SUPREME COURT OF QUEENSLAND

CITATION:	*Ozibar Pty Ltd v Laroar Holdings Pty Ltd* [2015] QSC 345
PARTIES:	**OZIBAR PTY LTD ACN 114 591 721 as trustee of OZIBAR UNIT TRUST** (plaintiff/respondent) **v** **LAROAR HOLDINGS PTY LTD** **ACN 011 058 772** (defendant/applicant)
FILE NO/S:	S20/2015
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Mackay
DELIVERED ON:	4 December 2015
DELIVERED AT:	Rockhampton
HEARING DATE:	21 October 2015
JUDGE:	McMeekin J
ORDERS:	**1. Paragraphs 46 to 50 and 80 to 118 of the Statement of Claim are struck out;** **2. The plaintiff shall file and serve such amended Statement of Claim as it may be advised within 28 days;** **3. The plaintiff is ordered to pay the costs of the defendant of and incidental to this application;** **4. The parties have liberty to apply on three business days' notice in case there is a need for further clarification of these orders or argument as to the paragraphs that should be struck out, and as well to allow the defendant to renew its application in the event that the plaintiff does not re-plead within the time allowed or if the defendant maintains that any such re-pleaded cause is itself fatally flawed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the defendant applies for summary judgment or in the alternative to strike out the plaintiff's Statement of Claim – where the proceedings concern

the leasing of a commercial premises owned by the defendant – where the plaintiff's claim depends on the implication in the lease of certain of the terms contained in s 43 of the *Retail Shop Leases Act 1994* – whether it is arguable that there is privity of contract between the plaintiff and the defendant – whether the *Retail Shop Leases Act 1994* applies to any agreement between the plaintiff and the defendant

Retail Shop Leases Act 1994 (Qld), s 5, s 8, s 18, s 42, s 43, s 44
Retail Shop Leases Regulation 2006, s 9, s 12
Uniform Civil Procedure Rules 1999 (Qld), r 171, r 293

Aussie Traveller Pty Ltd v Marklea Pty Ltd [1998] 1 Qd R 1
Battik Pty Ltd v Hawkesbury Nominees Pty Ltd & Ors [1999] ACTSC 55
Bradford House Pty Ltd v Leroy Fashion Group Ltd (1983) 68 FLR 1
Burns v MAN Automotive (1986) 161 CLR 653
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232
Dewar v Goodman [1907] 1 KB 612
General Steel Industries Inc. v. Commissioner for Railways (N.S.W.) (1964) 112 CLR. 125
Hart v Windsor (1843) 12 M & W 68
Horsey Estate Ltd v Steiger [1899] 2 QB 79
Mekpine Pty Ltd v Moreton Bay Regional Council [2014] QCA 317
Orsay Holdings Pty Ltd v Mecanovic and Ors [2013] QCA 232
Re Rakita's Application [1971] Qd R 59
Sandhurst Trustees Ltd v Australian Country Cinemas Pty Ltd [2006] QSC 165
Southwark London Borough Council v Tanner [2001] 1 AC 1 at 11
Walton Stores (Interstate) Ltd v Maher (1988) 164 CLR 394

COUNSEL: C Heyworth-Smith QC for the applicant

G Long (director of the respondent company) appeared in person

SOLICITORS: Macrossan and Amiet Solicitors for the applicant

G Long (director of the respondent company) appeared in person

[1] **MCMEEKIN J:** The defendant applies for summary judgment pursuant to r 293 Uniform Civil Procedure Rules ("UCPR") or in the alternative to strike out the plaintiff's Statement of Claim pursuant to r 171 UCPR. While the relevant pleading was drafted by a legal practitioner the plaintiff was represented at the hearing by a director, Mr Long, who has no legal training. He appeared by leave.[1]

[2] The proceedings concern the leasing of the defendant's premises in Mackay known as "the Dome".[2] The plaintiff conducted a nightclub at those premises. It commenced occupation upon the assignment of a sublease on 23 April 2008 and remained in occupation until it surrendered its lease in May 2013. The precise nature of the arrangements between the parties is in dispute but for ease of reference I shall call the plaintiff the lessee and the defendant the lessor and the arrangement between them a lease.

