SUPREME COURT OF QUEENSLAND

CITATION:	*Ozibar Pty Ltd v Laroar Holdings Pty Ltd (No 2)* [2016] QSC 82
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:	S20/15
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Mackay
DELIVERED ON:	12 April 2016
DELIVERED AT:	Rockhampton
HEARING DATE:	9 February 2016. Last submissions received 23 February 2016.
JUDGE:	McMeekin J
ORDERS:	**1. The Plaintiff's application filed 27 January 2016 is dismissed;** **2. The Plaintiff is given leave to file such amended Claim and Statement of Claim as it might be advised on or before 4 pm on 10 May 2016;** **3. Paragraph 3 of the Order made on 4 December 2015 is vacated and the following order substituted:** **3. The Plaintiff, Gregory Charles Long and Narelle Long are ordered to pay the costs of the Defendant of and incidental to this Application and the Defendant's costs thrown away by reason of:** **(a) the striking out of paragraph 46 to 50 and 80 to 118 of the Statement of Claim; and** **(b) any subsequent amendment to the Statement of Claim.**

4. The Plaintiff, Gregory Charles Long and Narelle Long are ordered to pay:

(a) the costs of and incidental to the application filed on 27 January 2016 by the Plaintiff;

(b) the costs of and incidental to the further hearing of the application filed on 17 September 2015 by the Defendant; and

(c) the Defendant's costs thrown away by any subsequent amendment to the Statement of Claim;

5. The parties have liberty to apply on the giving of three days' notice to the other.

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 has been given leave to re-plead – whether the Retail Shop Leases Act 1994 applies – whether a reasonable cause of action is disclosed based on a surrender or assignment of the lease, a lease by attornment, a breach of covenant, a derogation from grant or a nuisance – whether there was a loss of commercial opportunity

Land Title Act 1994 (Qld), s 10, s 11, s 12
Property Law Act 1974 (Qld), s 69
Retail Shop Leases Act 1994 (Qld), s 15, s 43
Retail Shop Leases Amendment Act 2006 (Qld), s 8
Uniform Civil Procedure Rules 1999 (Qld), r 149, r 171, r 293

195 Crown Street Pty Ltd v Hoare [1969] 1 NSWR 193
Adamow v Kirk (1958) 75 WN (NSW) 514
Aussie Traveller Pty Ltd v Marklea Pty Ltd; Marklea Pty Ltd v Aussie Traveller Pty Ltd [1998] 1 Qd R 1
Barry v Heider (1914) 19 CLR 197; [1914] HCA 79
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541
Byrnes v Jokona Pty Ltd [2002] FCA 41
Draney v Barry [2002] 1 Qd R 145
Ex parte Jackson; Re Australasian Catholic Assurance Co Ltd (1941) 41 SR (NSW) 285
Fleeton v Fitzgerald (1998) 9 BPR 16,715; (1999) ANZ ConvR 571
Fuller's Theatre and Vaudeville Co Ltd v Rofe [1923] AC 435 at 438
Konica Business Machines Australia Pty Ltd v Tizine Pty Ltd (1992) 26 NSWLR 687

Lapham v Orange City Council [1968] 2 NSWR 667
Leakey and Others v. National Trust for Places of Historic Interest or Natural Beauty [1980] QB 485
Legione v Hateley (1983) 152 CLR 406; [1983] HCA 11
Logan City Shopping Centre Pty Ltd v Retail Shop Leases Tribunal [2007] 1 Qd R 246; [2006] QSC 172
Lynch v Keddell (No 2) [1990] 1 Qd R 10
Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd [1976] 2 NSWLR 15
Matthews v AusNet Electricity Services Pty Ltd & Ors [2014] VSC 663
Mornwood Pty Ltd v Halrobe Pty Ltd [2012] QCAT 513
Ozibar Pty Ltd v Laroar Holdings Pty Ltd [2015] QSC 345
Partridge v McIntosh & Sons Ltd (1933) 49 CLR 453; [1933] HCA 38
Relvok Properties Ltd v Dixon (1973) 25 P and CR 1
Roseburn Pty Ltd v Eastride Pty Ltd [2009] QSC 159
Specialist Diagnostic Services Proprietary Limited and Healthscope Limited [2012] VSCA 17; 305 ALR
Taylor v Gillett (1875) LR 20 EQ 682

COUNSEL: C Heyworth-Smith QC for the applicant

P Land for the respondent on a direct brief

SOLICITORS: Macrossan and Amiet Solicitors for the applicant

[1] **McMeekin J:** At the material time the plaintiff, Ozibar Pty Ltd (Ozibar), conducted a nightclub (known as "Mainstreet") out of premises owned by the defendant, Laroar Pty Ltd (Laroar). Ozibar claims that the premises were defective and unfit to be used as a nightclub. It claims damages. Laroar applies to have Ozibar's pleadings struck out as disclosing no reasonable cause of action pursuant to r 171 Uniform Civil Procedure Rules ("UCPR") or for summary judgement pursuant to r 293.

[2] The matter first came before me on 21 October 2015. I ordered that the key paragraphs of Ozibar's Statement of Claim be struck out: see *Ozibar Pty Ltd v Laroar Holdings Pty Ltd* [2015] QSC 345 delivered on 4 December 2015. Essentially I held that Ozibar's claim that the compensation provisions in the *Retail Shop Leases Act* 1994 were included in the lease arrangements between the parties was untenable. That effectively meant the end of Ozibar's claim as no other basis for a right to damages was then pleaded.

[3] I gave Ozibar leave to file and serve an Amended Statement of Claim within 28 days. Laroar had liberty to apply to renew its application in the event Ozibar did not re-plead within the time allowed or if Laroar maintained that any such re-pleaded cause was itself fatally flawed.

[4] Ozibar filed an Amended Statement of Claim on 15 January 2016 (not within the required 28 days) and now applies to have the time specified in the Order varied to allow for the late filing of the Amended Statement of Claim and an Amended Claim (not yet filed). The delay is not relevant but Laroar says that even if permitted the whole statement of claim ought to be struck out.

[5] According to the submission of Mr Land of counsel, who now appears for Ozibar, the Amended Statement of Claim pleads ten separate causes of action. The pleading is complex and, with respect, convoluted. Ozibar continues to rely on the incorporation of provisions of the *Retail Shop Leases Act* 1994 ("the Act").

[6] Laroar renews its attack on the pleading arguing that it still discloses no cause of action. As well Laroar contends that there is an issue estoppel arising from my earlier findings preventing Ozibar re-pleading causes of action based on a right to compensation arising from the Act, the principal focus of the earlier hearing.

The Background

[7] The precise nature of Ozibar's right to occupy the subject premises is in dispute.

[8] It is not presently contentious that the subject premises were initially leased by Laroar to a company, Taochi Pty Ltd (Taochi), on 10 May 2004. Taochi entered into a sublease with Ferix Pty Ltd (Ferix) on 13 August 2004. That sub-lease expired on 30 July 2007. An option in the head lease was exercised by Taochi commencing on 1 August 2007 for a term of five years. Ozibar pleads that Ferix exercised an option contained in the sub-lease (paragraph 22 of the Amended Statement of Claim[1]) and Taochi granted a new sub-lease to Ferix "from 31 July 2007". There was an assignment of the sub-lease from Ferix to Ozibar on 23 April 2008. So much is not in issue for present purposes.

[9] Ozibar then pleads that on 2 June 2008 Taochi either surrendered its head lease to Ozibar, or assigned the head lease to Ozibar, or alternatively there was a "lease by attornment" by Taochi to Ozibar from that date. These claims are contentious. I will return to these arguments.

[10] Ozibar then pleads that on 25 November 2010 an assignment of the head lease from Taochi to Ozibar was registered. This head lease expired on 31 July 2012. From 1 August 2012 to 27 November 2012 Ozibar held on a monthly lease. On 27 November 2012 Ozibar entered into a new lease of the premises with Laroar for a term of three years with an option, backdated to 1 August 2012. In May 2013 Ozibar abandoned the premises. On 8 October 2013 Ozibar formally surrendered the lease.

[11] As mentioned, Ozibar seeks damages essentially on the ground that the premises were defective and unfit for use as a nightclub. I summarised the plaintiff's complaints at [47] of my earlier reasons:

> "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

[1] All references hereafter to the statement of claim are intended to be references to this Amended Statement of Claim now advanced

> 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.[2] All this, I should say, is alleged not proved. For present purposes I take the plaintiff's case at its highest."

[12] The timing of the alleged water intrusions are of significance. The rainfalls complained of, and the consequent water intrusion, are pleaded to have occurred:

(a) Between 26 January 2009 and the end of April 2009;[3]
(b) Between 18 September 2009 and 27 November 2012;[4]
(c) Early October 2012;[5]
(d) From 27 November 2012 onwards (the lease being surrendered on 8 October 2013);[6] and
(e) January 2013.[7]

[13] On 21 August 2009 Ozibar's business was the subject of a "Closure Order" issued by the relevant government department and was then closed until 18 September 2009.[8] Ozibar attributes the issuing of the Order to the intrusion of water, that in turn being due to the pleaded defects in the premises.

[14] Ozibar claims:

(a) loss of expected profits during the period of the forced closure;[9]
(b) the costs of carrying out work to comply with the Closure Order;[10]
(c) the loss of expected profits from 1 August 2009 (the relevance of the date not being apparent but including the period after the re-opening on 18 September 2009 following the closure order) until 27 November 2012 (the date that Ozibar entered into the new head lease with Laroar);[11]
(d) the cost of a mould reduction programme conducted over a period of 166 weeks commencing 18 September 2009;[12]
(e) a loss of what is called "commercial opportunity" the loss being the estimated expected net profits Ozibar would have received had it not been forced to surrender the lease on 8 October 2013, that surrender in turn being due to the depletion of its capital brought about by the losses incurred up to 27 November 2012.[13]

The nature of the present applications

[15] Ozibar seeks leave to amend its pleadings in accordance with the Amended Claim and Statement of Claim tendered. Laroar opposes leave being given. It seeks that

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[2] See para 59 of the Amended Statement of Claim
[3] *Ibid* para 56
[4] *Ibid* para 71
[5] *Ibid* para 94
[6] *Ibid* para 77
[7] *Ibid* para 101
[8] *Ibid* para 62
[9] *Ibid* para 63A
[10] *Ibid* para 63A
[11] *Ibid* para 75 and 75A(a)
[12] *Ibid* para 75A(c)
[13] *Ibid* para 110

the Statement of Claim be struck out under r 171 UCPR and applies for summary judgment. I discussed the relevant rules and principles in my earlier determination.

[16] I will consider the various sections of the Statement of Claim in detail below. As will be seen much of the pleading should be struck out. The principal problems are:

(a) Claims are pleaded that disclose no reasonable cause of action – the claims for compensation under the *Retail Shop Leases Act* that pre-date 27 November 2012 (paragraphs 46, 46A, 46B, 46C, 47, 48, 49, and 50 of the Statement of Claim); the claims that depend on a finding that there was a surrender, assignment or attornment of the existing head lease between Laroar and Taochi, and so privity of contract or estate between the parties, based on the exchange of emails concerning the payment of rent and relating to repairs (paragraphs 26, 26A, 26B, 26C, 26D, 26E, and 26F); the claims based on a breach of the covenant for quiet enjoyment (paragraphs 118 to 122; 147 to 150); the claims based on an alleged derogation from the grant (paragraphs 123 to 126; 151 to 154);

(b) Some of the pleadings have a tendency to prejudice or delay the fair trial of the proceeding (paragraphs 75B; 76B; 80 to 90; 91 to 110; 111 to 117; 136 to 138; 139 to 142; 144 to 146; 155 to 159); and

(c) The pleading of damages is unrelated to the alleged breaches or fundamentally flawed (paragraph 110).

[17] I turn to consider the disputed parts of the pleading. They relate to the various bases that Ozibar advances for contending that Laroar is under some obligation to pay to it the damages sought.

The *Retail Shop Leases Act*

[18] Ozibar's principal argument is that it has a right to compensation pursuant to the compensation provisions contained in Part 6 Division 7 of the Act.

[19] To take advantage of the right to compensation conferred by the Act it is necessary that Ozibar's right to occupy the subject premises be pursuant to a "retail shop lease" as defined in the Act (see s 42). Ozibar argues that the "lease" under which it was entitled to occupation, however it be described, was a "retail shop lease" as defined because the premises were situated in a "retail shopping centre" as defined.

[20] The Act has been amended from time to time. Significant changes to the definition of "retail shopping centre" as contained in s 8 of the Act were introduced by the *Retail Shop Leases Amendment Act* 2006. The changes came into effect on 3 April 2006. There is arguably an advantage to Ozibar if the definitions then introduced apply to the lease arrangements here.

[21] My earlier determination was that the parties' rights were governed by the Act as it stood prior to the coming into force of the *Retail Shop Leases Amendment Act* 2006. I held that Reprint 3E of the Act applied and that Ozibar could not bring itself within the definitions then in place.

[22] No attempt is made to dispute the finding that Ozibar could not bring itself within the definitions then in place. Rather Mr Land submits that I applied the wrong version of the Act. If I had applied the correct version, so the argument goes, I

would have applied the amended definitions introduced in 2006 and come to a different conclusion. Laroar argues that I cannot revisit my earlier decision, there being an issue estoppel.

