentified group of people. It may be that the meaning of the text should be confined to the lessee as opposed to other people. It is clear that the Coolum Country Club rules and regulations are not directed to the lessee as such. However, it's not necessary, in my view, to finally decide that question.

The point which, in my view, disposes or resolves this particular contention is that the direction or requirement of the lessor is one that must be reasonable.
In support of the contention that the amendments are reasonable, CDLI relied upon no more than the facts that there is a differential rate, as between the amount that has been charged by Pinehurst for a round of golf to a player and what is charged to a member of the public by the resort. The point is that Pinehurst charged less. The second factor relied upon was that CDLI is a commercial organisation.

Although the evidence about it wasn't detailed, over time there has been a change in the way in which the golf course has been operated. It was not proved that CDLI operates any business on the golf course. It is the owner of the land. That is clear. But whether it operates a business on the golf course didn't appear from the evidence, so far as I can tell. It may be accepted that CDLI is at least the land-holding company in a group of companies which operates the resort and operates the golf course. But it must be borne in

mind that the reasonable directions and requirements which are the subject of clause 6.1(f) are those of the lessor, which is not identified in the lease as operating any business on the golf course. Secondly, in earlier times, the course was not operated, whether by CDLI or anyone else, by allowing access to the public on every day of the week. There was no evidence tendered by CDLI to show what its business requirements were, or how its commercial interests could be or would be or were being affected by Pinehurst's conduct of its business.

In my view, the two facts identified by CDLI as justifying the amendment to the rules as a reasonable direction or requirement within the meaning of clause 6.1(f) go nowhere towards the conclusion that a prohibition against Pinehurst being able to utilise its right for six people to use and enjoy the golf course by charging those people is such a threat that it is a reasonable direction or requirement to prohibit Pinehurst from charging or receiving payment.

The conclusion that clause 4.1 does not, on the proper construction of clause 6.1(f), amount to a regulation governing the premises or a reasonable direction or requirement of the lessor relating to the premises, means that it is unnecessary for me to consider further the validity of the amendments, and having regard to the fact that other people may be affected by them, I do not propose, in those circumstances, to do so.

CDLI submits that, in any event, conduct such as a rule or regulation or some other kind of direction or requirement, could be engaged in by CDLI in such a way as to remove Pinehurst's entitlement, if the lease had continued, to charge for six people to use and enjoy the golf course. For that reason, it submits that there must be a discount of the damages "in light of the probability that CDLI will, in the future, take steps to (sic) other peoples or entities including Pinehurst may not sell golfing rights for the golf course".

The difficulty in that submission for the present purposes is that the conclusions to which I have come about clause 4.1 don't depend upon anything other than construction of clause 6.1(f) of the lease applied to the operation of clause 4.1. As to what other rule or regulation or direction might be made by CDLI which would be both valid and would engage the obligation of a lessee under clause 6.1(f), there is no further elucidation. I am unable, therefore, to reach the view that there should be a significant discount because of the possibility that some other attempt might have been made to affect Pinehurst's rights.

If there were another attempt, it would be necessary not only to consider the question of whether there is relevantly a rule or regulation governing the premises or a reasonable direction or requirement under clause 6.1(f), but whether in exercising any power to impose or create such a rule or regulation or give such a direction or requirement, CDLI, would itself be acting in breach of contract. By the reply and answer, Pinehurst alleges that an amendment that would have the effect of depriving it of the ability to conduct its business, if made for that purpose, would breach an alleged implied term, either to cooperate and to do all things reasonable necessary to enable Pinehurst to have the benefit of the lease, or to act in good faith, honestly and reasonably. That itself would be a breach of contract exposing CDLI to a claim for damages for breach of contract. There is an alternative plea of estoppel against such an amendment.

In its submissions, CDLI directed a substantial part of its argument to the question whether Pinehurst had, as a matter of implied term, the right to conduct a business by using the six golf rights. In my view, Pinehurst's claim for damages for breach of contract

does not, at this point, depend on a conclusion on that point one way or the other, because CDLI's repudiation which was accepted is not now disputed, and Pinehurst's entitlement to damages for loss of bargain following the termination is not disputed subject to the matters that I've already dealt with.