[3] The defendant makes three points. First, it says that there is no contract between it and the plaintiff at any time relevant to the alleged breaches of the lease. Secondly, as pleaded, the claim depends on the implication in the lease of certain of the terms contained in section 43 of the *Retail Shop Leases Act* 1994 ("the Act"). The plaintiff contends that the defendant breached those implied terms. The defendant contends that the lease is not one to which the Act applies. The plaintiff does not plead any other basis for its claim. Thirdly, the defendant complains that the plaintiff's pleading of its damages is plainly flawed.

[4] If the defendant is correct then it follows it is entitled to the relief it seeks in one or other form.

Which Version of the Act Potentially Applies?

[5] The original version of the Act commenced in 1994. It was subsequently amended. Amendments to the Act that came into force from 3 April 2006 under Act No 4 of 2006 are expressly said not to apply to a lease that was in force at the time the amending Act came into force and any extension or renewal of such a lease: see s 129 of Act No 4 of 2006. The *Retail Shop Leases Regulations* 1994 were repealed in 2006 (see s 12 *Retail Shop Leases Regulation* 2006) and no transitional provisions of a like nature were provided.

[6] The original sublease of which the plaintiff took assignment was to a head lease for a five year term entered into on 10 May 2004 albeit the term created was agreed to have come commenced nearly two years before on 1 August 2002. There was an option for five years that the head lessee exercised in 2007. The expiry of the term under the option on 31 July 2012 led to no changes in the arrangements between the parties – the plaintiff continued in occupation presumably under a month to month

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1 Section 90 *Supreme Court Act* 1995

2 I ignore, for present purposes, the defendant's complaint that the premises leased by the plaintiff are not in the area known as "the Dome": see paragraph 3 of the Defence.

tenancy[3] although there seems to have been no consideration given by the parties then to the precise nature of its right to occupy. On 27 November 2012 the plaintiff entered into a lease for a term of three years with the defendant with the term backdated to commence on 1 August 2012.

[7] The breaches complained of are alleged to have occurred between 18 September 2009 and 27 November 2012.

[8] It follows then that up and until 27 November 2012 the plaintiff's occupancy was pursuant to a lease that had been in force prior to 3 April 2006 (the term of which commenced on 1 August 2002) which had been either extended or renewed. Hence the Act as it stood prior to 3 April 2006 applies. Reprint 3E of the Act therefore applies.

Privity of Contract

[9] The defendant's first point was that there existed no privity of contract between the plaintiff and the defendant. The argument effectively is that assuming that the Act applies to the premises the subject of the sublease the conditions that it imposes are not enforceable at the suit of the assignee of a sublease against the head lessor. No case was cited as determining the point either way.

[10] Before turning to the point I note that the plaintiff alleges that in late 2010 there was an assignment of the head lease from the head lessee to the plaintiff, that assignment occurring with the express consent of the defendant. The plaintiff exhibits correspondence from the solicitors acting for the head lessee to the solicitors acting for the defendant requesting consent to the assignment. Whether that consent was forthcoming is not disclosed. Assuming that the assignment occurred does not affect the argument.

[11] It is true that in the normal course where a lessee assigns a lease there will be privity of estate but no privity of contract between the lessor and the assignee. However the doctrine of privity of contract does not apply to covenants that "touch and concern" the land. Such covenants are enforceable against the lessor by the assignee. Covenants that are merely personal to the assignor are not: *Re Rakita's Application* [1971] Qd R 59 at 63; *Dewar v Goodman* [1907] 1 KB 612 at 620 per Jelf J; *Sandhurst Trustees Ltd v Australian Country Cinemas Pty Ltd* [2006] QSC 165 at [18] per Chesterman J (as his Honour then was).

[12] The question then is whether the covenants imported by the Act "touch and concern the land". I was not referred to any authority on the point. In *Sandhurst* (supra) Chesterman J quoted with apparent approval the authors of *Woodfall Landlord and Tenant* (at [11.051]) that "a satisfactory working rule for determining whether a covenant touches and concerns the land" is that it must inter alia affect "the nature, quality, mode of use or value of the land of the reversioner." That "rule" accords

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3 Consistently with cl 10.1.1 of the head lease?

with authority: *Horsey Estate Ltd v Steiger* [1899] 2 QB 79 at 89 per Lord Russell CJ.