[23] I am inclined to think that I can re-visit the question but it is not necessary to decide the estoppel point. Ms Heyworth Smith of Queens Counsel who appears for Laroar has drawn my attention to s 15 of the Act, which was in force both before and after the passing of the *Retail Shop Leases Amendment Act* 2006. It provides:

> **Application of Act—if premises become or cease to be retail shop after commencement of lease**
>
> (1) This Act does not apply to -
>
> (a) a lease of premises that become a retail shop after the commencement of the lease; or
>
> (b) an assignment of the lease; or
>
> (c) a renewal of the lease under an option under the lease.
>
> *Example of subsection (1)(a)—*
>
> On 1 April 1995 a person enters into a 3-year lease for the conduct of a business from premises that are not in a retail shopping centre. On 1 September 1995, the business is prescribed by regulation as a retail business. Under the subsection, this Act does not apply to the lease even though the premises have become a retail shop.
>
> (2) This Act continues to apply to -
>
> (a) a lease of premises that cease to be a retail shop after the commencement of the lease; or
>
> (b) an assignment of the lease; or
>
> (c) a renewal of the lease under an option under the lease.
>
> *Example of subsection (2)(a)—*
>
> On 1 April 1995 a person enters into a 3-year lease for the conduct of a business from premises in a retail shopping centre. On 1 September 1995, the business ceases to be a retail shop because the cluster of premises in which the leased premises are situated cease to be a retail shopping centre. Under the subsection, this Act continues to apply to the lease even though the premises are no longer a retail shop.

[24] Section 15 could be more clearly worded. Read literally, it provides in subsection (1)(b) that the Act does not apply to "an assignment of the lease" but in subsection (2)(b) that the Act does continue to apply to "an assignment of the lease". I am concerned with subsection (1). Some qualification of the words "the lease" in sub-paragraphs (b) and (c) must be implied to make any sense of the provisions. I think that the words "referred to in paragraph (a)" or words to a similar effect need to be added to paragraphs (b) and (c) to identify "the lease" being referred to. The examples given suggest that is the intended meaning.

[25] My construction of the section is as follows: if the Act did not apply to the premises in question at the commencement of the lease in question because they were not then within the relevant definitions (eg the premises were not part of a "retail shopping centre" as defined) then the Act does not apply so long as that lease continues, and it continues even if assigned or extended by exercise of an option, even though the premises do come within definitions introduced after the lease first commenced.

[26] This construction has the effect that changes to the legislation will not alter the obligations on the parties already fixed by prior agreement and would seem to avoid

a potential unfairness that might otherwise occur. This approach seems to me to meet the evident intent of subsection (1).

[27] That approach is consistent with views expressed in other cases. Counsel drew to my attention the remarks of Philip McMurdo J (as his Honour then was) in *Roseburn Pty Ltd v Eastride Pty Ltd* [2009] QSC 159 in response to the submission that by s 15(1) "the Act does not apply to a lease of premises that become a retail shop only after the commencement of the lease, an assignment of the lease, or a renewal of the lease under an option." McMurdo J said (at [12]) "the plaintiff's argument as to the construction of the Act appears to be correct but it is unnecessary to express a concluded view." Similarly in *Mornwood Pty Ltd v Halrobe Pty Ltd* [2012] QCAT 513, citing *Roseburn,* the members succinctly stated: "Materially, s 15(1) of the RSLA provides that a lease that begins life as a non-retail shop lease cannot acquire the character of a retail shop lease after its commencement, assignment or renewal."

[28] It is common ground, following my earlier decision at least, that the business conducted by the Ozibar was not a "retail business" as defined in the Act, and the premises were not situated in a "retail shopping centre" as defined in s 8 of the Act as it stood in 2004 when the head lease was first entered into by Taochi. Hence, at that time, the lease was not a "retail shop lease" and the Act did not apply to it. For present purposes I will assume that the premises did fall with the definition of "retail shopping centre" as defined after the commencement of the 2006 Amending Act and so, arguably at least, the Act then applied to the premises, subject to the effect of s 15.

[29] However, the effect of s 15 is that if the Act did not apply to the premises in 2004 when the head lease was entered into, which is now accepted by the parties, then it did not apply so long as Ozibar derived its title through that head lease. Ozibar's case is that its title was derived through that head lease – either by way of taking over that head lease through surrender from, or assignment by, Taochi after the exercise of the option in the head lease by Taochi in 2007, or by attornment, ie a turning over, of that head lease. It is not to the point that under the general law a new lease comes into existence from the exercise of the option, as Ozibar submitted. Section 15 overrides the general law.

[30] Nor does it avail Ozibar to assert that a new sublease came into existence from 31 July 2007 (and so after the introduction of the amended definitions) following the exercise of the option by Ferix in the original sub-lease. The argument necessarily involves the concept that, irrespective of whether the head lease is or is not a "retail shop lease", the sub lease is because it commenced after the change in the definitions in April 2006. It would be a strange result if the head lease was not a "retail shop lease" but the sub-lease was a "retail shop lease". The specific reference to "lease" in the Act, and the absence of any reference to "sub-lease" suggests that it is to the head lease that one must look to determine whether the lease is or is not within the relevant definitions. The reasoning is analogous to that of McMurdo J in *Logan City Shopping Centre Pty Ltd v Retail Shop Leases Tribunal* [2006] QSC 172; [2007] 1 Qd R 246. His Honour there held that the compensation provisions in s 43(2) of the Act do not extend to a permitted assignee of a retail shop lease but are restricted to the original lessee.

[31] Section 15 of the Act is a complete answer to Ozibar's arguments that the amended version of s 8 should apply. As succinctly set out in the Laroar's further submissions:

> "In this case the "lease" said to be a "retail shop lease" by the Plaintiff was either:
> (i) the head lease which commenced on 1.08.2002, in which case sec. 15(1)(a) excludes the Act; or
> (ii) The head lease which commenced on 1.08.2007 as a result of the exercise of the option to renew, in which case sec. 15(1)(c) excludes the Act; or
> (iii) any "assigned" lease as might be relied on (sic) the Plaintiff, which if such lease existed at all, would attract the operation of sec. 15(1)(b)."[14]

[32] My earlier decision stands. Those paragraphs in the pleading alleging the incorporation of the compensation provisions of the Act into the lease arrangement between the parties, however it be described, up and until the entry into the new lease on 27 November 2012 should be struck out as disclosing no cause of action. Paragraphs 46, 46A, 46B, 46C, 47, 48, 49, and 50 are relevant here.

Paragraph 10C

[33] Ozibar pleads: "The old Head Lease contained a covenant implied by law that [Laroar] would not derogate from its grant." The "old Head Lease" is a reference to the lease between Laroar and Taochi entered into in May 2004.

[34] Laroar complains that the pleading has no relevance – there is no breach of such a covenant pleaded nor does it appear to serve any other purpose.

[35] Ozibar defends the pleading on the ground that the "old Head lease" was renewed and the same implied term became part of that renewed lease. A breach of the implied term in the new lease is alleged in paragraph 125. While that is so, the pleading still has no relevance.

[36] There is no pleading that the implication of the term in the renewed lease depended for its existence on the fact that it was implied in the "old Head Lease". Rather the pleading in paragraph 10C is repeated verbatim in relation to the new lease at paragraph 20C. The term is said to be "implied by law" – not by reason of its implication in the earlier lease. As I understand the law it is a feature of every lease.

[37] While no argument was directed to the point, paragraph 10C is mentioned again at paragraph 76H where it is asserted that the lease entered into between the parties on 27 November 2012 "contained the covenant alleged in paragraph 10C". Paragraph 76H is again called up at paragraph 151. Why it is not simply pleaded at paragraph 76H or 151 (as it was at paragraph 20C) that the lease entered into on 27 November 2012 contained a term implied by law that the lessor would not derogate from the grant is not apparent.

[38] The fundamental pleading rule is that a pleading should contain material facts and be "as brief as the nature of the case permits" (see r 149(1)(a) UCPR). The paragraph here is relatively innocuous - its purpose seems to be merely to show that

[14] See para 2(c) of Ms Heyworth-Smith's submissions

Ozibar consistently asserts that the term is relevant. That is irrelevant. If this was the only matter of complaint I would not order that the paragraph be struck out. However, given that so much of the pleading is to be struck out there is no point to preserving this paragraph.

Paragraph 26 to 26F

[39] The effect of the pleadings in paragraph 26 through to paragraph 26E is:

(a) That on 2 June 2008 Ozibar, Laroar and Taochi agreed that the rent for the "new Head Lease' would be paid directly by Ozibar to Laroar. A series of emails passing between Taochi, its solicitors, Ozibar and the real estate agent charged with managing the properties on behalf of Laroar is particularised. The emails include the provision of the Laroar's agent's bank account details;

(b) That thereafter rent was paid directly by Ozibar to Laroar, and without objection by either Laroar or Taochi, and was not paid by Taochi;

(c) That thereafter all notices of defects in the premises was given by Ozibar directly to Laroar through Laroar's agents and not to Taochi without objection from any party, no such notice was given by Taochi, and any response to such notices was given by Laroar to Ozibar;

(d) Clause 10.2.2 of the "new Head Lease" gave to Laroar the power to accept a surrender of the lease.

[40] Paragraph 26F then pleads that in the premises that I have just described the relationship of lessor and lessee came into existence between Laroar and Ozibar on 2 June 2008 because:

(a) Taochi surrendered its interest in the "new Head Lease" either expressly or by operation of law which surrender, if express, was accepted;

(b) In the alternative Taochi assigned its interest in the "new Head Lease" to Ozibar with the consent of Laroar with a consequent surrender by operation of law of Ozibar's sub-lease from Taochi;

(c) In the alternative the relationship of lessor and lessee by attornment came into existence between Ozibar and the Laroar.

[41] The terms and conditions that applied were said to be those in the "assigned new Sub-Lease" for (a) and (c) and the "assigned new Head Lease" for (b).

[42] I will deal with each of Ozibar's contentions separately but they have one common and substantial problem. There is no indication whatever that the parties, when communicating with one another, were even contemplating any alteration of their interests in their respective estates.

Was there an express surrender? - Paragraph 26F(a)

[43] To found an express surrender it is necessary that the party affected, Taochi, in fact intended to surrender the lease and that the lessor, Laroar, accepted the surrender. Express surrender depends on intention. There must be "apt or sufficient operative words used": *Woodfall Landlord and Tenant* para 1-1847 (28th edn).

[44] Ozibar argues that the emails that were exchanged whereby Taochi's solicitor directed that rent be paid directly by Ozibar to Laroar's agent rather than to Taochi and then to the agent, along with the actions of the parties consistent with that direction, together with Ozibar's directing complaints about the premises to Laroar's agent and Laroar responding to those complaints, is sufficient to show the necessary intention of both parties that Taochi intended to surrender its estate. In my view the emails cannot have that effect. They have no bearing on either parties' intention concerning the lease estate held by Taochi.

[45] As well, as Laroar submits, absent writing, there can be no enforceable disposition of Taochi's estate in the land. Section 10(1) of the *Property Law Act* 1974 ("PLA") provides:

> **Assurances of land to be in writing**
> (1) No assurance of land shall be valid to pass an interest at law unless made by deed or in writing signed by the person making such assurance.
> (2) This section does not apply to—
> …
> (b) a surrender by operation of law, including a surrender which may, by law, be effective without writing; or
> (c) a lease or tenancy or other assurance not required by law to be made in writing; …"

[46] The emails particularised at paragraph 26 of the Statement of Claim are the only writings pleaded. The emails relied on, taken together as Ozibar submits they should be, do not satisfy the requirements of s 10(1). Ozibar in effect argues that the emails are an "assurance of land" - "assurance" in the PLA is defined as a "conveyance and a disposition made otherwise than by will". "Conveyance" is defined to include "a transfer of an interest in land, and any assignment, appointment, lease, settlement, or other assurance in writing of any property."[15] Quite simply, there is no pleading of any statement in the emails that can be construed as a "conveyance or disposition of an interest in land". Subsection 10(2)(c) does not apply as the lease contended for here is for a term exceeding three years. It was therefore required to be in writing: see s 11 and s 12 PLA.

[47] Laroar also submits that to effect a surrender of a registered lease – which Taochi's lease was – the surrender must be in the prescribed form and lodged for registration. Section 69 of the *Land Title Act* 1994 provides, *inter alia*:

> **Surrendering a lease**
> (1) A registered lease may be wholly or partly surrendered by operation of law or by registering an instrument of surrender of the lease executed by the lessor and the lessee.
> (2) However, a registered lease may be surrendered by registering an instrument of surrender only with the consent of every mortgagee and sublessee of the lessee.
> …
> (4) On registration of an instrument of surrender of a registered lease, the interest of the lessee vests in the lessor.

[48] There is no plea that "an instrument of surrender of the lease executed by the lessor and the lessee" has been registered. Rather Ozibar argues that Taochi and Laroar

[15] See Schedule 6 to the PLA

can be ordered to execute such an instrument. That is no doubt correct[16] provided the underlying premise is made out – that Taochi did expressly surrender the head lease.

[49] Finally, Laroar submits that the pleading at paragraph 26G creates a difficulty for Ozibar. Ozibar there pleads that on 25 November 2010 an assignment of the head lease from Taochi to the Ozibar was registered. There is no pleading that the registration was to give effect to an assignment or surrender agreed two years earlier. Thus, two years after Ozibar asserts that a surrender or assignment took place, and Taochi had no lease to assign, the parties assumed that Taochi continued to hold its estate and could then assign it. It is legitimate to bring into account the actions of the parties subsequent to the time in question to determine intention: see *Re Grove* (1889) 40 Ch D 216 at 242 where Lopes LJ said: "[In] order to determine a person's intention at a given time, you may regard not only conduct and acts before and at the time, but also conduct and acts after the time, assigning to such conduct and acts their relative and proper weight and cogency."

[50] I conclude with the observation that the notion that a lessee could avoid all its obligations under a lease simply by persuading the lessor to accept rent from a third party, or by pointing to a lessor agreeing to address defects in the premises when brought to its agent's attention, is, I think, a novel one.

[51] In my view, the words used in the emails are not "apt or sufficient" to show an express surrender by Taochi or an acceptance of a surrender by Laroar. The proposition is unarguable. The "premises" pleaded in paragraph 26 and 26A to 26E simply do not lead to the conclusion drawn in paragraph 26F(a) of the Statement of Claim that there was an express surrender of the head lease by Taochi. In the words of r 171 no reasonable cause of action is shown.