It may be necessary, in order to resolve whether any amendment that might otherwise be valid which would have the effect of depriving Pinehurst of the ability to conduct its business would be a breach of contract by CDLI, to potentially engage in an examination of whether there was an implied term of the kind CDLI set up as a hurdle to Pinehurst's claim. But as I say, in my view, it's not necessary now to decide positively whether there's an implied term of that kind. In other words, it's not necessary to decide whether any conduct by CDLI which would cause Pinehurst not to be able to conduct its business and which is not otherwise expressly or impliedly permitted by the lease would be a breach of contract. The questions which are raised by a positive implied term of the kind upon which CDLI focused upon in its submissions and the actual issues which I've discussed above that are raised by the case at present are different things.

The conclusion to which I've come is that it is not necessary for me to resolve upon Pinehurst's allegations that an effective amendment which engaged clause 6.1(f) would itself be a breach of the implied term or obligation as a matter of proper construction commonly associated with the decisions of the High Court in *Secured Income Real Estate (Australia) Ltd v St Martin's Investment Ltd* (1979) 144 CLR 596 on the one hand, or an implied term as to good faith and reasonableness of the kind discussed by the New South Wales Court of Appeal in *Alcatel Australia Limited v Scarcella* (1998) 44 NSWLR 349 on the other.

The remaining issue of substance is the question of the assessment of damages in accordance with the evidence which was given by a chartered accountant called by Pinehurst, Mr John Thynne. The total damages claimed of $1,019,832 are made up of three components. The first component is past loss of profits from 5 January 2012 to 31 October 2013. The sole issue of fact relating to the claim for that period is that from 30 June 2012, Mr Thynne's calculation assumes that there are no commission expenses incurred by Pinehurst. In fact, throughout the period of Mr Shannon's involvement from the 1990s, he charged rates of commission which were rounded by Mr Thynne for the purposes of his calculations to 25 per cent, and which Pinehurst accepts should be treated as being an expense that Pinehurst would have incurred in operating its business of marketing the six golf rights to members of the public.

The second component is the claim for future loss of profits from 31 October 2013 to 15 March 2035 in the sum of $699,951. The assumptions which are made by Mr Thynne in respect of both that component and the third component are similar. First, Mr Thynne has assumed a number of games for each period over the total period on the basis of 780 games per year. 780 was the number he adopted as the annual average of the nine year period from data up until the time when CDLI excluded Pinehurst from conducting its business. However, it appears that in 2010 and 2011 and for the period from then, the games that were being played, on an annualised basis, were significantly less than that. It's unnecessary to delve into the detail but, for example, taking the half yearly average between January and June for the years 2010 and 2011, it was a number significantly below 300.

The difficulty with taking the average of games at 780 over a nine year past period is no analysis was suggested to have been made about the relative operating circumstances over those years in terms of the availability of the resort to the public on particular days or by particular arrangements other than through Pinehurst and, as previously outlined, there is plainly some variation that has occurred over that period. However, CDLI did not challenge Mr Thynne's adoption of 780 games per year as an element of his calculations.

The second step in Mr Thynne's calculations is to assume a dollar value per game. He assumed an amount, which was net of GST, of $68.18. The amount inclusive of GST is $75 per game. The third step in Mr Thynne's calculation was to adopt a discount rate for the projection of loss of earnings (based on the number of games and the dollar value per game just mentioned) over the period initially to 2035 and then from 2035 to 2055. The discount rate which he adopted was five per cent per annum. He adopted that rate by ascertaining a "real" risk free rate being the long term government bond rate less the amount of assessed inflation, then assessing the perceived risk of the business failing in the short term, medium term and long term and then, lastly, taking into account the risk of the golf course ceasing to operate as a golf course.