[13] Section 18 of the Act provides that the duties imposed or entitlements conferred by the Act are "included" in a lease which is subject to the Act. Section 42 provides that sections 43 and 44 are included in such a lease. Section 43(1) provides:

> **When compensation is payable**
> (1) The lessor is liable to pay to the lessee reasonable compensation for loss or damage suffered by the lessee because the lessor, or a person acting under the lessor's authority—
> (a) relocates the lessee's business to other premises during the term of the lease or of any renewal of it; or
> (b) substantially restricts the lessee's access to the leased shop; or
> (c) takes action (other than action under a lawful requirement) that substantially restricts, or alters—
> (i) access by customers to the leased shop; or
> (ii) the flow of potential customers past the shop; or
> (d) causes significant disruption to the lessee's trading in the leased shop or does not take all reasonable steps to prevent or stop significant disruption within the lessor's control; or
> (e) does not have rectified as soon as is practicable—
> (i) any breakdown of plant or equipment under the lessor's care or maintenance; or
> (ii) any defect in the retail shopping centre or leased building containing the leased shop, other than a defect due to a condition that would have been reasonably apparent to the lessee when the lessee entered into the lease or, for a lessee by way of assignment of the lease, when the lessee accepted the assignment; or
> (f) neglects to clean, maintain or repaint the retail shopping centre or leased building containing the leased shop or the part of the centre or building that, under the lease, is the lessor's responsibility; or
> (g) causes the lessee to vacate the leased shop before the end of the lease or renewal of it because of the extension, refurbishment or demolition of the retail shopping centre or leased building containing the shop.

[14] The issue then is whether the grant of a right to damages to a lessee can be said to affect "the nature, quality, mode of use or value of the land" of the defendant. The provision does not expressly or implicitly create a right in relation to land: while self-evident see *Mekpine Pty Ltd v Moreton Bay Regional Council* [2014] QCA 317 at [33] per McMurdo P, Morrison JA agreeing at [143]. I have not had the advantage of any submissions on the point but it seems to me to be at least arguable that the value of the land is affected by burdening it with an obligation to pay compensation to third parties if used in a certain way. As well, indirectly at least, the way in which the lessor uses the land is affected by these provisions. And as to paragraph (f) it has been held that an obligation to keep clean the property demised,

touches and concerns the land: *Barnes v City of London Real Property Co* [1918] 2 Ch 18 at 33. Further, the objects of the Act would be undermined if the rights conferred by it were not enforceable by an assignee of the lease. The objects of the Act are "to promote efficiency and equity in the conduct of certain retail businesses in Queensland" and are to be achieved through ways including "mandatory minimum standards for retail shop leases": see s 3 and s 4(a) of the Act.

[15] In my view the point is arguable and sufficient to deny the defendant relief on this ground.

[16] Further the plaintiff contends that the defendant, through its agents, directed the plaintiff to pay the rent due under the head lease directly to the defendant. The plaintiff contends that the original lessee abandoned the lease entirely in 2008 and all dealings thereafter were between the plaintiff and the defendant. The defendant does not deny that this occurred but rather says that it is uncertain of the true state of affairs. Further, the plaintiff points to direct communications between it and the defendant over the relevant period concerning the problems with the state of the premises.

[17] Whether such a direction and such conduct is sufficient to substitute the plaintiff as the head lessor with contractual rights and obligations vis á vis the defendant is far from clear. Even if it is sufficient to establish an agreement between them of some sort for valuable consideration the question remains as to the terms of that agreement. If the term of the tenancy thereby agreed was only month to month (as the rental was paid monthly) or at will would not assist the plaintiff as s 42 of the Act expressly provides that the obligation to pay compensation imposed by s 43 of the Act, which is fundamental to the plaintiff's case, does not apply to such tenancies. It would be necessary for the plaintiff to demonstrate that the term provided for in the sub lease or head lease is implied. With some hesitation I have come to the view that the allegations raise a triable issue. If the word "lease" means "an agreement under which a person gives or agrees to give to someone else for valuable consideration a right to occupy premises" as the Act provides[4] then the payment of rent directly to the defendant and at its request, and not to the assignor and holder of the sublease as the sublease provided, and the evident permitted occupation of the premises, arguably creates a lease contract between the parties.

[18] I should not be taken to determining that is so but the allegations raise sufficient uncertainty as to the true nature of the relationship between the parties as to justify a trial.

[19] There remains the issue of whether the Act applies to any lease between the parties.

The Relevant Provisions

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4 See s 5 of the Act.