Surrender by operation of law - paragraph 26F(b)

[52] A surrender of a lease by operation of law is one that is implied from the actions of the parties to the lease. It is necessary to show an act or omission by one party to a lease that is inconsistent with the lease continuing and that being assented to or accepted by the other party: *195 Crown Street Pty Ltd v Hoare* [1969] 1 NSWR 193; *Konica Business Machines Australia Pty Ltd v Tizine Pty Ltd* (1992) 26 NSWLR 687 at 695A.

[53] One distinction between an express surrender of a lease and one that occurs by operation of law is that the latter can occur "independently of and even in spite of the intention of the parties": *Woodfall Landlord and Tenant* para 1-1849 (28th edn). As well, there is no need for writing or registration. Thus the impediments to a finding of express surrender are not directly relevant here.

[54] However the argument is as before – whether directing that rent be paid directly by the sub-lessee to the head lessor, and the payment accordingly, along with complaints about the state of the premises by a sub-lessee being received by the head lessor and acted upon are arguably sufficient to establish both an act inconsistent with the lease continuing and an acceptance.

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[16] As to the registration of informal instruments see *Barry v Heider* (1914) 19 CLR 197

[55] I was referred by counsel to the judgements in *Konica Business Machines Australia Pty Ltd v Tizine Pty Ltd* (1992) 26 NSWLR 687 as correctly stating the law. There Clarke JA (with whom Priestley and Handley JJA agreed), after a review of the authorities, concluded:

> "The question whether a surrender by operation of law has occurred is not to be answered by the rigid application of an artificial formula. When the question arises the court is required to pay regard to the substance of the matter and to determine whether the landlord's response to the tenant's abandonment is inconsistent with the continued existence of the lease.
>
> If it is found that the landlord has acted in such a manner as unequivocally to indicate that it no longer regards the lease as in existence then it will follow that a surrender has taken place. If the landlord's actions are consistent with the lease remaining in existence, or are equivocal, then it would not be correct to infer that a surrender had occurred.
>
> In the circumstances of this case, I am unable to conclude that the respondent's conduct, and in particular the acts relied upon by the appellant, were unequivocally referable to an intention that the lease be terminated."[17]

[56] Abandonment and re-entry are the typical indicators of a surrender occurring. Indeed statements can be found in the cases to the effect that a yielding up of possession by the lessee is essential – either to a third party (eg *195 Crown Street* at 200 per Asprey JA) or to the landlord (eg *Konica* at p 697 per Handley JA). That however is not, I think, essential. In *Fleeton v Fitzgerald* (1998) 9 BPR 16,715; (1999) ANZ ConvR 571 Beazley JA (Mason P and Meagher JA agreeing) summarised the principles:

> "Surrender occurs where a lessee gives up the leasehold interest to the immediate lessor and the lessor accepts the surrender. Surrender may occur by operation of law as well as by express act of the lessee, and is therefore not subject to notice requirements. For there to be a surrender by operation of law there must be unequivocal conduct by both parties which is inconsistent with the continuance of the tenancy: see *Chamberlaine v Scally* [1992] EGCS 90. Surrender by operation of law occurs where the parties do some act showing an intention to terminate the lease and it would be inequitable for them to rely upon a formal deed of surrender, or where the tenant gives up possession of the premises and the landlord accepts that to have occurred: see *Oastler v Henderson* (1877) 2 QBD 575; Helmore, *The Law of Real Property in New South Wales*, 2nd Edition (1966) at 107. Likewise, there will be a surrender by operation of law where the tenant abandons the premises and the landlord re-enters: see *Buchanan v Byrnes* (1906) 3 CLR 704; *Robinson v Kingmill* (1954) 71 WN (NSW) 127.
>
> In this case there was, of course, no true consensual or voluntary surrender. The first respondent was, in effect, presented with a fait accompli. However, that being the case, the first appellant [*quaere respondent?]* accepted that he was being forced from the premises and he left. He also took the necessary steps to permit the incoming lessees to apply for a liquor

[17] At p 697

> license. He did not seek to assert his rights under the lease, as he was entitled to do. Accordingly, I am of the opinion that the lease was impliedly surrendered."[18]

[57] Here it should be recalled that Ozibar was in lawful possession of the premises by reason of the sub-lease from Taochi. Taochi was never in possession, physically, at any material time. There therefore could not be any abandonment of possession, in a physical sense, by Taochi. Nor was there any re-entry by Laroar. Neither abandonment nor re-entry is pleaded.

[58] The only act pleaded that is even arguably inconsistent with the terms of the sub-lease was the payment of rent direct to the head lessor's agent. However that occurred because Taochi directed Ozibar to do so – see paragraph 26b of the pleading. The email referred to at paragraph 26b is exhibited to Ms Long's affidavit.[19] Its terms are thus not in issue. It is one of a series of emails concerning outstanding rent. The email is headed "Subject: Taochi – sublease to Ozibar – Main St Nightclub". It is from Taochi's solicitors to Ozibar's solicitors. A Barbara Wiperi is copied into the email. I understand Ms Wiperi to be a representative of Taochi. It reads:

> "Please see attached fax which is causing great concern to my client [ie Taochi]. Please contact MBB [ie the agent managing the property on behalf of Laroar] urgently today to arrange any necessary payments by 5pm today directly to the head lessor's agent. Please confirm once paid/resolved."

[59] The series of emails, one of which I have quoted, seems to clearly show that both Laroar and Ozibar appeared to accept that Taochi's involvement was essential on the question of outstanding rents owing.

[60] In my view these statements, and the actions then taken, in context, are not, and are not capable of being seen as, "unequivocal conduct by both parties which is inconsistent with the continuance of the tenancy" to cite from Beazley JA's judgment in *Fleeton* above. In fact quite to the contrary. The email asserted that the sub-lease existed. Taochi's concern mentioned in the email can only be because it remains liable under the head lease to pay outstanding rent. Far from abandoning the lease Taochi was directing how it wished Ozibar to discharge its obligations to Taochi under the sub-lease.

[61] Nor can I see that complaining to the owner of the property about defects in the premises that must ultimately be its responsibility and a response to those complaints by the owner is in any sense inconsistent with the obligations in the head lease remaining on foot. The short circuiting from sub-lessee to head-lessor was a practical approach and in both parties' interests.

[62] These facts can be compared to those in *Konica*. There the lessee did abandon possession. A third party took up possession. The lessor demanded and received an occupation rent from the new occupant. The Court unanimously rejected the argument that there had been a surrender by operation of law. It was held that the incoming third party was in possession on account of both the lessor and the lessee.

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[18] At 16,719

[19] See Ex "A" to the affidavit filed 19 October 2015. All emails pleaded appear in that exhibit.

Those facts are much stronger in favour of a surrender than the facts pleaded here, yet the argument failed.

[63] In considering what may constitute an "unequivocal act of surrender" that the authorities say must be shown Sachs LJ's observation in *Relvok Properties Ltd v Dixon* (1973) 25 P and CR 1 at 5 is pertinent:

> 'Whether in any individual case the landlord has done more than … protect his interests is of course a question of fact in each case. The onus lies on the tenant to prove that more has been done and thus the Lease terminated.'

[64] While the argument here relates to a matter of pleading, and the discharge of an onus is not yet the point, I cannot see how Ozibar's case is even arguable as its materials merely tend to show that Laroar has done no more than protect its own interests in having rent paid directly to its agent's account.

[65] In my view the argument cannot be sustained that the facts pleaded lead to the conclusion that a surrender of the head lease occurred, let alone unequivocally show that, as is necessary.

Assignment of the head lease - paragraph 26F(d)

[66] The same factual basis is advanced as before but it is said that the directing of how rent was to be paid, the acceptance of rent from the sub-lessee, and the way in which complaints about defects were handled, leads to the conclusion that there has been assignment of the head lease to the sub-lessee. I cannot accept that is arguable.

[67] There remain the same significant problems - there is no mention by any party of there being any assignment of the lease intended; the parties subsequently acted on the basis that the head lease continued with Taochi by agreeing to an assignment two years later; there is no writing evidencing any such arrangement; and finally, there is a complete absence of any authority justifying the approach now urged on Ozibar's behalf.

[68] Mr Land placed considerable reliance on the judgment of Asprey JA in *195 Crown Street Pty Ltd v Hoare* [1969] 1 NSWR 193 at 200 where his Honour said:

> "In the present case the crucial fact to be proved is the grant of the new lease; for the mere yielding up of possession by the lessee to the third party and the payment of rent by the third party to the lessor are quite consistent with the third party taking the subject premises by way of assignment of the existing lease from the lessee."

[69] If the statement be relied on for the proposition that there is a universal rule that the yielding up of possession to, and subsequent payment of rent by, a third party leads inevitably to the result that there has been an assignment of the lease then I cannot accept it. I am confident Asprey JA meant no such thing. It is trite to observe that statements by judges in the one case are intended to be suited to the facts and issues there under discussion and are not necessarily apt to different issues and facts. In *195 Crown Street* it was not in issue that there had been an assignment of the head lease. What the assignor was endeavouring to do was persuade the court that he should be relieved of his contractual obligations to the lessor which of course continued despite the assignment. The original lessee under the assigned lease (ie

the assignor) argued that in fact the assignment should be seen as a surrender of the head lease. The point that Asprey JA was making was that the actions of the several parties there under consideration were entirely consistent with the fact of the uncontested assignment and so not unequivocally referrable to a surrender. As Hardie A-JA said: "…all the documents in the case point, not to a surrender, but to an assignment" (at p 206/43).

[70] Precisely the same point can be made here – all the documents and the actions that Ozibar relies on point to the existence of the sub-lease. That there was a direction as to where rents should be paid does not detract from that assertion. There is no need to assume that an assignment had taken place to explain the conduct of the parties.

Attornment – paragraph 26F(g)

[71] Ozibar then pleads in the alternative a lease by attornment.

[72] An attornment is "a recognition, by any means, by the person entitled to occupy land of a change effecting the holder of the reversionary interest in that land: *Lapham v Orange City Council* [1968] 2 NSWR 667 at 671. A typical example given is when a new owner takes over the demised premises and the incumbent lessee acknowledges that the new owner can rely on the same terms of the lease as the previous owner: *Adamow v Kirk* (1958) 75 WN (NSW) 514. Attornment clauses are usually found in mortgages. There the mortgagor acknowledges expressly that as between themselves and the mortgagee one is to be considered the tenant and the other the landlord, whatever the true state of affairs might be. Such clauses give rise to what Evatt J described in *Partridge v McIntosh & Sons Limited* as a "mere factitious arrangement between A and B to regard themselves as though they were landlord and tenant."[20]

[73] In the cases to which I was taken there was invariably an express clause by which one party attorned to the other party. No case was cited in which a person in occupation attorns tenant ie acknowledges that he is tenant, to an unwilling landlord. The only authority Mr Land cited in support of his argument was *Ex parte Jackson; Re Australasian Catholic Assurance Co Ltd* (1941) 41 SR (NSW) 285 at 290. But that was a case of an express attornment clause in a mortgage. Here there is no such express acknowledgment. Nothing said there assists Ozibar.

[74] The issue is what the law relating to attornment has to do with the facts here?

[75] As the judgments in *Partridge* make clear, at the heart of the doctrine underlying lease by attornment is that there is an estoppel binding on the parties to the estoppel. What is necessary to found an estoppel depends on the category of estoppel alleged. In *Legione v Hateley* (1983) 152 CLR 406 at 430 Mason and Deane JJ said that it was "customary to recognize three general classes of estoppel, namely, of record, of writing and *in pais".* Here there is no record or writing relied on (in the form of an express promise, statement or representation) and so it is that last category that is of relevance. An estoppel *in pais* depends upon an adoption of an assumption and the prevention of an unjust departure from that assumption by the other party if it is shown that "as a result of adopting it as the basis of action or inaction, the other

[20] *Partridge v McIntosh & Sons Ltd* (1933) 49 CLR 453 at 473

party will have placed himself in a position of material disadvantage if departure from the assumption be permitted": *Legione* at p 431 per Mason and Deane JJ.

[76] There is no pleading of the adopting of any assumption as a basis of action or inaction by Ozibar or any pleading of any consequent material disadvantage.

[77] In my view on the facts pleaded no attornment is shown.

Conclusion re paragraphs 26, 26A, 26B, 26C, 26D, 26E, and 26F

[78] I am conscious that the point raised here goes to a pleading – not the merits. But in my view paragraphs 26, 26A, 26B, 26C, 26D, 26E, and 26F of the Statement of Claim disclose no reasonable cause of action and have a tendency to prejudice or delay the fair trial of the proceeding. They should be struck out.

Paragraphs 46, 46A, 46B, 46C, 47, 48, 49, 50, 55(b)

[79] Paragraphs 46, 46A, 46B and, to an extent, paragraphs 47, 48, 49 assert or depend on the claim that I have already rejected[21] namely that the "new Sub-Lease" as defined in the Statement of Claim (the sublease that Taochi granted to Ferix commencing on 31 July 2007 - see paragraph 22 – 22B of the pleading) is a "retail shop lease" and so has included within it the compensation provisions of the Act.

[80] It follows that for the reasons already given paragraphs 46, 46A, 46B should be struck out as disclosing no reasonable cause of action and as having a tendency to prejudice or delay the fair trial of the proceeding.

[81] Paragraphs 47, 48, 49 depend, in addition, on the plea that the monthly lease that came into existence on 1 August 2012 is a "retail shop lease". Paragraph 46C pleads that the "Monthly Lease alleged in paragraph 26H is not a 'periodic tenancy' for the purpose of s 42(2)(a) of the Act." Section 42(2) of the Act expressly provides that the compensation provisions are not included in periodic tenancies. A "monthly lease" is by definition a periodic tenancy. No fact is pleaded to show why any different construction should apply to the tenancy here: see r 149(2) UCPR. Again the pleading has a tendency to prejudice or delay the fair trial of the proceeding and should be struck out.