The precise calculation of the relevant rate, that is, the amounts for those risks respectively to arrive at the outcome of five per cent was not identified. In cross-examination of Mr Thynne, CDLI identified, accurately, that he had assumed, for the purpose of his calculation based on those assumptions, that the golf course would retain its present and past attractiveness into the future to 2055. Mr Thynne made the points that the calculation which he therefore performed was one in which did not allow for growth either for inflation or for improved operating conditions for the business.

However, as to the former, it has to be remembered that he adopted his discount rate on the footing that it was a real rather than nominal cash flow that he was valuing and, secondly, in terms of growth, the reality is that Pinehurst's business had been operated in a very stable way over a very long period of time and no particular opportunities or reasons for growth were identified by any of the factual evidence led from the witnesses who had conducted the business.

CDLI challenged Mr Thynne's assessment in submissions by the contention that the discount rate which he adopted of five per cent was too low. It was submitted that the rate which I should adopt is 12 per cent. Given that the discount rate is a component of a calculation to be performed by the iterative calculation of a discounted cash flow, it's surprising to receive such a submission in circumstances where, firstly, CDLI did not adduce any evidence of its own as to the appropriate discount rate, secondly, did not cross-examine Mr Thynne about whether 12 per cent was a more appropriate rate or why and, thirdly, did not provide a calculation showing what the effect of adopting a 12 per cent discount rate would be. In my view, it's not possible, in those circumstances, to adopt CDLI's approach to the question of assessing damages having regard to the discount rate.

Nevertheless, I am quite conscious that a five per cent discount rate, as one which incorporates business risk for a small business activity is, on any view of it, relatively low. It's not much more than the rates that are adopted merely for the contingency of present receipt of the future cash flow in other contexts. To illustrate that, the calculation performed by Mr Thynne has the effect that, for the full year ending 30 June 2054 the projected loss of profit of $53,177 is one that has a present value of $7,430. One's experience shows that, adopting a higher rate of discount would have the effect that the

prospect of the receipt of a dollar in 2054 would not be worth very much at all at the present time. The point is that, for the last 20 years of calculation, there is $237,458 of loss claimed by Pinehurst when the ability of anyone to foresee Pinehurst's ability to carry on its business after 2035 is extremely speculative at best.

Pinehurst's claim is for a loss of profits and is one that falls within the method or measure of loss to be calculated or assessed in accordance with the decision of the High Court in *Sellars v Adelaide Petroleum* (1994) 179 CLR 332. According to that methodology, the first question is whether, on the balance of probabilities, Pinehurst has lost an opportunity which is valuable, and there's no doubt that element of the process is satisfied in this case. Once that conclusion is reached, the measure of damages is supposed to proceed on the footing of an assessment of the possibilities of Pinehurst achieving the hypothetical cash flow or lost profits. The assessment of the possibilities results in a percentage figure which is not arrived at by mathematical process although expressed at the end of the day in a percentage. It is the assessment of a chance which will often involve broad, brush assumptions or inferences.

The prospect, in my view of Pinehurst obtaining the lost profits for the years from 2035 to 2055, which are claimed, is one that would be heavily discounted on that approach in most circumstances even without knowing of specific risks which could inform a present assessment of the likelihood of there being a failure to obtain the projected profits so far into the future. The very methodology by which discounted cash flows are carried out in terms of business valuation suggests that, looking as far into the future as 2055 is something one rarely does. Instead a more readily foreseen or foreseeable period of the future is taken on the footing that the valuation exercise is performed taking an entry and exit value of the thing to be valued. In the circumstances of this case, on the evidence that's been presented, the result or conclusion of Mr Thynne as to a calculation of the present value incorporating the risks of Pinehurst's alleged loss of profits 40 years into the future is in a somewhat unsatisfactory state. Notwithstanding that, it's the obligation of the court to do the best it can on the evidence in terms of making an assessment of the quantum of Pinehurst's damages.