[20] It is necessary to examine the scheme of the Act. The source of the implied terms on which the plaintiff relies is in s 42 of the Act which provides that "a retail shop lease … is taken to include sections 43 and 44". The primary question here is whether the subject lease is a 'retail shop lease" as defined. A "retail shop lease" is defined in s 5 of the Act to mean "a lease of a retail shop" with exclusions not here relevant. "Retail shop" is defined to mean:

> "…premises that are:
>
> (a) Situated in a retail shopping centre; or
>
> (b) Used wholly or predominantly for the carrying on of 1 or more retail businesses."

[21] The plaintiff claims that it qualifies under both limbs. I will deal with the second limb first as it is relevant to both arguments.

[22] To be a "retail business" as defined it is necessary to operate a business "prescribed by regulation as a retail business": s 5 of the Act. Businesses so prescribed are found in the Schedule to the Regulations. Section 9 of the Regulations provides:

> **Retail business**
>
> (1) A business is a retail business if—
>
> (a) it is a business mentioned in the schedule; or
>
> (b) its whole or predominant activity is, or is a combination of, the sale, hire or supply of goods or services mentioned in the schedule.
>
> (2) The wholesale sale of goods is not a retail business.

Is a "Nightclub" a "retail business"?

[23] In its pleading the plaintiff describes its "shop" as "the Mainstreet Nightclub".[5] Mr Long has explained in his various affidavits that the business that was conducted on the premises enjoyed what was originally known as a "cabaret license" - a liquor license that entitled the licensee to sell alcoholic beverages provided entertainment was also provided. For the purposes of the license that was the "primary purpose" or "principal activity" of the lessee's business – the provision of entertainment. The entertainment provided included live bands, live DJ music, dance competitions, functions including catering of food supplied from off premises, "beer pong competitions", and "ladies only entertainment nights".[6]

[24] Mr Long initially contended that this was a business mentioned in the Schedule to the Regulations – defined as the supply of "amusement and entertainment services". That description does not appear in the Schedule that is relevant to the lease. It did appear in the original Regulations of 1994. It was omitted on the coming into force of s 8 *Retail Shop Leases Amendment Regulation (No 1)* 2000. Thus when the subject lease commenced in 2002 the description did not appear. In any case, as of 3

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5 See para 3(c) of the Statement of Claim.

6 See para 13 of Mr Long's affidavit filed 20 October 2015.

April 2006, the 1994 Regulations were repealed: s 12 *Retail Shop Leases Regulation* 2006. The Schedule to the 2006 Regulations did not resurrect the description on which Mr Long relied. I take it that Mr Long was unaware of the change to the Schedule until he received the defendant's outline of argument.

[25] Mr Long's fall-back position was that the nightclub business came within "amusement parlour", a description that does appear in both the 2006 Regulations and the 1994 Regulations as amended in 2000. That argument involves a considerable and, in my view, impermissible, stretch of the language.

[26] I have been unable to find a dictionary definition of "amusement parlour" although I think that the concept is well understood in our society. It is encapsulated, for example, in the policy document of the Melbourne City Planning Scheme of 2006: "Amusement parlours provide an important entertainment and recreational role … particularly for young people."[7] The National Gallery in Canberra advertises having an "amusement parlour" and indicates that available there, in what are described as "family spaces", will be "free activities inspired by Sideshow Alley for families to enjoy together." Each example reflects my understanding of the concept. Nightclubs are not the places for "young people" or "families".

[27] The Macquarie Dictionary defines "nightclub" as "a place of entertainment, open until late offering food, drink, cabaret, dancing etc." The Shorter Oxford Dictionary defines "nightclub" as "a club frequented during the night hours esp (*sic*) for drinking and dancing".

[28] The significant distinction between an 'amusement parlour" and a "nightclub" that I perceive is that the former conjures up images of innocent entertainment for the younger people involving arcade games while the latter conjures up images of entertainment of a more adult kind notably including music, dancing and the selling of alcoholic beverages for consumption on the premises – precisely the activities that the plaintiff conducted as part of its business.

[29] "Nightclub" is not mentioned in the Schedule. Nor is there any reference to a business involving the provision of dancing or cabaret. There is reference to the sale of alcohol and food but the approach taken in the Schedule is restrictive. The only express reference to the sale of alcohol is in the category "Liquor retailing for off-premises consumption". That plainly does not apply. The only category that potentially applies to the sale of food and alcohol for consumption on the premises, so far as my experience goes, is that of "restaurant" to be found under the heading "Dine in retailing". In my view that too cannot apply. Mr Long assured me that licenses to sell alcohol can be obtained for other business described in that category, eg café, but that does not assist, even assuming it to be so. The "whole or predominant activity" of a nightclub, to use the words of s 9 of the Regulations, is not the sale of food or the supply of coffee to its patrons. It may be an incidental

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7 Cl 22.01 Local Planning Policies Melbourne Planning Scheme.

activity but that is as high as it can be put. In short a "nightclub" is not a "restaurant" nor is it a "café".