[82] Both bases on which paragraphs 47, 48 and 49 depend are untenable. It follows that they too must be struck out.

[83] Paragraph 50 pleads:

> "In the premises of the proper construction of the term 'lessee' and the term 'lessor' in the Act and the facts alleged in paragraphs 26F(c), (f) and/or (g) and/or paragraph 26G hereof:
>
> (a) the Defendant was from 23 April 2008 to 31 July 2012 the "lessor" of the assigned new Sub-Lease;
>
> (b) the Plaintiff was from 23 April 2008 to 31 July 2012 the "lessee" of the new Head Lease or of the assigned new Sub-Lease;

[21] See [32] above

> (c) the Defendant was from the 1 August 2012 to 27 November 2012 the "lessor" of each of the Monthly Leases alleged in paragraph 26 H hereof; and
>
> (d) the Plaintiff was from 1 August 2012 to 27 November 2012 the "lessee" of each of the Monthly Leases alleged in paragraph 26H hereof for the purpose of each of the terms alleged in paragraphs 47, 48 and 49 hereof."

[84] While not entirely clear, the purport of the pleading, I think, is that it follows from the matters pleaded in paragraphs 26F(c), (f) and/or (g) and/or 26G that the parties are "lessor" and "lessee" within the meaning of those terms in, and for the purposes of, the Act in respect to the head lease, sub-lease and monthly lease referred to. I confess that I am not entirely sure but I think that it is a roundabout way of pleading that the Act applies to the leases mentioned.

[85] I have said that paragraphs 26F(c), (f) and (g) should be struck out. It follows that paragraph 50, to the extent that it relies on those paragraphs, must be struck out. That leaves the premises pleaded in paragraph 26G, but paragraph 26G suffers from the same problem.

[86] As already mentioned paragraph 26G pleads that "on 25 November 2010 an assignment of the new Head Lease from Taochi to the plaintiff was registered in the Queensland land registry." The head lease referred to was that granted by Laroar to Taochi upon the exercise of the option by Taochi contained in the original 2004 lease (see [10] above). Again, I have already rejected the argument that the head lease obtained upon the exercise of that option is a "retail shop lease."[22]

[87] Fundamentally paragraph 50 pleads that the Act applies to the leases mentioned. I have found that it does not. It follows that the parties are not "lessor" and "lessee" in respect of a "retail shop lease" as defined – whether the lease be any one of the leases mentioned in paragraph 50. Again the pleading has a tendency to prejudice or delay the fair trial of the proceeding and should be struck out.

[88] Finally complaint is made about paragraph 55(b). The complaint again is that the pleading is dependent on the assumption that the Act applies to whatever lease was in place during the periods mentioned. It is there pleaded that as at 21 August 2009 "the plaintiff expected on reasonable grounds that over the period from 1 August 2009 to 31 July 2012 [the nightclub] would consistently make an average net monthly profit ranging from …" and there are then set out monthly expected profit figures.

[89] The pleading makes no express assertion that it is dependent on the prior allegations that I have rejected – that is, that the leases in place from 1 August 2009 were "retail shop leases" as defined in the Act. The paragraph does appear under the heading "Claims Against the Defendant Under the Retail Shop Leases Act…" but that heading purportedly covers paragraphs 46 to 79 of the pleading and no like complaint is made about many of the paragraphs in that section of the pleading.

[90] I would decline to strike out paragraph 55(b) on the ground that it depends on a favourable finding in relation to the application of the Act. Reference is made to the

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[22] *Ibid*

paragraph again in paragraphs 55A, 55B, 91 and 96. The pleading in paragraphs 55A and 55B set up the claim for damages by reference to the plaintiff's reasonable expectations of profits pleaded in paragraph 55(b). In paragraph 91 it is said that the monthly trading figures for June to September 2012 exceeded Ozibar's expectations pleaded in paragraph 55(b). In paragraph 96 it is said that the monthly trading figures for October and November 2012 were less than Ozibar's expectations pleaded in paragraph 55(b). It is I think unfortunate that the pleading is in terms of Ozibar's expectations at the time. It suggests a subjective element, which presumably is unintended. Ozibar's subjective expectations of its future profits have nothing to do with the damages that it may be entitled to.[23] As pleaded there is the potential for a false issue to be raised.

[91] Paragraphs 46, 46A, 46B, 46C, 47, 48, 49, and 50 have a tendency to prejudice or delay the fair trial of the proceeding or are unnecessary. Arguably so does paragraph 55(b) but I have had no submissions on the point that concerns me.

Paragraph 75B

[92] The complaint is that the paragraph is irrelevant to any pleaded cause of action. Ozibar's response is that the paragraph is relevant to the later pleading of damages and details Laroar's degree of knowledge as at the date of Ozibar's entry into the new lease – that is on 27 November 2012.

[93] The pleading is:

> 75B. From approximately April 2012 (the Plaintiff is not able to be more particular until after disclosure) to approximately early November 2012 (the Plaintiff is not able to be more particular until after disclosure):-
>
> (a) By letter dated 10 April 2012 the Defendant's agent enquired of the Plaintiff as to whether it wanted to take another lease of Mainstreet;
>
> (b) the Plaintiff by letter dated 27 April 2012 advised the Defendant's agent that it wished to take another lease of Mainstreet;
>
> (c) by letter dated 16 July 2012 the Plaintiff advised the Defendant's agent, inter alia, that "to walk away from the offer of a new lease would be disastrous for Ozibar given the financial commitments we have already made";
>
> (d) by email dated 2 August 2012 from the Defendant's agent to the Plaintiff the Defendant advised, inter alia, that:- "we are keen to retain Main Street Night Club as a tenant…";
>
> (e) by email dated 3 August 2012 from the Plaintiff to the Defendant's agent the Plaintiff stated, inter alia, "we also are for obvious reasons keen to operate the Main Street business for another three to six years to allow us to have some chance of re-cooping (*sic*) the losses that Ozibar has suffered which do not need repeating" and asked for an indemnity against further costs and economic losses to Ozibar associated with the leaks in the building structure; and

[23] See *Commonwealth of Australia v Amann* (1991) 174 CLR 64 at p 80 per Mason CJ and Dawson J

> (f) by email dated 4 September 2012 the Defendant's agent advised that it would give no indemnity "…but that it gave an assurance… that should there be any water leaks reported we will ensure to the best of our abilities that these are repaired as soon as possible".
>
> At the trial of this proceeding the Plaintiff will refer to each of the emails for their full terms true meaning and effect.

[94] The effect of the pleading is: to allege that each side was keen to enter into the lease; to allege that Ozibar informed Laroar that Ozibar had sustained losses to that date; to allege the motivations behind Ozibar's decision to enter into the lease; to allege that Ozibar had sought and had been refused "an indemnity against further costs and economic losses to Ozibar associated with the leaks in the building structure; and to allege that Laroar's agent had promised on Laroar's behalf that if leaks were reported Laroar would "ensure to the best of our abilities that these are repaired as soon as possible."

[95] Presumably the pleading is intended to attract the second limb of the rule in *Hadley v Baxendale.* In describing the principles fundamental to the assessment of damages for breach of contract Brennan J said in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 pp 98-99:

> "The rule in *Hadley v Baxendale* (1854) 9 Ex 341, at 354 [156 ER 145, at 151] prescribes the condition on which damages can be awarded in respect of a loss sustained by reason of a breach of contract: 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'
>
> Applying the rule in *C Czarnikow Ltd v Koufos* [1969] 1 AC 350, at 385, Lord Reid said that: 'The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation.'"

[96] Thus, it is legitimate to plead facts that were in the contemplation of both parties and that would, as a result, alter the usual rule that applies, that is that damages be restricted to what "may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself." That is what I think the pleading is designed to do. However I cannot see that the pleading in fact does that.

[97] To return to the pleading. Presumably it is invariably the situation that the two sides negotiating to enter into a lease (or indeed any contract) are both keen to do so before the event. It adds nothing to assert those facts.

[98] Nothing is said to turn on the allegation that Laroar knew that Ozibar had suffered losses previously, unless it be the inference that if there was another downpour with consequent water entry and disruption to business then Ozibar would seek to claim all losses previously suffered when not in a contractual relationship with Laroar.[24] That is an impossible claim to maintain, but as best I can see it has not been expressly said.

[99] Of the remaining allegations none of the facts alleged are later used to found any claim for additional loss. Nor do they found any cause of action. For example there is no pleading that the last matter alleged was a misrepresentation of Laroar's true position inducing Ozibar to enter into the lease; or that Laroar did not later use its best endeavours to repair reported leaks (not that it is said to be a contractual promise).

[100] I cannot see how the pleading advances the case Ozibar seeks to make out. The pleading is unnecessary and should be struck out.

Paragraphs 76A, 76B, 76C, 80-90

[101] In paragraph 76 Ozibar pleads that the parties entered into a new lease on 27 November 2012. What follows is designed to assert that the Act applies to this new lease. Thus in paragraph 76A it pleads: "The new lease was a 'retail shop lease' as defined by the Act and the plaintiff repeats and relies upon the facts alleged in paragraphs 3, 46A and/or 46B hereof."

[102] I have said that paragraphs 46A and 46B should be struck out. The reference to those paragraphs here should also be struck out. That however does not mean the end of the claim.

[103] The complaint again is that the paragraphs each depend on the assumption that Ozibar's occupancy of the subject premises was pursuant to a "retail shop lease" as defined and that the point has already been determined against Ozibar and so there is an issue estoppel.

[104] That is not so. The finding in the earlier proceedings relate to the "leases", using the term broadly, in place up to 27 November 2012, not the lease in place after that time. So much is evident from paragraph [8] of my earlier reasons:

> "It follows then that up and until 27 November 2012 the Ozibar'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."

[105] My understanding of the arguments then advanced was that Ozibar's claim for damages was restricted to breaches of the various "leases" in place, however they be described, up to that date. Hence I made no findings concerning the lease entered in to on 27 November 2012.

[106] Whether the lease of 27 November 2012 is a "retail shop lease" depends on whether the subject premises are in a "retail shopping centre" as defined. The definition

[24] Although see the section "Paragraphs 91 to 110" at [117] and following and the reference at [127]

appears in s 8 of the Act. It is s 8 as amended in 2006 that applies to a lease entered into in 2012. I have not previously considered that version of s 8.

[107] For present purposes s 8 defines "retail shopping centre" as:

> (1) A retail shopping centre is a cluster of premises having all of the following attributes:
>
> …
>
> (d) the cluster of premises is promoted, or generally regarded, as constituting a shopping centre, shopping mall, shopping court or shopping arcade.

[108] Laroar questioned whether the nightclub premises was "situated in" a cluster of premises for the purposes of the subsection. The nightclub was on the first floor and the arcade of shops on the ground floor. I have very little evidence on the point and no submissions. That is a question of fact for the trial. For present purposes it is not in issue that the "cluster of premises", assuming it be one, had the attributes set out in paragraphs (a) to (c) of s 8(1). Hence I have quoted only the paragraph in issue - paragraph (d). In paragraph 3 of its Statement of Claim Ozibar pleads the various facts that, if accepted, would satisfy the various provisions of s 8(1). Paragraph 3 is called up by paragraph 76A.

[109] I gave the parties leave to provide further evidence and submissions on the question of whether "the cluster of premises is promoted, or generally regarded, as constituting a shopping centre, shopping mall, shopping court or shopping arcade". Laroar submits that a distinction is drawn in its advertising, and generally, between the shops that are "promoted, or generally regarded, as constituting a shopping centre, shopping mall, shopping court or shopping arcade" and the nightclub. The material adduced by Ozibar does not assist its argument as no document exhibited "promotes" the shopping area (even the arcade on the ground floor without the addition of the nightclub) as a "shopping centre, shopping mall, shopping court or shopping arcade" *per se.*

[110] However, on reflection, it seems to me that this must be an issue that requires determination at a trial. Ozibar is entitled to lead at a trial what evidence it can as to how the premises are regarded "generally", that is by the community. That is not an issue to resolve on a summary judgment or strike out application.

[111] To the extent that Ozibar wishes to plead that the lease of 27 November 2012 is a "retail shop lease" then it is entitled to do so. I decline to strike out paragraph 76A.

[112] Paragraph 76B pleads: "By Item 13 of the new lease the Plaintiff and the Defendant acknowledge that the Act applied". On the present state of the pleadings the plea takes the case nowhere. There is no pleading, for example, that even if the Act does not apply by statutory force the parties have agreed that it should be taken to apply and are bound by that agreement, or that otherwise an estoppel arises. In the absence of some point to the pleading the plea is unnecessary and should be stuck out.

[113] Paragraph 76C pleads: In the premises of paragraph 76A hereof the new lease [ie the 27 November 2012 lease] contain the implied terms alleged in paragraphs 47, 48

and 49." Ozibar pleads this proposition in more detail in paragraphs 131-146 of the Statement of Claim. I deal with this below.[25]

[114] Paragraphs 80 to 84 plead the steps that Laroar could have taken to prevent water entry, the fact that it did not take those steps, and the loss and damage that follow from the breach of the implied terms alleged in paragraph 47. Paragraph 47 having gone so should these paragraphs to the extent they are interlinked with the paragraphs that have been struck out. Paragraphs 81 and 82 are called up in paragraph 125. Whether they should be struck out entirely, or merely amended, depends on the arguments relevant there.

[115] Paragraphs 85 to 88 plead the loss and damage that follow from the breach of the implied terms alleged in paragraph 48. Paragraph 48 having gone so should these paragraphs.