Pinehurst accepts that notwithstanding the amount of the calculations that are propounded by the pleading and in Mr Thynne's report an allowance should be made of approximately 20 or 25 per cent in the calculation of loss for the expense of commissions. It submits that a 25 per cent discount would result in an assessment of damages of $82,423 for past losses and, applying the 25 per cent to future losses, $703,056 for future losses. That seems, in general terms, appropriate except for the failure to take account of Mr Thynne's assumption of no commission for past losses from 1 July 2012 onwards. Appropriately, the sum of $82,423 would also have to be reduced. Allowing those reductions takes account of the failure of Pinehurst's claim as pleaded and in the assumptions made by Mr Thynne to allow for the expenses which Pinehurst has always incurred except for the initial period when Dr Andary personally put in the effort to utilise its rights and to market them in carrying on its business.

However, in my view, there needs to be an additional reduction because the amount of loss so derived still only reflects the adoption of a five per cent discount rate for the full period of the claimed losses through to 2055. There's no precise mathematical way in which it seems to me that the calculation can or should be made to reflect the fact that, in my view, the discount rate extended over that period is based on an assumption which is too aggressive as to the years particularly from 2035 onwards.

Adopting a global approach, in my view, the amount to be allowed for past loss of profits from 5 January 2012 to 31 October 2013 should be reduced from $82,423 to the sum of $65,000 to reflect the allowance of a commission of 25 per cent during the period from 1 July 2012 to 31 October 2013. And, also adopting a global approach, the amount for the two periods from 31 October 2013 to 15 March 2035 and 15 March 2035 to 15 March 2055 should be reduced, firstly, as submitted by the Pinehurst, to allow for commission to the amount of $703,056 and, to reflect the particular view I have of the risk associated with the losses claimed so far into the future, a further reduction of a global amount of approximately $50,000 reducing the sum to, in total, to $650,000.

In coming to that conclusion, and having regard to the total of the claimed losses in accordance with Mr Thynne's calculation before reduction for commission of approximately $937,000, the allowance that I've made for the additional risk not reflected, in my view, in his choice of discount rate taken as an assessment of the possibilities looking into the future is still relatively generous. One could justify a range of a broad kind, in my view, having regard to the particular features of this case. The factors which would justify a lower assessment of the possibilities would take into account those emphasised by CDLI being the possibility of change in the use of the golf course and those taken into account by Mr Thynne which include, also, the possibility of change in the conduct of Pinehurst's business. For example, Dr Andary is not a young man and Pinehurst's business may not have been conducted in the same way in the future. But, at the end of the day, those negative factors are only one side of the equation and, in the absence of a full examination of all factors, necessarily, a global assessment of possibilities of the kind which I've just made must be a rough and ready exercise.

The conclusions to which I've come are that, before interest, the assessment of past losses should result in the finding of loss in the sum of $65,000 which necessarily is a rounded amount because some of those past losses are a past hypothetical loss. To that, there will need to be applied a calculation of interest. The assessment that I make of future loss is in the global sum of $650,000 which, for obvious reasons, doesn't bear interest.

Now there are a number of other arguments and contentions that I've not specifically dealt with in the reasons, notwithstanding their present length. Are there any specific findings that you want me to deal with, Mr Travis, that I've not made?

...

HIS HONOUR: Because I've not accepted Mr Thynne's evidence in its entirety, in terms of his conclusion as to the discount rate, Pinehurst asks that I make further findings as to the factors in the assessment of the possibilities which might have led to a higher amount. I had in mind the factors that were dealt with by Mr Thynne which I largely accept as a discussion of matters which are of relevance. So, for example, Mr Thynne, in his consideration, looked at the way in which the golf course will continue into the future in terms of the performance of the golf course and potential fluctuations in performance, and relied upon the fact that the golf course is one of the major features of the whole resort; that the golf course has been used in the same fashion, broadly speaking, for 20 years or so; that Pinehurst was selling rounds of golf at a discount of about 50 percent; that the drop in the numbers in the 2010-2011 years may have been affected by the GFC and flood

events that occurred in those years; and that the average rate of usage of the rights was relatively low, being approximately two games a day

...

HIS HONOUR: Pinehurst applies for an order for costs of the claim to be assessed on the indemnity basis. The discretionary power to make an order for costs to be assessed on the indemnity basis under UCPR 703 is largely unfettered, although the case law informs the relevant considerations to be taken into account. The particular factors relied upon here can be divided into categories.