[30] I conclude that the business of a nightclub is not a "retail business" as defined as the "whole or predominant activity" of the business does not fall within any business described in the Schedule to the Regulations.

[31] I turn to the plaintiff's primary argument – that the subject lease was a "retail shop lease" as defined in s 5 of the Act as it is a lease of premises that are "situated in a retail shopping centre". The defendant says that is not so. Again the argument depends on definitions in the Act.

[32] Section 8 of the Act defines "retail shopping centre" as follows:

> **Meaning of *retail shopping centre***
>
> (1) A ***retail shopping centre*** is a cluster of premises—
>
> (a) 5 or more of which are used wholly or predominantly for carrying on retail businesses; and
>
> (b) for which 1 person is, or would be if the premises were leased, the head lessor.
>
> (2) However, a building with more than 1 storey is not a ***retail shopping centre*** except to the extent that a storey of the building contains, or adjoining storeys of the building each contain, a group of premises complying with subsection (1)(a) and (b).
>
> *Examples of subsection (2)—*
>
> 1 In a multistorey building owned by 1 person, the ground floor contains 5 retail businesses. All other floors of the building are used solely for commercial purposes, eg. Premises used by legal or accounting firms or financial advisory services. Only the ground floor of the building is a retail shopping centre.
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> 2 In a multistorey building owned by 1 person, the ground and first floors each contain 5 retail businesses. All other floors of the building are used solely for commercial purposes. The ground and first floors of the building collectively are a retail shopping centre.
>
> 3 Each floor of a 5 storey building owned by 1 person contains 5 or more retail businesses. The building is a retail shopping centre.
>
> (3) To remove any doubt, if a retail business is conducted in premises situated in a building separated from a retail shopping centre only by the centre's common areas, the ***retail shopping centre*** includes the premises.
>
> *Example of subsection (3)—*
>
> A fast food shop is conducted from a building in a retail shopping centre's car park. The shop is part of the retail shopping centre.

[33] It is common ground that "the Dome" consists of a two storey building in which there is "a cluster of premises" five or more of which are used wholly or predominantly for carrying on retail businesses and in respect of which the defendant is the head lessor. That "cluster of premises" exists on the ground floor of the building. Thus subsection (1) of the definition is engaged.

[34] The plaintiff's nightclub is on the first floor of the building ie that floor above the "cluster of premises". That floor does not satisfy subsection (1)(a) – there is no "cluster of premises" there at all, only the plaintiff's business and a car park used by the tenants. Thus subsection (2) operates to exclude that floor as "a retail shopping centre". The situation falls squarely in example 1.

[35] However the plaintiff contends, and the defendant denies, that subsection (3) operates to include the first floor in the "retail shopping centre". The plaintiff argues that the nightclub is a "retail business" conducted in premises situated in a building "separated from a retail shopping centre only by the centre's common areas".

[36] The difficulty with the argument is that it ignores the first condition. It assumes that the Mainstreet Nightclub is a "retail business".

[37] I have already found that the nightclub is not a "retail business". That necessarily excludes the operation of subsection (3). It is evident that to attract the operation of subsection (3) it is necessary to satisfy both conditions. Here Mr Long attempts to give the subsection an inclusionary effect for a business that would not otherwise qualify. That is the effect of subsection (1) but not of subsection (3).

[38] There seems to me to be two points to these provisions concerning a shopping centre. One is not to exclude from the operation of the Act a floor of a building that might include a business that would not qualify as a "retail business" but which is surrounded by businesses (at least five in number) that are prescribed in the Schedule. The other is to make clear ("to remove any doubt") that if the business is one prescribed in the Schedule it does not lose its status as a "retail business", and the advantages and obligations conferred and imposed by the Act, merely because it is separated from the "cluster" by the common areas.

[39] The parties discussed at some length whether the plaintiff could satisfy the second condition – that is whether the premises leased by the plaintiff was "separated from a retail shopping centre only by the centre's common areas." It is not necessary for me to determine the point. The plaintiff's arguments were not without merit. Given the dispute, if it was relevant, there would need to be a trial to resolve the factual issue.