[116] Paragraphs 89 and 90 plead the loss and damage that follow from the breach of the implied terms alleged in paragraph 49. Paragraph 49 having gone so should these paragraphs.

Paragraphs 91 to 110 - "Claim for damages for loss of commercial opportunity"

[117] Particular complaint is made about several paragraphs. I will turn to those complaints in a moment. The overall complaint is that these paragraphs "do not appear to give rise to any maintainable cause of action. They appear to plead what would have happened if the plaintiff had not suffered a depletion of capital." I agree.

[118] I will attempt to summarise the effect of the 20 paragraphs in question.

[119] The lease referred to here is "the new lease" – that is the lease entered into on 27 November 2012 backdated to commence from 1 August 2012.

[120] Ozibar pleads in paragraph 105 that in May 2013 it was forced to close the nightclub and informally surrender the lease of the premises.

[121] At paragraph 110 Ozibar pleads that but for that closure it would have operated the nightclub for the full term of the lease plus the option period available under the lease and that it forwent profits that it would have obtained of $624,000. It claims that sum. Ozibar pleads that the closure in May 2013 occurred for two reasons:

(a) that Ozibar's capital was depleted by $1,015,264.04[26] as a result of the diminished returns it suffered or costs that it incurred in the period from 1 August 2009 to 27 November 2012 (see paragraphs 100, 103, 104, 106, and 110) ;

(b) that there was heavy rain in January 2013 with consequent water intrusion into the nightclub premises causing a "loss of net profit" to Ozibar making it "difficult" to continue to trade (paragraphs 101, 102, 104, 106 and 110). I note that in paragraph 103 Ozibar pleads that despite that intrusion it could have continued in business but for the depletion of capital.

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[25] See [179] – [250] below

[26] The pleading asserts "as alleged in paragraph 99" – presumably a reference to paragraph 100 as paragraph 99 contains no such allegation

[122] That is a summary of the effect of the pleadings. In the course of the 20 paragraphs there is pleaded a raft of facts that are not essential to the cause of action that I think is being alleged. The basic pleading rule is to plead those facts and only those facts necessary to establish the cause of action (see r 149(b) UCPR). Most of the facts pleaded are not germane to that purpose. While a more extensive pleading can be necessary to prevent surprise (eg r 155(4)) or for other particular purposes (eg r 150) it is not evident that those rules are called on, or satisfied, here.

[123] Thus in paragraphs 91 to 97 Ozibar pleads: that its profits exceeded its expectations in June, July, August and September 2012; that from October 2013 there was "additional competition" to the nightclub business; that there was a downturn in trade because of the downturn in the mining industry in the area; that Ozibar knew these things when it went into the new lease; that rainwater caused a shorting of the electrical system in the nightclub in October 2012 which caused patrons to stay away; that Ozibar notified Laroar of these events and the effects on it; that Ozibar's net monthly profit was reduced as a result; and that Ozibar took steps to combat the effects of these events. All these facts are irrelevant to establishing the cause of action relied on here. I note that the rainwater entry and subsequent notice are called up in relation to the nuisance claim later made in the pleading. They may be relevant there.

[124] The same fault is found in paragraphs 107, 108 and 109 – there are pleaded matters which are not relevant to the setting up of any cause of action. There it is alleged that between May 2013 and June 2014 three competitor nightclubs closed, such that by June 2014, assuming the continuation of Ozibar's business, there would have been only two nightclubs in Mackay, and the population of Mackay and surrounding areas was sufficient to sustain two nightclubs. These are all properly matters of evidence going to the claim that a certain net profit was achievable. But in my view they have no place in a pleading.

[125] Paragraphs 101, 102 and 103 raise a different problem. Taken in context they are confusing. There it is alleged that rainfall fell in January 2013, water entered the premises, and as a result the nightclub suffered a "loss of net profit" which made it "difficult" to keep trading. Then it is said in paragraph 103 that despite that reduction in profit the nightclub would have continued to trade but for the depletion in capital. At this point one would think that these paragraphs are entirely irrelevant to the claim made for lost commercial opportunity. In claiming damages for loss of commercial opportunity it is not necessary to plead all the obstacles overcome in trading. Either the water entry and consequent reduction in profits caused the loss complained of or it did not. However to confuse the picture paragraphs 104, 106 and 110 then plead that the water entry in January 2013 was causative of the loss alleged.

[126] So far as the present claims are concerned if Ozibar wishes to plead that the water entry of January 2013 was causative of the loss it claims then paragraph 103 should be struck. If it does not then paragraphs 101, 102, 103 and the references to paragraphs 101 and 102 in the later paragraphs should be struck out. I note that paragraph 101 is called up at paragraph 135 in a different context. It may be relevant to the case there pleaded.

[127] I note that in paragraph 98 there is a reference back to paragraph 75B where it was alleged, *inter alia*, that Laroar knew that Ozibar had lost monies when conducting

the nightclub from the premises in the period leading up to entry into the lease and wished to re-coup those monies. I cannot see that allegation is relevant here or in any way assists Ozibar's case.[27]

[128] The essential fault in the pleading is that nowhere in these 20 paragraphs is any fact alleged which, if accepted, shows that Laroar is liable for the depletion of capital or responsible in law for the claimed continuing effects of that depletion of capital.

[129] In the written submission supporting the pleading the following is asserted:

> Paras 91-110 These paras set up and particularize the Plaintiff's claim for damage for loss of commercial opportunity. That commercial opportunity flowed from the right (option to renew upon the valid exercise of the same) conferred by the Defendant upon the Plaintiff in the new Head Lease [ie the lease between Taochi and Laroar entered in to on 1 August 2007 for a period of five years][28] or the assigned new Sub-Lease [ie the sublease from Taochi to Ferix assigned to Ozibar on 23 April 2008], to take a new lease of Mainstreet for three years with an option for a further term of three years, thereby providing to the Plaintiff an opportunity to make a profit: c.f. Brennan J. (as he then was) in Amann's Case, supra at 102, "a promise to give the plaintiff an opportunity to acquire an unexpressed benefit", and see further at 103. In the instant case, that chance to make a profit given by the Defendant was lost, or greatly diminished because of the Defendant's breaches so far as concerns water intrusion into Mainstreet, those breaches being breaches of the old Head Lease. The chance to make a commercial profit is part of what the Plaintiff acquired because it was part of the new Head Lease, or, the assigned new Sub-Lease which the Plaintiff acquired by entering into a covenant to pay rent to the Defendant. If the loss of an opportunity to make a commercial profit, based upon the provision by the Defendant of an option to renew the Head Lease, is regarded as too tenuous (which is denied) then the Plaintiff submits that the loss of the opportunity to make a commercial profit by taking a further lease of Mainstreet has been caused by the Defendant's breach of the new Head Lease in allowing or failing to prevent water intrusion. A breach of the new Head Lease without even having resort to the option to renew, can lead to a loss of an opportunity to make a commercial profit: see Brennan J. (as he then was) in Amann's Case, supra at 102-103. The Plaintiff can recover for the loss of that opportunity to make a profit even if its chance of doing so is less than 50%: Sellars-v-Adelaide Petroleum NL (1994) 179 CLR 332 at 349 per Mason C.J., Dawson, Toohey and Gaudron J.J. The loss claimed flows from the damages for breach of the new Head Lease or the assigned new Sub-Lease which are $1,015,264.04 and damages for loss of a commercial opportunity, i.e., the profit that would have been made from the new Lease (the option to take which is part of the new Head Lease or the assigned new Sub-Lease) had the Plaintiff not lost $1,015,264.04 which for the purpose of the claim for loss of commercial opportunity is termed by the Plaintiff as "depletion of capital". The measure of the lost commercial opportunity is claimed by the Plaintiff as $624,000 or in the alternative, the value to the

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[27] And see [92] – [100] above

[28] I here assume consistency in the terms used and the definitions applied in the pleading– "new Head Lease", "assigned new Sub-Lease" and "old Head Lease".

Plaintiff of the new Lease. The claim is based upon Sellar's Case, supra and/or Amann's Case, supra.

[130] Two things can be said about these propositions. The first is that they are not pleaded. The facts alleged do not touch on any of these matters. There is no reference to any of the leases now said to be the basis of the claim. There is no identification of the breaches of those leases now said to relevant. I say that with some hesitation as I have considerable trouble following the pleading. If I have not followed the intention of the pleader then the pleading should be struck out as being too difficult to follow.

[131] The difficulties arise in part because there are continual references back to earlier paragraphs in the pleading (see paragraphs 91, 96, 98, 99, 100, 101, 104 and 106) and the paragraphs referred to themselves refer back to earlier paragraphs (see eg paragraph 100 which refers back to 75A (which takes the reader back to paragraphs 55B (which relies on 55(b) and 55A)), 62 (which refers to 59) and 63A and 75(c); or paragraph 101(b) which takes the reader back to paragraph 77 which then refers back to paragraphs 71 (which refers back to paragraphs 57, 67, 70 and 28(a)) and 59 (which refers back to paragraphs 57 and 58)), usually without any statement as to the purpose of the reliance.. The problem with pleading in this way is that it is not apparent what relevance the paragraph referred back to is intended to have. It makes following the point of the pleading very difficult. In my view this complaint bedevils much of the Statement of Claim.

[132] The second problem is that even if they had been pleaded the facts asserted do not disclose a reasonable cause of action. Dealing with the fundamental propositions underlying the claim as detailed in the submissions:

(1) **That there was a right in the form of an option to renew the lease for three years with an option for a further term of three years conferred by Laroar upon Ozibar in the "new Head Lease" or the "assigned new Sub-Lease"** - There is no pleading of any right in the "new head lease" to an option to renew the lease for three years with an option for a further term of three years. The express pleading is to the opposite effect [said to be without an option to renew – see paragraph 20A and 20B of the statement of claim]. Even if there was such a right that was a right conferred on Taochi, not Ozibar. Ozibar gains no right to exercise an option with Laroar by reason of the assignment of the sub-lease to it in April 2008.

(2) **That a chance to make a commercial profit is "part of what [Ozibar] acquired because it was part of the new Head Lease, or, the assigned new Sub-Lease which [Ozibar] acquired by entering into a covenant to pay rent to [Laroar]" –** I take this to be a reference back to the emails that were exchanged and pleaded in paragraph 26 and the inferences sought to be drawn in paragraph 26F. I have previously explained why I rejected the propositions underlying paragraph 26F.

(3) **That "a chance to make a profit given by [Laroar] was lost, or greatly diminished because of [Laroar's] breaches so far as concerns water intrusion into Mainstreet, those breaches being breaches of the old Head Lease" [ie the lease from Laroar to Taochi entered into on 10 May 2004 but agreed to have commenced on 1 August 2002 and which was for a**

period of five years] - Ozibar cannot possibly have any basis for complaining about breaches of the "old head lease" which had expired before it even took up occupation of the premises in April 2008, not that any such breaches are alleged;

(4) **That "the loss of the opportunity to make a commercial profit by taking a further lease of Mainstreet has been caused by the Defendant's breach of the new Head Lease in allowing or failing to prevent water intrusion" -** Ozibar was not deprived of the opportunity of taking a further lease in the nightclub premises and making what profit it could. So far as the pleading shows it was given that opportunity in November 2012 by Laroar, after negotiation, but surrendered the lease – presumably in breach of its terms. Even if there was such a loss of opportunity it could not have been caused by a breach of a previous lease.

In summary paragraphs 91 to 110 (save for paragraphs 94 and 95 pleading the rainwater entry and subsequent notice) should be struck out for three reasons: the pleading is inherently confusing; the claim relies on premises that I have found are not tenable; and there are pleaded facts that are unnecessary and embarrassing.

Paragraphs 111 to 117

[133] These paragraphs appear under the heading: "Claim against the Defendant for damages for breach of clause 14.7 of the assigned new sublease or alternatively of the assigned new head lease".

[134] At paragraph 10A Ozibar pleads:

"Clause 14.7 of the old Head Lease is as follows:-

> 'Maintenance of common areas.
>
> The Lessor shall keep and maintain in good order and repair and in a clean and tidy condition all common areas from time to time, provided for the use of the Lessees of the said building and their respective servants, employees, customers, clients, invitees and licencees, provided always that the Lessor shall not be or be deemed to be in breach of its obligations hereunder by reason of any temporary breakdown or faulty operation of any of the appurtenances or services in the common areas'."

[135] Ozibar Submits: "Clause 14.7 was imported into the new Head Lease because the new Head Lease was renewed in all of its terms, including Clause 14.7, except for an increase in rent and the omission of an option to renew. In the case of the assigned new Sub-Lease, paras 13 and 14 refer to Clauses 1.1 and 1.2 of the old Sub-Lease (not changed in the new Sub-Lease because of the limited changes brought about by the renewal) which are therefore imported into the assigned new Sub-Lease. Such importation then imports into the assigned new Sub-Lease, Clause 14.7 of the new Head Lease."[29]

[29] Ozibar's submission at p 6 under heading "Para 111-117"

[136] The "assigned new sub-lease" is a reference to the sub-lease granted by Taochi to Ferix commencing on 31 July 2007 (see paragraphs 22A and 22B) and assigned to Ozibar on 23 April 2008 (see paragraph 25).

[137] The "assigned new head lease" is a reference to the head lease granted to Taochi by Laroar commencing on 1 August 2007 (paragraphs 20A and 20B) which Ozibar pleads was assigned to it on 2 June 2008 (paragraph 26F).

[138] Laroar's complaint here is that the clause 14.7 referred to was not a covenant between the parties. Laroar's submission is that there was "no 'assigned head lease' as pleaded in paragraph 76F"[30] and that the clause was not a term of the "assigned new sub-lease". The reference to paragraph 76F is I think a mistaken reference to 26F. If so, I agree with the submission. It follows from my earlier determination.