Pinehurst submits that overall, the conduct of CDLI in defence of the proceeding can be characterised as intended to vex Pinehurst. In support of that, reliance is placed upon the number of allegations raised without a factual basis being advanced to justify them at the trial and the circumstance that many of them have been abandoned. Included in its submissions is support of that characterisation of the proceeding, Pinehurst relies upon the abandonment of the counterclaim, although a separate order for the costs of the counterclaim has already been made.

Pinehurst points to the fact that even in CDLI's initial correspondence before the proceeding commenced allegations of impropriety and potentially fraudulent conduct were made by against Pinehurst without any apparent basis.
Mr Travis, for CDLI, submits that the proceeding has not been conducted on the basis of those allegations and that's true. I accept that the purpose of an order for indemnity costs is not to express disapproval about conduct, irrespective of how improper it was, which is not directly in issue in the proceeding.

Pinehurst relies upon the fact that a number of the issues raised by the pleadings, and even by the later iterations of the pleadings on the part of CDLI, have been abandoned in conduct of the trial of the the claim in circumstances where that was not clear or apparent until CDLI opened its case; and perhaps more specifically until actual concessions were made during the course of discussion of the issues during the trial or in argument. It is a matter of some gratification that CDLI's representatives conducted themselves appropriately at the trial about those points.

Another factor relied upon by Pinehurst is that the defence based upon the change in the rules of the Coolum Country Club, made on 20 December 2012, was made for the specific purpose of, again, disputing or vexing Pinehurst by that allegation, and that CDLI's conduct, in making those changes, was directed towards defeating Pinehurst and nothing else. Even if that were true, it doesn't seem to me to be a particular reason for an order for indemnity costs. In my view, a defendant is not precluded from taking whatever action it thinks will support its case and maintain its defence, or create a defence, as a matter of law.

Although this is out of the order in which the submissions were advanced, the next factor that I identify is that Pinehurst submits that the mitigation issue that took up a not insignificant part of the questions to be decided at the trial, and which involved offers made successively by CDLI to Pinehurst after Pinehurst had terminated the contract was one that was so hopeless that an order for costs should be made on the indemnity basis.

Mr Travis submits that, notwithstanding the findings that I've made, the question was not one that was improper to raise, and again, I accept that view of the world.
It seems to me that is so although the plea had little, or very little, prospect of succeeding, in circumstances where CDLI was determined to reserve to itself, initially, the right to prosecute the counterclaim, a position that was maintained up until the first day of the trial, and even further, to maintain a right, in effect, to defeat Pinehurst's reasonable expectations by contending that Pinehurst wasn't entitled to carry on its business as it had been doing for almost 20 years, which was something of a hollow position to take.

Notwithstanding that, in my view, the one issue on which CDLI has had some measure of success is the question of damages. Also, in my view, from a time which is difficult to predict, as a matter of common sense, it was reasonably apparent that the substantial issue in this case was going to be an amount for the award of damages. Pinehurst's claim, initially, was based on the footing that it was entitled not only to an order for specific performance, but a claim for damages of $2 million, which would compensate it as if it had lost all its rights and the contract had been terminated. That was an error on the Pinehurst's part, which was maintained in the running of the case until relatively late in the piece. In those circumstances, notwithstanding the factors relied upon by Pinehurst, I'm not prepared to make an order for costs on the indemnity basis.

The order which I propose to make is an order that the defendant pay the plaintiff's costs of the claim on a standard basis.

...

HIS HONOUR: I give judgment for the plaintiff against the defendant in the sum of $718,983, including $3983 interest.

...

HIS HONOUR: I order that the defendant pay the plaintiff's costs of the claim to be assessed on the standard basis.

...

HIS HONOUR: I further order that Dean Andary be released from the undertaking he gave dated 27 February 2013 filed on 1 March 2013 and I further order that the plaintiff be released from the undertaking it gave dated 13 February 2014, which is exhibit 37 in the proceeding.