[40] I am satisfied that the plaintiff cannot bring the lease under which it enjoyed occupation of the defendant's premises within the terms of the *Retail Shop Leases Act* 1994. The implied terms on which it relies therefore do not apply to its sublease.

[41] This conclusion does not depend on any view as to the precise basis of the plaintiff's occupation. Whether the sublessee abandoned the head lease, or whether there exists some form of lease by estoppel or attornment, all of which the plaintiff argued applied here, is neither here nor there – the plaintiff does not point to any form of lease containing the terms on which it relies.

[42] I turn then to the question of what relief is appropriate.

Summary Judgment?

[43] Rule 293 UCPR provides:

> **Summary judgment for defendant**
>
> (1) A defendant may, at any time after filing a notice of intention to defend, apply to the court under this part for judgment against a plaintiff.
>
> (2) If the court is satisfied—
>
> (a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and
>
> (b) there is no need for a trial of the claim or the part of the claim;
>
> the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and may make any other order the court considers appropriate.

[44] In *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232, after a review of authorities, the Court of Appeal considered the approach that should be adopted to summary judgment applications brought pursuant to rules 292 and 293 UCPR. It was held that the more stringent test laid down by Barwick C.J. in *General Steel Industries Inc. v. Commissioner for Railways (N.S.W.)* (1964) 112 C.L.R. 125 at 130 "that the case of the plaintiff is so clearly untenable that it cannot possibly succeed" is not to be applied. Rather "the court must consider whether there exists a real, as opposed to a fanciful, prospect of success. If there is no real prospect that a party will be successful in all or part of a claim, and there is no need for a trial, then ordinarily the other party is entitled to judgment": per Atkinson J at [47]. See also McMurdo P at [2] and Williams JA at [17]. I bear in mind the cautionary statement of McMurdo P in that case:

> "Nothing in the UCPR, however, detracts from the well established general principle that issues raised in proceedings will be determined summarily only in the clearest of cases. Gaudron, McHugh, Gummow and Hayne JJ. said in *Agar v. Hyde*, (2000) 201 C.L.R. 552, 575–576 [57] recently cited with approval by Gleeson C.J., McHugh and Gummow JJ. in *Rich v. CGU Insurance Ltd* (2005) 79 A.L.J.R. 856, 859 [18]-[19]:
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> > "… Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way."[8]

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8 At [3].

[45] I am satisfied that the plaintiff has no real prospect of establishing its case based on the incorporation of terms set out in the *Retail Shop Leases Act* 1994. However I am not persuaded that its cause is so hopeless that summary judgment ought to be given. That is, I am not persuaded that there is no need for a trial.

[46] It is necessary to say a little more about the facts.

[47] The plaintiff's essential complaint is that rainwater gained entry into the premises through cracks in the roof in various places and through the blockwork walls. In the normal course the adequacy of the structure itself would be the landlord's responsibility, not the tenant's. The intrusion caused many problems but significantly water became lodged in inaccessible places beneath flooring, became stagnant and foul, thereby rendering the premises totally unsuitable for use as a nightclub, or perhaps for any commercial propose.[9] All this, I should say, is alleged not proved. For present purposes I take the plaintiff's case at its highest.

[48] The issue is whether there is a need for a trial albeit on a ground not yet pleaded or explored by the plaintiff.

[49] There are significant difficulties facing the plaintiff. The long established rule is that there is no condition implied in a lease that the premises are fit for the purpose for which they are let: *Hart v Windsor* (1843) 12 M & W 68 at 87; 152 ER 1114 at 1122. The rule remains in place: *Bradford House Pty Ltd v Leroy Fashion Group Ltd* (1983) 68 FLR 1; and see *Southwark London Borough Council v Tanner* [2001] 1 AC 1 at 11 (cited with approval by Philip McMurdo J (as his Honour then was) in *Orsay Holdings Pty Ltd v Mecanovic and Ors* [2013] QCA 232 at [17]) for the proposition, inter alia, that "the tenant takes the property … in the physical condition in which he finds it…".

[50] And here the express terms of the lease are against the implication of any contrary condition: see cl 8.1.3 of the head lease which provides that "if any part of the Premises is destroyed or damaged and as a result is unfit for the Permitted Use" then "the Lessor shall not be obliged to reinstate the premises". Rather provision is made for abandonment of the lease or alteration to the obligation to pay the rent.