[139] As well, assuming the clause was a term of the "assigned new sub-lease", that does not mean it was a covenant between Laroar and Ozibar. An assignee of a sub-lease does not obtain rights as against the head lessor. By the importation of terms from the head lease into the sub-lease Ferix obtained rights against Taochi, but not against Laroar. Ozibar is in no better position than Ferix. There is neither privity of estate nor contract between Ozibar and Laroar at any material time.[31] I cannot see that the claim is maintainable.

[140] For completeness I observe that a claim based on privity of estate existing between Ozibar and Laroar arising out of the registration of the assigned head lease is not advanced. It will be recalled that it is pleaded at paragraph 26G that "an assignment of the new Head Lease from Taochi to the Plaintiff was registered in the Queensland Land Registry" on 25 November 2010. It is said that Ozibar will refer to the assignment for "its full terms, true meaning and effect" but nowhere are the terms pleaded and their effect is unknown.

[141] Ms Heyworth-Smith submitted that the pleading at paragraph 26G presently seems to go nowhere. I agree.

[142] The success of any such claim would depend first on cl 14.7 being characterised as a covenant that "touches and concerns the land" and secondly on the proposition that the walls of the building (through which water is said to have intruded) could be properly described as "common areas … provided for the use of the Lessees of the said building and their respective servants [etc]…" for the purposes of cl 14.7. I have received no argument and hence express no opinion on the maintainability of such a claim.

[143] Paragraphs 111-117 too should be struck out.

Paragraphs 118 – 122 – Breach of a covenant to give "Quiet Enjoyment"

[144] The pleading here concerns an alleged breach of cl 6 of the "assigned new sub-lease" and the "assigned new head lease". The terms of cl 6 of the "old head lease" are pleaded at paragraph 10B of the Statement of Claim. The covenant here is in the familiar form: "The Lessor covenants that if the Lessee performs and observes the

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[30] Laroar's submission at p 4 under heading "111-117"

[31] *Fuller's Theatre and Vaudeville Co Ltd v Rofe* [1923] AC 435 at 438; *Taylor v Gillett* (1875) LR 20 EQ 682

Lessee's obligations under this Lease the Lessee may occupy and use the Premises during the Term without any interruption by the Lessor or any person lawfully claiming through the Lessor."

[145] Again Laroar's complaint is that the clause does not form part of any relationship between the parties.

[146] Ozibar submits:

> "These paras set up a claim for damages for breach of Clause 6 of the old Head Lease (covenant for quiet enjoyment). This clause is imported into the assigned new Sub-Lease. The Plaintiff so pleads by repeating and relying upon para 112 (see para 118) because para 112 imports into the assigned new Sub-Lease by reason of paras 13 and 14, Clauses 1.1 and 1.2 of the old Sub-Lease which by reason of its renewal import those same terms into the new Sub-Lease which was assigned to the Plaintiff. For the reasons set forth in paras 26F(c), (f) and (g), they formed part of the relationship between the Plaintiff and the Defendant."[32]

[147] I have said that paragraph 26F should be struck out. That removes the basis of Ozibar's case that terms imported into the "assigned new sub-lease" (ie cl 6) "formed part of the relationship between the Plaintiff and the Defendant."

[148] Again there is the potential, but so far unpleaded, case that the assignment of the new head lease occurred upon registration of the assignment on 25 November 2010. Privity of estate would then exist between Ozibar and Laroar. Covenants that touch or concern the land might be enforced. Again I have heard no argument on the point. However I make the following observations.

[149] Authority can be found supporting, at least in a general sense, the case that Ozibar might seek to advance: *Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd* [1976] 2 NSWLR 15 per Yeldham J. The decision was discussed with apparent approval by McPherson JA (Thomas J agreeing) in *Aussie Traveller Pty Ltd v Marklea Pty Ltd; Marklea Pty Ltd v Aussie Traveller Pty Ltd* [1998] 1 Qd R 1. However the difficulty for Ozibar in pleading a case based on a leasehold interest commencing in November 2010 is that any claim for breach of the covenant in question must bring into account the state of the premises at the date of the grant. The tenant takes the property in the physical condition in which it finds it. I mentioned relevant authorities in my earlier decision.[33] I made mention there of possible claims that Ozibar might explore to distinguish this long line of authority but no attempt has been made to show that there is any arguable case.

[150] In *Byrnes v Jokona Pty Ltd* [2002] FCA 41 Allsop J, as his Honour then was, considered the effect of such a covenant and, with respect, conveniently set out the relevant principles. After pointing out that it was a question of fact whether the lessee's ordinary use of the premises had been substantially interfered with, and that the tenant was entitled to the full benefit of the demise for the known or nominated purpose his Honour cautioned that "[t]his is not by any means to elevate matters to a

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[32] P 6 of Plaintiff's Submissions

[33] *Ozibar Pty Ltd v Laroar Holdings Pty Ltd* [2015] QSC 345 at [49]

covenant for the fitness of the premises for the nominated purpose".[34] His Honour then added:

> "In assessing whether there has been a material reduction in the fitness of the premises for the business, the accepted state of the premises at the time of grant is relevant. The covenant does not apply to things done before, or the state of affairs at, the grant. The tenant takes the property not only in the physical condition in which he, she or it finds it, but also subject to the uses which the parties must have contemplated would be made of the parts retained by the landlord: *Southwark LBC v Tanner*, supra at 11-12. One should be careful about finding a breach of the covenant where the matters complained of worsen the position little from the state of affairs at the date of the grant."[35]

[151] Ozibar does not plead any fact demonstrating that the position was worse at the time of the alleged breach than the state of affairs at the date of the grant. Absent any plea that there was a material change after the time of the grant Ozibar's pleading has the effect of elevating a covenant for quiet enjoyment to a covenant for the fitness of the premises for the nominated purpose. Such a claim cannot succeed.

[152] Paragraphs 118 -122 too should be struck out.

Paragraphs 123 - 126

[153] The claim here relies on the importation into the "assigned new sub-lease" and the "assigned new head lease" of a covenant implied by law that Laroar would not derogate from the grant. It is pleaded that the grant was restricted to using the premise solely as licensed premises under the *Liquor Act* and that the water intrusions complained of rendered the premises "materially less fit" for that purpose.

[154] Laroar's complaint is that the paragraphs "plead no facts which form the foundation of a reasonable cause of action" and reference is made to the case pleaded in respect of the *Retail Shop Leases Act*.

[155] Ozibar submits:

> "These paras relates to the Plaintiff's claim for damages for breach of the covenant not to derogate from the grant. For the reasons set out above, this covenant is imported into the assigned new Sub-Lease or the assigned new Head Lease. The Plaintiff repeats and relies upon the facts that were in existence and of which the Defendant was aware before the commencement of the assigned new Sub-Lease or the assigned new Head Lease. The covenant can be breached by omissions. From August 2009 at the very latest, the Defendant was, or ought to have been aware of the intrusion of rainwater into [the nightclub] that rendered [the nightclub] materially less fit for the sole purpose for which it could be used. The reasonable steps alleged in para 81 do not have to be confined to breach of the RSLA and the Plaintiff can use the contents of that paragraph in other causes of action set up in the same pleading."

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[34] At [62]
[35] At [65]

[156] Ozibar cannot complain that Laroar has derogated from the grant until there be privity of estate between Ozibar and Laroar. That first occurs on the pleaded case when the parties enter into the new lease in 2012. It may have occurred upon the registration of the assignment of the head lease on 25 November 2010 but, as I have said, that is not pleaded, at least not expressly.

[157] There is the further difficulty that the damages pleaded are said to be set out in paragraph 75A. It will be recalled that those claims were for loss of expected profits during the period of the forced closure on 21 August 2009, the costs of carrying out work to comply with the Closure Order, the loss of expected profits from 1 August 2009 until 27 November 2012 (the date that Ozibar entered into the new head lease with Laroar), and the cost of a mould reduction programme conducted over a period of 166 weeks commencing 18 September 2009. In each case the damages there referred to were, on the pleaded facts, substantially or wholly incurred before there was any privity of estate or contract between the parties. To that extent the claim is not maintainable.

[158] As presently pleaded the claim discloses no reasonable cause of action or has a tendency to prejudice or delay the fair trial of the proceeding. I will come back to the issue of whether such a claim is maintainable at all in the circumstances evident here.[36]

[159] Paragraphs 123 -126 too should be struck out.

Paragraphs 127 – 130: Claim in Nuisance

[160] Ozibar's claim here relies on the facts pleaded in paragraphs 111 and 112. Paragraph 112 refers the reader back to paragraphs 13 (a reference to cl 1.1 of the sublease from Taochi to Ferix setting out the terms of the grant), 14 (a reference to cl 1.2 of the sublease from Taochi to Ferix where the parties acknowledge that the sub-lease is "subject to and conditional upon" the terms of the head lease) and 26F. Paragraph 26F has been struck out and the reference here too must go. I do not see the matters there asserted as essential to the claim in nuisance.

[161] The complaint is that the claim is substantially statute barred (said to be effectively from a date six years prior to either the date of hearing of the application or the date of my decision) and hence leave should not be given to plead a claim that cannot succeed.

[162] Ozibar submits:

> "Paras 127-130: The cause of action for nuisance did not arise after the commencement of these proceedings. The facts on which it is based were set forth in the various paras of the Statement of Claim that were not struck out by this Court. The Court can give leave to make the amendment to allege nuisance. See UCPR 376(4) and s.16(2) of the *Civil Proceedings Act 2011."*

[163] I plainly have the power to permit an amendment to plead a new cause of action despite the limitation period having expired. Section 16 of the *Civil Proceedings Act* 2011 provides:

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[36] See [258] below

> **16 Amendment for new cause of action or party**
> (1) This section applies to an amendment of a claim, anything written on a claim, pleadings, an application or another document in a proceeding.
> (2) The court may order an amendment to be made, or grant leave to a party to make an amendment, even though—
> (a) the amendment will include or substitute a cause of action or add a new party; or
> (b) the cause of action included or substituted arose after the proceeding was started; or
> (c) a relevant period of limitation, current when the proceeding was started, has ended.
> (3) Despite subsection (2), the rules of court may limit the circumstances in which amendments may be made.
> (4) This section applies despite the *Limitation of Actions Act 1974*.

[164] Section 16(2)(c) and (3) are relevant. The rules of court do limit the circumstances in which amendments after the limitation period has expired may be made. Rule 376(4) UCPR provides:

> **376 Amendment after limitation period**
> (1) This rule applies in relation to an application, in a proceeding, for leave to make an amendment mentioned in this rule if a relevant period of limitation, current at the date the proceeding was started, has ended.
> …
> (4) The court may give leave to make an amendment to include a new cause of action only if—
> (a) the court considers it appropriate; and
> (b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment.

[165] In my view the condition in sub-rule 376(4)(b) is satisfied. The test is whether the additional facts arise out of the same "story".[37] The cause of action in nuisance is based on the same allegations of water incursions, at the same time, in the same way, with the same effects, certainly physically and to a large extent financially, as set out in the original form of the pleading.

[166] A submission was made that the sub-rule was not satisfied because those earlier causes of action ought to be struck out. I accept that it would be a material consideration if all existing causes of action were struck out as not maintainable, however that factor seems to me to be best considered under sub-rule 376(4)(a) - as to whether it is "appropriate" to give leave.

[167] On that point, Ms Heyworth-Smith for Laroar submitted, in the course of oral argument:

(a) Laroar is required to defend against a claim that is raised well after the time that the legislature expected a defendant to face such claims;
(b) No matters are placed before the Court to explain why nuisance wasn't pleaded in the first instance;

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[37] *Draney v Barry* [2002] 1 Qd R 145 per McMurdo P at [4] and per Thomas JA at [57]

(c) No matters are placed before the Court to explain why the defendant is not prejudiced by the addition of the cause outside the limitation period;
(d) The nuisance claim as currently pleaded would stand alone – there is no other claim that it would attach to;
(e) The effect of the order would be to jettison the proceeding as it currently stands and substituting a statute barred proceeding which is not what r 376(4) was intended to achieve; and
(f) that leave could only have effect back to at best, 8 February 2010 (ie a date six years before the hearing of the application) or perhaps six years before my determination of the application.

[168] That last submission whilst initially pressed was abandoned and properly so in my view. It misconceives the effect of leave being given. If the matter was in doubt it was settled in *Lynch v Keddell (No 2)* [1990] 1 Qd R 10. Macrossan CJ said there (McPherson J agreeing), in relation to the question of whether a defendant added out of time could plead the limitation statute in bar:

> "…The apparent difficulty which has been felt arises from the rule that ordinarily a defendant who is joined is treated as becoming a party only at the date of joinder and no relation back operates to make him a party as from the writ or the commencement of the proceedings to which he has been introduced as party: *Ketteman v. Hansel Properties* [1987] A.C. 189. *The rule is different where amendments are made to proceedings between continuing parties. These are deemed to apply as from the commencement of the proceedings between those parties*: cf. *Sneade v. Wotherton Barytes and Lead Mining Company* [1904] 1 K.B. 295 and *Warner v. Sampson* [1959] 1 K.B. 297.
>
> Just as in *Adam v. Shiavon* it was said that the right to plead the statute was gone when an amendment permitting the addition of a new cause of action was ordered under O.32 r.1 [the predecessor to r 376] …
>
> *It so happens that in the case of amending to add a cause of action out of time against an existing defendant the principles which have been adopted say that the amendment relates back to the time when the defendant first effectively was made a party to proceedings* and this means that there is no opportunity, by mounting a supplementary argument, to contend that the defendant after the addition of the new cause of action may plead the statute in bar."[38]

[169] The proceedings here were commenced on 19 May 2015. A six year limitation period applies: s 10(1)(a) *Limitation of Actions Act* 1974. If Laroar chooses to plead the limitation statute in bar then, assuming leave to include this claim is given, the claim will be effective only for incursions subsequent to 19 May 2009.