[51] On the other hand that reasoning has been distinguished where the lessor's actions have amounted to an interference with the covenant for quiet enjoyment or amount to derogating from the grant: *Battik Pty Ltd v Hawkesbury Nominees Pty Ltd & Ors* [1999] ACTSC 55 per Higgins J. There the leased premises were used as a restaurant. The viability of the business depended on the location of an exhaust fan and the proper ducting of smoke and heat away from the restaurant area. The landlord was responsible for that exhaust fan and ducting. It was held liable in damages.

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9 See para 59 of the Statement of Claim.

[52] Here the complaint is not about the lessor's actions but its inaction in the face of water intrusion brought about by natural causes. Higgins J relied in part on the reasoning of McPherson J in *Aussie Traveller Pty Ltd v Marklea Pty Ltd* [1998] 1 Qd R 1 at 12, where, in the context of a landlord failing to enforce a covenant of a lease against a co-tenant he said: "A person may now be liable for acts done on his land creating a nuisance even though they were done by the trespasser *or resulted from natural causes*, if he fails to take steps to eliminate or prevent them."[10] The authorities cited in support are not apposite to this case, but that is not the point. The case serves to demonstrate the development of the law in relation to the obligations of landlords. It may be that the plaintiff can reformulate its case to take advantage of some as yet unidentified aspect of the case. It may be that it cannot – I have had no submissions on the point.

[53] Mr Long urged that there are other possible grounds to found an action.

[54] Mr Long argued that the plaintiff may be able to demonstrate an estoppel preventing the defendant denying the common assumption of the parties that the Act did apply to the lease arrangement: see *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 394 at 413 per Mason CJ. He was unable to take me to any document passing between the plaintiff and the defendant demonstrating any such assumption. He did point me to the correspondence to which I have earlier referred passing from the solicitors acting for the head lessee (Taochi Pty Ltd) to the solicitors acting for the defendant requesting consent to the assignment. There is a reference there to the disclosure statement required by the Act. But all that proves is that those solicitors thought that the Act applied, not that the defendant had encouraged any such belief. Similarly he pointed to communications from the plaintiff to the defendant, long after entry into the occupation by the plaintiff, where reference is made to the possibility of seeking compensation under the Act. But the plaintiff's beliefs and statements cannot found an estoppel binding the defendant. Reference was made to the original head lease but that does not assist. Schedule B to the lease reads "Insert Retail Shop Lease Disclosure Statement" and there is hand written "Not Applicable" and initialled "DD" – presumably David Denny the director of the defendant company. That is strongly against any such estoppel. I am not persuaded there is any evidence even pointing to the possibility of this ground succeeding.

[55] Mr Long took me to certain correspondence between the parties where statements were made by the lessor or its agents to the effect that repairs would be affected to prevent water entry. If those statements were found to have been made (which seems very likely), found to have misrepresented the defendant's position (about which there is no evidence) and found to have induced the plaintiff to act to its detriment (perhaps a difficult proposition given the plaintiff's later conduct in persisting in its occupation) there may be a viable cause of action involving a misrepresentation or misleading and deceptive conduct. I should not be taken to expressing any view as to the prospects. The plaintiff is in the difficult position that

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10 My emphasis.

Mr Long had prepared his argument on one basis only to find that it was fundamentally unsound, was without legal representation, and was scrambling to seek out alternative bases to pursue its claim effectively "on the run."

[56] In my judgment the plaintiff should be given a chance to re-consider its position.

Damages

[57] The defendant has a further complaint. In its pleading of damages the plaintiff has pleaded as its loss a loss of gross weekly revenue.[11] There is no reference to the outgoings that necessarily would have been incurred. While in other places there is a reference to "profits" there is no pleading of how one is derived from the other. The defendant complains that the pleading in its present form will "delay and prejudice the fair trial of the proceeding". The plaintiff could make no answer to this complaint. It is plainly right.

Leave to Re-plead

[58] The defendant argues that even if I determine that there should otherwise be leave to re-plead I should exercise my discretion to refuse such relief. The defendant urges that approach principally because, even if the plaintiff could show some breach of a contract, or other cause of action, it cannot establish that the losses of which it complains were causally related to any such breach.