[170] Notice was first given of this claim with the delivery of the proposed amended pleading on 15 January 2016. Ozibar was within time to issue proceedings in mid-January 2016 for intrusions that occurred after mid-January 2010. Several such

[38] My emphasis

incursions are pleaded.[39] Had Ozibar preferred it was quite entitled to issue a new Claim and Statement of Claim alleging nuisance for events that occurred from mid-January 2010 on. It was understandable as to why it did not. The delay since then has come about because of the time taken to bring the matter on for hearing and in awaiting this judgment. Subject to what I have to say later[40] there is no reason why amendment to permit a claim in nuisance, at least to that extent, should not be allowed in these proceedings – the limitation statute is irrelevant.

[171] However Ozibar seeks a wider order. If amendment is allowed to add a cause of action in nuisance for those incursions out of time then the practical effect of the amendment sought will be to bring into account water incursions pleaded to have occurred in a four month period between 18 September 2009 (the pleaded incursions prior to that date pre-dating 19 May 2009) and 15 January 2010, six years before notice of the claim was given. Incursions were said to have incurred in that period.[41]

[172] That analysis effectively disposes of the complaint that Laroar is required to defend against a claim that is raised "well after" the time that the legislature expected a defendant to face such claims. The delay in bringing proceedings to Laroar's notice is four months. It is not a substantial delay. No doubt, part of that delay came about because Ozibar awaited the delivery of my decision consequent upon the arguments last October.

[173] The complaint that no explanation is given as to why nuisance was not pleaded initially does not take the matter very far. The reason is clear enough – the proceedings were first founded on the mistaken assumption that the compensation provisions of the *Retail Shop Leases Act* applied. A plea in nuisance would have added nothing or nothing substantial.

[174] Prejudice is of course always relevant. I am conscious that it is not merely the "marginal prejudice" consequent upon a delay of four months that is relevant.[42] The prejudice may be palpable or may exist without either of the parties being able to point to it.[43] Laroar complains that no evidence was led demonstrating that no prejudice would be suffered by Laroar if the amendment was allowed. While true in the sense that no evidence was led directly dealing with the issue, there was substantial evidence before the Court from which inferences can be drawn. It is apparent from the affidavit material that Laroar has been made well aware over the years of Ozibar's complaints about water intrusions and the alleged effects on its business. That the facts are now categorised as amounting to a nuisance does not obviously create prejudice.

[175] It needs to be borne in mind that, while Ozibar has the overall onus, here it must prove a negative, with all the difficulties that involves. And further the argument assumes that Ozibar should know what prejudice Laroar might experience. If a party suffers prejudice from a proposed amendment one expects that party to alert the Court to that prejudice. Laroar did not do so.

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[39] See [12] above
[40] See [272]
[41] *Ibid*
[42] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541
[43] *Ibid* at 551 per McHugh J

[176] Finally the effect of my orders will be to permit Ozibar to re-plead, if it is so minded, in relation to causes of action that can be said to be maintainable principally following the commencement of the head lease in November 2012. This will not be a case of jettisoning all prior causes pleaded and substituting an entirely new cause out of time.

[177] Relevant factors favour the granting of leave to amend despite the expiration of the limitation period.

[178] There remain peculiarities in the claim for damages in nuisance. They are more marked in the claim made later in the pleading for damages for nuisance arising during the currency of the "new lease". I will deal with the issues there.[44]

Paragraphs 131 to 146

[179] These claims relate to the "new lease" ie the lease the parties entered in to in November 2012. In the sections that follow Ozibar pleads, or purports to plead, an entitlement to compensation under the *Retail Shop Leases Act* during the period of that new lease.

[180] The complaint is that there is an issue estoppel.

[181] I have dealt with the arguments previously – see [103] to [111] above. There is no issue estoppel. However there are other problems.

[182] Paragraphs 131 to 135 merely repeat and rely on 20 named paragraphs. Why these paragraphs are relevant is not stated. Some seem clearly to be not relevant (paragraphs 91 to 97; 100), some potentially are (the paragraphs pleaded in paragraph 132 – the pleading of the entry into the new lease and the terms of it; the water entry of January 2013 pleaded in paragraph 101), and in respect of some it is impossible to know (75B).

[183] The striking feature of the 16 paragraphs (131 to 146) is that a further 40 or so paragraphs are called up, each of which, save the potentially relevant paragraphs just mentioned, refer to events that pre-date the entry into the new lease, or to losses said to have been suffered before that time, but nonetheless are advanced as relevant to the present claim, albeit without explanation. How such events or losses can be relevant presently escapes me. Out of deference to the pleader I will analyse the claims made but little more needs to be said to justify the striking out of the whole claim on the basis that the pleading at least has a tendency to prejudice or delay the fair trial of the proceeding, if indeed there is any reasonable cause of action disclosed.

[184] In the introductory section Ozibar's pleading refers back to a number of paragraphs that I have said should be struck out – 91 to 97, 75B, 76B, and 101. If any of the facts there mentioned are now relevant then it will be necessary for Ozibar to re-plead to allege precisely what breaches or other relevant acts it says occurred in the relevant period to establish its right to compensation.

[185] In Paragraph 134 Ozibar repeats and relies on paragraph 100 (the depletion of Ozibar's capital at the time of entry into the new lease) which in turn refers the

[44] See [259]-[273] below

reader back to paragraph 75A. That paragraph pleads the "total losses sustained by the Plaintiff in operating [the nightclub] from 1 August 2009 to 27 November 2012". It is not shown how that allegation is relevant to any cause of action said to arise under the new lease entered into after that period had ended. The pleading has a tendency to prejudice or delay the fair trial of the proceeding. It should be struck out.

[186] The claim advanced refers separately to various sections of the Act. I will deal with the arguments accordingly. The claim refers back to paragraphs 47, 48 and 49 which effectively plead that the provisions of s 43(1) (c), (d)(ii) and (e) of the Act respectively were implied in the head lease, sub lease and monthly lease in place prior to 27 November 2012.

Section 43(1)(c) of the Act – paragraphs 136 to 138

[187] The claim here is said to be pursuant to the term pleaded in paragraph 47. Paragraph 47 pleads that the leases there under consideration contained this term (from s 43(1)(c) of the Act):

> "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 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."

[188] It can be seen that two of three things must be shown – (1) the lessor has done an act or acts (2) which causes significant disruption to the lessee's trading in the leased shop; or (3) the lessor does not take all reasonable steps to prevent or stop significant disruption within the lessor's control. Then there should be a pleading particularising the compensation said to be owing flowing from the alleged act or inaction. I cannot discern from the pleading:

(a) what act Ozibar asserts that Laroar has done which has caused "significant disruption to the lessee's trading"; or
(b) alternatively what steps Ozibar asserts were within Laroar's control that Laroar reasonably should have taken to stop such disruption; or
(c) whether there was such disruption and if so what is the nature and extent of it; or
(d) what reasonable compensation is causatively related to the alleged act or failure to act.

[189] Turning to what is pleaded - at paragraph 136 Ozibar refers back to paragraphs 101 to 109 and then pleads that "in the premises":

(a) [in paragraph 136(a)] that the "facts alleged" in those several paragraphs "either in complete or partial combination or singly constituted, on the proper construction of the term alleged in paragraph 47 hereof 'significant disruption to the lessee's trading in the leased shop'";
(b) [in paragraph 136(b)] after a reference back to paragraphs 81 and 82 "alternatively" that Laroar did not take all reasonable steps to prevent or stop significant disruption within its control.

[190] The significant problem is that "the premises" pleaded do not lead to the conclusion pleaded.

[191] The principal difficulty with paragraph 136(a) is that there is no pleading of any act done by Laroar or its agents in any one of the paragraphs 101 to 109, let alone an act that "causes significant disruption to [Ozibar's] trading".

[192] It is necessary to examine the paragraphs in question more closely to demonstrate the point.

[193] In paragraph 101 it is pleaded that rain fell in January 2013 and entered through the northern and eastern walls of the building. This is the only express reference to water entry during the currency of the lease. Presumably it is not intended to plead that Laroar caused the rain to fall and it is not expressly pleaded, and it would need to be if it was to be alleged, that Laroar did an act that caused rain to enter the building.

[194] Paragraph 102 pleads in effect that as a result of the rainwater entry in January 2013 the nightclub business suffered a "loss of net profit" and that made it "difficult" to keep operating. There is no pleading of the loss of net profit said to have been suffered.

[195] Paragraph 103 pleads that despite the water entry in January 2013 Ozibar could have kept trading but for the earlier depletion of its capital. I have previously mentioned the confusion this pleading creates.

[196] Paragraph 104 refers back to paragraph 78 (Laroar served a notice under the *Property Law Act* on Ozibar) and then pleads that but for the water entry in January 2013 and the depletion of its capital Ozibar could have kept paying the rent due and kept operating the nightclub. Paragraph 105 pleads that Ozibar ceased operating the nightclub and surrendered the lease. Paragraph 106 essentially repeats paragraph 104. Paragraphs 107 to 109 plead that three competitor nightclubs closed, there would have then been only two nightclubs left if Ozibar could have kept trading, and Mackay's population could support two nightclubs.

[197] But none of the matters pleaded in paragraphs 101 to 109 has anything to do with Laroar and its actions or inactions during the currency of the lease in question. What is missing is an allegation that Laroar (or its agent) either did an act that caused the rain to enter the building or failed to take reasonable steps to prevent or stop the disruption caused by the water entry.

[198] It might be thought that the pleading in paragraph 136(b) cured the problem, and so it might, save for three problems.

[199] The first is that the word "alternatively" is used. I do not follow why. Paragraph 136(b) "repeats and relies" on paragraphs 81 and 82. Paragraph 81 pleads the "reasonable steps "within Laroar's control that Laroar could have taken to stop the "significant disruption alleged in paragraph 80". Paragraph 82 pleads that the steps were not taken. But these cannot be in the "alternative" to the matters alleged in paragraph 136(a) as "the premises" in paragraph 136(a) do not show any cause of action. The allegation here is essential to establish a cause of action.

[200] The second problem is that to "repeat and rely" on a previous paragraph which by its terms relates to a specific complaint referable to a specific period, and a period quite different to the one in question, is inherently confusing. Perhaps what is meant

is that Laroar should have taken the steps alleged in paragraph 81. But that is not what is said. This is not mere pedantry. The form of the pleading raises the question as to whether Ozibar intends to assert that Laroar should have taken these steps at the time with which paragraph 80 is concerned. If Ozibar intends to so plead then it must do so expressly, not by implication. But if that is the intent I would strike the pleading out as not maintainable. Ozibar cannot assert as a breach of a lease a failure to do an act before that lease was entered in to.

[201] That leads me to the third problem which is related to the second. To what extent is the reference to paragraph 81 intended to "repeat and rely" on the facts alleged in paragraph 80 to which it refers?

[202] Paragraph 80 itself relies on 15 prior paragraphs most of which have nothing to do with disruption to trading but some do.

[203] Those paragraphs which do assert facts which could be seen to relate to such disruption are paragraphs 62 (the issuing of the closure order in 2009), 66 barricading off a section of the nightclub), and 68 (consequent reduction of maximum patronage by 65 persons who each would have spent $60 per day). I assume that no reference is intended to the effects of the closure order made more than three years before the new lease was entered in to but if it is said to be relevant here then there would need to be a pleading demonstrating that fact. There is none. Assuming that the reference to the closure order is not intended there remains the question of whether there is intended to be a reference to paragraphs 66 and 68? If not, the problem then is that there is no pleading of what effect the water entry in January 2013 had on trading – an essential feature of the claim.

[204] Those paragraphs referred to in paragraph 80 which do not appear to relate to such disruption include paragraphs 34, 37, 39, 44, 70, 71 and 77 which each describe the path of travel of rainwater into the building (or call up paragraphs that do so), paragraph 57 which essentially repeats the first four of those paragraphs, paragraph 58 which relates that water pooled in certain places and that Ozibar did not know that was occurring, paragraph 64 which asserts that Ozibar first discovered the presence of pooled water in January/February 2010 and notified Laroar, and paragraph 65a which asserts that Ozibar's servant or agents first observed water entering through a particular place. There is no fact pleaded which shows how any of this is relevant to water entry that occurred during the currency of the lease. Perhaps they are not intended to be called up by the reference. But I suspect that they are. The difficulty is that Laroar cannot know what it is to plead to in the context of the claim made under this lease.

[205] There are other problems with the pleading. I said earlier that the water entry of January 2013 pleaded in paragraph 101 is the only express reference to water entry said to have occurred after the commencement of the new lease in November 2012. I say "express reference" as the implication of the pleading at paragraph 77 (called up in paragraph 101) is that there was more than one such rainfall in the relevant period - Ozibar there pleads "during periods of large rainfall in Mackay from 27 November 2012 onwards rainwater intruded into [the nightclub] as alleged in paragraph 71 hereof and with the consequences alleged in paragraph 59 hereof." Laroar is entitled to know the case it has to meet – is the case that is advanced limited to the one entry of water that is pleaded or more than one and, if the latter, particulars are needed. At present the case pleaded is confusing.

[206] Another problem – and this is almost certainly an error - is that there is no pleading of any effects from the entry of water alleged to have occurred through the northern wall. In relation to the eastern wall it is said that the entry of rainwater "caused the conditions and effects alleged in paragraph 77". The omission of any effects from the entry through the northern wall means that there was no need to plead it. But I assume that this omission is an error as, if one follows the rather tortuous path through the paragraphs referred to, the implication is that the northern wall is of some significance, at least on earlier occasions (see the references to water pooling at the base of the northern wall (paragraph 71b, 57a, and 34c and 34d) and, while not referred to, see the emphasis given in paragraph 63D to the "state of the northern wall" in causing the conditions alleged in paragraph 59).

[207] Another apparent error is the reference to paragraph 67 (presumably intended to be to paragraph 69) called up in paragraph 71, which is called up in paragraph 77, which is called up in paragraph 101.