[59] The difficulty is that causation is a matter for evidence. It is not to the point that the inspector who ordered the closure of the business may have a different view to that claimed by the plaintiff, as the defendant points out. That may give the defendant considerable comfort about the eventual outcome but cannot result in a summary dismissal of the claim. The plaintiff says that the water ingress lead to the development of mould and the like, dampness, rotting of timber fittings and fixtures, an obnoxious smell and the eventual closure of its business. Whether all this is so is a matter for evidence but it is not so obviously wrong as would justify a summary dismissal.

[60] Another problem facing the plaintiff is in its claim for losses post-dating its discovery of the problem of water ingress. That includes a claim for loss of "commercial opportunity" as a result of loss of capital which caused it to close the business and surrender its lease in May 2013 (in the sum of $624,000 – see paragraphs 109 to 118). On its own case the plaintiff entered into that lease in November 2012 knowing of the existence of the water ingress of which it now complains. As mentioned the plaintiff says that it took an assignment of the head lease in late 2010. It pleads that it became aware of the problem of water ingress well before, in January 2010.[12] It is certainly a peculiar claim to assert that the defendant is responsible for losses sustained by reason of the plaintiff's decision to

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11 See paras 68, 75(a), 82(c) and (d), 85, 89, 114 and 118 of the Statement of Claim.

12 See paras 64 and 65 of the Statement of Claim

continue to operate a business from premises that it alleges were fundamentally unsound and known to be so. *Burns v MAN Automotive* (1986) 161 CLR 653 was cited and supports the defendant's argument. That decision is authority for the proposition that there comes a point in time beyond which any damage suffered cannot be said to have been within the reasonable contemplation of the parties as flowing from the breach alleged.

[61] Whether there is a distinction to be drawn between the continued operation of a prime mover with continuing and certain losses under a hire agreement, as was the case there, and the continuation of a business of the type here is a moot point. Wilson, Deane and Dawson JJ drew just such a distinction: see at p 668.

[62] Mr Long countered by asserting that the plaintiff was between a rock and a hard place. It had expended substantial monies in bringing the premises up to standard and had to make a decision whether to abandon the investment or persevere. That may be so but the plaintiff's argument now is that it is the defendant who is to bear the cost and risk associated with its decision. That seems a very unlikely result.

[63] While I entertain serious doubts about the viability of the latter claim I think it is a matter for evidence and legal argument on matters that are not without difficulty. Certainly in relation to matters of causation the issue is not so clear as to justify an exercise of such a discretion against the plaintiff. I will give the plaintiff leave to re-plead.

Conclusion

[64] Rule 171 UCPR provides:

> **Striking out pleadings**
> (1) This rule applies if a pleading or part of a pleading—
> (a) discloses no reasonable cause of action or defence; or
> (b) has a tendency to prejudice or delay the fair trial of the proceeding; or
> (c) is unnecessary or scandalous; or
> (d) is frivolous or vexatious; or
> (e) is otherwise an abuse of the process of the court.
>
> (2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.
>
> (3) On the hearing of an application under subrule (2), the court is not limited to receiving evidence about the pleading.

[65] In my view the proper order is to strike out those parts of the Statement of Claim that I have held cannot support any action or are embarrassing in the sense that they will delay or prejudice the fair trial of the proceedings. Rule 171(1)(a) and (b) are engaged.

[66] No precise submissions were made concerning the appropriate order I should make if I reached this point. The application seeks that the whole pleading be struck out but that goes too far. It is evident that the pleading of the provisions of the *Retail Shop Leases Act* should be struck out – that is paragraphs 46 to 50. The pleading of loss and damage from paragraph 80 on is predicated on breaches of the terms alleged to have been implied by the *Retail Shop Leases Act* 1994. In accordance with my determination, as presently pleaded, they are without foundation. In any case they will require amendment to plead the net loss rather than the gross loss of revenue. There may be other paragraphs that should be struck out. I will hear from the parties, if necessary, to determine the final orders.

[67] The orders will be:

(a) Paragraphs 46 to 50 and 80 to 118 of the Statement of Claim are struck out;

(b) The plaintiff shall file and serve such amended Statement of Claim as it may be advised within 28 days;

(c) The plaintiff is ordered to pay the costs of the defendant of and incidental to this application;

(d) The parties have liberty to apply on three business days' notice in case there is a need for further clarification of these orders or argument as to the paragraphs that should be struck out, and as well to allow the defendant to renew its application in the event that the plaintiff does not re-plead within the time allowed or if the defendant maintains that any such re-pleaded cause is itself fatally flawed.