[208] I suspect that all this is intended to say is that following the rainfall of January 2013 water gained entry to the building by one or other or each of the means described in paragraphs 34, 37, 44 and 70; there was consequent pooling of water as particularised in paragraph 71; the pooling had the effects particularised in paragraph 59; that in turn caused significant disruption to Ozibar's trading (not particularised); that disruption could have been prevented if Laroar had undertaken the steps pleaded at paragraph 81; those steps were not taken; thereby Ozibar is entitled to compensation under the term relied on (again not particularised). If that is what was meant it was not said.

[209] In summary the facts alleged in paragraphs 103 to 109 have nothing to do with the issues raised by the term said to be included in the lease. Paragraph 101 is potentially relevant as it pleads the entry of rainwater which is the starting point but it is inherently confusing. There is no pleading of the disruption to trading caused by the intrusion nor of its financial consequences – unless the intent is to refer back to paragraphs 66 and 68, which is far from clear.

[210] In my view paragraph 136 is confusing and has a tendency to prejudice or delay the fair trial of the proceeding.

[211] Then there is the question of the proper pleading of the breach of the implied term and the loss and damage said to flow from the alleged breach of the implied term.

[212] Paragraph 137 refers back to paragraphs 92, 93, 100, and 102 to 109. Paragraph 138 then pleads:

> "As a result of the breach alleged in paragraph 137 hereof the Plaintiff sustained loss and damage alleged in paragraph 110 hereof which the Plaintiff repeats and relies upon; and the Plaintiff claims one or other sum alleged therein together with interest as alleged therein as reasonable compensation for the breach of the implied term in the new lease alleged in paragraph 47 hereof."

[213] There are two difficulties. The first is that there is no breach pleaded in paragraph 137. The second is that the loss and damage pleaded in paragraph 110 is not related to any possible breach of the alleged implied term. To return to paragraph 137 and

its references to paragraphs 92, 93, 100, and 102 to 109. The paragraphs do not allege a breach of the term said to be implied. Paragraph 92 pleads that from October 2013 there was "additional competition" to the nightclub business and that there was a downturn in trade because of the downturn in the mining industry in the area. Paragraph 93 pleads that Ozibar knew these things the year before when it decided to and did enter into the new lease. Paragraph 100 pleads that at the time of entry into the new lease Ozibar's capital was depleted by not less than $1,015,264.04 and refers the reader back to paragraph 75A. I have described the effect of paragraph 75A previously[45] - it refers to the losses alleged to have been sustained up to 27 November 2012. I have summarised the effects of paragraphs 102 to 109 above.[46]

[214] None of the matters alleged even assert an act by Laroar or a failure to act – they cannot possibly involve a breach by Laroar of the term alleged.

[215] Given the absence of any identified breach paragraph 138 cannot logically describe the loss and damage suffered following any breach. But, as mentioned, paragraph 110, to which paragraphs 138 refers, on its face, claims the whole of the benefit of the lease contract, not damages during the period (so far as the pleading shows an unidentified period) that the lessor failed to prevent water intrusion causing an interruption to trading. The surrender of the lease is said to have been caused by the difficulty in trading following the January rainfall (the extent, duration and effect of those difficulties being unexplained) and the depletion of capital in the years before the parties entered into the lease in question – not due to a breach of the implied term. I return to the problems presented by paragraph 110 later.[47]

[216] The compensation to which Ozibar can claim to be entitled depends entirely on the disruption that it can prove flows from the rainfall and consequent water entry of which it complains. If the claim is that Laroar failed to take reasonable steps open to it to prevent that disruption then one issue will be how long it should have taken for Laroar to reasonably implement those steps – Ozibar must presumably bear the consequences in the meantime. Without a precise pleading on the point Laroar cannot respond to the claim. The steps alleged in paragraph 81, on their face, involve substantial work – providing waterproofing of the northern and eastern walls, waterproofing of certain joins and fire doors, and construction of a wall shielding the northern wall. If Ozibar's real intent is to plead that these steps should have been taken before the rain fell in January 2013 then that needs to be expressly pleaded. As presently pleaded that allegation is not squarely raised but is suggested.

[217] Paragraphs 136 to 138 should be struck out.

Section 43(1)(d)(ii) of the Act– paragraphs 139 to 142

[218] Here the claim relies on the implication in the new lease of the term implied by s 43(1)(d)(ii) of the Act. The pleading is found in paragraphs 139 to 142. I have received no submissions on the pleading save on the estoppel point. However I found the pleading confusing and make the following observations.

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[45] See [157] and [185] above
[46] See [193]-[197] above
[47] See [275] – [279] below

What needs to be pleaded

[219] Paragraph 48 of the statement of claim pleads that by reason of s 42(1) and s 43(1)(d)(ii) of the Act there was included in the leases there mentioned the following term:

> 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 does not have rectified as soon as is practicable 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."

[220] It can be seen that to succeed to compensation pursuant to the term said to be implied requires that the following be shown and therefore pleaded:

(a) There must be a defect in the retail shopping centre or leased building containing the leased shop;
(b) The defect must not be "due to a condition that would have been reasonably apparent to the lessee when the lessee entered into the lease";
(c) That the lessor, or a person acting under the lessor's authority, failed to rectify the defect as soon as practicable;
(d) That as a result of that failure the lessee suffered loss or damage.

[221] I would have thought that these four facts could be very easily pleaded in a few simple, short paragraphs. While there are only four paragraphs they are far from simple. Over 30 paragraphs are called up.

What is pleaded

[222] As I follow the pleading the defect that is identified is that rainwater enters the building. That appears from paragraph 139 where Ozibar "repeats and relies on the facts alleged in paragraphs 86 and/or 94 and 95 and 101" of the statement of claim and then pleads: "In the premise thereof entry of rainwater through both parts of the northern and/or eastern walls alleged in paragraph 101 [ie the entry of rainwater in January 2013] hereof was, on the proper construction of the implied term alleged in paragraph 48 hereof 'any defect in the leased building containing the leased shop.'"

[223] In paragraph 140 Ozibar pleads that it repeats and relies on the same paragraphs as mentioned in paragraph 137 of the pleading - paragraphs 92, 93, 100, and 102 to 109.

[224] Paragraph 141 then pleads: "By reason of the premises alleged in paragraphs 139 and 140 hereof the defendant breached the implied term in the new lease alleged in paragraph 48 hereof." For the reasons previously identified "the premises" alleged in paragraph 140 do not show any breach.[48]

[48] See [193]-[197] and [213] above

[225] Paragraph 142 repeats the reliance on most of the paragraphs mentioned in paragraph 140, then pleads that the loss sustained as a result of the breach alleged in paragraph 141 was as particularised in paragraph 110.

What does the pleading mean?

[226] I have some trouble following the point of the pleading in paragraph 139. If it is intended to assert that the fact that rainwater entered the building is the relevant defect then why not simply state that fact and why add the reference to any prior paragraph?

[227] Examination of paragraphs 86, 94 and 95 that are repeated and relied on does not assist in clarifying the intended meaning. Each of the matters pleaded in paragraphs 86, 94 and 95 relate to events that occurred before the parties entered into the new lease or to actions that Ozibar says Laroar should have taken long before the lease was entered into. I will detail the allegations.

[228] Paragraph 86 pleads:

> 86. The Plaintiff repeats and relies upon paragraphs 61, 63(b), 64(c), 65(c), 67, 72 and 74 hereof. In the premises of paragraph 61 hereof, the Defendant:-
>
> (a) by no later than 14 August 2009 could have had rectified "*as soon as practicable"* all of the defects alleged in paragraph 85 hereof; or in the alternative
>
> (b) by no later than 18 September 2009, or by no later than January or February 2010 or by no later than approximately March 2010 could have had rectified "*as soon as practicable"* all of the defects alleged in paragraph 85 hereof.
>
> within the meaning of that term as is used in the implied term alleged in paragraph 48 hereof.

[229] Paragraph 94 pleads that in early October 2012 rainwater caused shortage of the electrical system at the nightclub with consequent effects on patrons.

[230] Paragraph 95 pleads that emails were sent by Ozibar to Laroar's agent notifying the agent of the power failure in October 2012 and the consequent effects on patronage and income. The new lease was entered into over a month later.

[231] If I am following all this, nowhere does Ozibar plead what is the physical condition of the building that permitted the rainwater to enter on the relevant occasion – in January 2013. That matter is pleaded elsewhere and in relation to a different time but not called up here. The legislation assumes a distinction between a "defect" and a "condition". Ozibar asserts here that the "defect" is the capacity of the building to permit water entry. Presumably the "condition" then is the physical state of the building that allows that to occur. That is certainly an arguable approach. The problem from a pleading point is that Ozibar has also alleged that the "defect" is the physical state of the building.

[232] That there is this potential confusion becomes apparent when paragraph 85, referred to in paragraph 86, is examined. An oddity of the pleading is that paragraph 85 is not expressly relied on in this section of the pleading but presumably it is called up by the reliance on paragraph 86. In paragraph 85 Ozibar pleads the defect in the building said to be relevant to the implication of the same implied term in relation to the same building but at an earlier time. Yet the defect pleaded is not precisely the same. Paragraph 85 repeats and relies on 19 prior paragraphs (none of which are now expressly relied on) and then asserts that "in the premises … each and every of the fissures and/or seepage or entry of rainwater" is the relevant "defect". Whether the relevant "defect" is identified as the physical condition of the building (ie the fissures or other physical imperfections that allegedly permit water entry) or the effect of those imperfections (ie that rainwater gets into the building) may not matter. However I suspect that it is relevant because if the earlier water entries are in any sense pertinent then Ozibar would need to show the water entry in January 2013 came about because of the same imperfections that permitted the water entry previously. Whether that is so or not, Laroar is entitled to know the case it has to meet.

[233] The paragraphs that Ozibar repeats and relies on in paragraph 86 each allege, in different ways, Laroar's alleged knowledge of prior entries of water. Those paragraphs are paragraph 61 (Ozibar brought the conditions pleaded in paragraph 59 to Laroar's attention on numerous occasions between April and August 2009), 63(b) (Laroar knew of the closure order of April 2009), 64(c) (Ozibar notified Laroar of the presence of pooled water in January/February 2010), 65(c) (Ozibar notified Laroar in March 2010 of what precisely is not said but presumably of water entry and Laroar's agents inspected same), 67 (Laroar knew through its agents of water entry on dates unspecified but well before November 2012 and knew Ozibar had barricaded off part of the nightclub), 72 (Laroar knew through its agents of water entry into the nightclub between 18 September 2009 and 27 November 2012) and 74 (Laroar knew thought its agents of the continuation of the conditions pleaded in paragraph 59 at times unspecified).

[234] To translate the pleading at paragraph 139 into understandable form it can be seen that what is alleged is:

(a) That rainwater entered the building in January 2013;

(b) That rainwater had gained entry to the building on numerous occasions prior to Ozibar entering into the new lease (and while not entirely clear perhaps by the same means);

(c) That Laroar knew that water had gained entry on those prior occasions as Ozibar had alerted Laroar to that fact and Laroar, through its agents, had on occasions witnessed that fact;

(d) That the water entry had caused the problems alleged in paragraph 59 and the power shortage alleged in paragraph 94, and Laroar knew of those problems as Ozibar had told Laroar or its agent about them at the time or soon thereafter;

(e) That the problems mentioned in paragraph (d) had impacted adversely on patronage and income and Laroar had been advised of that;

(f) That Laroar could have rectified the defect (ie the capacity for the building to permit rainwater entry) by no later than March 2010.

[235] When put in this form the difficulties with the cause of action alleged are revealed. Putting to one side any potential confusion from pleading alternative forms of defect there are two problems. The first is that Ozibar seeks to rely on acts that it is said should have occurred before the parties were in the relevant contractual relationship as a breach of the terms of that contract. Relevantly, there is no pleading that Laroar could have rectified the defect alleged in the time that the parties were in the relevant contractual relationship that imposed the obligation to pay compensation if Laroar failed to act.

[236] The second problem is that Ozibar was well aware of all relevant matters when it entered into the lease - that rainwater did enter the building, that that entry caused the conditions of which it now complains, and that those conditions caused a disruption to its trading. Given the pleading I cannot see how Ozibar can avoid a finding that the defect complained of was due to "a condition that would have been reasonably apparent to the lessee when the lessee entered into the lease", however one defines "condition". There is no pleading that the condition that caused the defect was one that was not reasonably apparent to Ozibar when it entered into the lease. It is debateable as to whether a plaintiff must plead a negative condition – it is arguably one for the defendant to raise. But the oddity here is that Ozibar, by its own pleading, seems to squarely raise the issue and answer it adversely to its own interests.

[237] Even if the case be put that I suspect Ozibar seeks to advance the pleading is deficient. At the very highest for Ozibar its case is:

(a) by reason of the matters set out in [234](b) to (e) above upon entering into the new lease Laroar came under an immediate duty to rectify the defect identified (ie the capacity for the building to permit rainwater entry) even before rain fell;

(b) that Laroar, or a person acting under its authority, failed to rectify the defect as soon as practicable;

(c) that by reason of that failure water gained entry in January 2013 and Ozibar thereby suffered loss and damage.

[238] That case is not yet pleaded. I have received no submissions on whether it is a viable one. The problem of Ozibar's obvious knowledge of the deficiencies in the building remains. As I have previously indicated it is a peculiar argument to advance that as a result of deficiencies in the building of which both parties were aware at the commencement of the lease it is Laroar that must bear the risk of Ozibar's business venture. I return to this issue later.[49]

[239] Finally the pleading is deficient in its pleading of the loss and damage said to have been sustained. What Ozibar must plead is the loss and damage suffered as a result of the failure of Laroar, or a person acting under the Laroar's authority, to rectify the defect as soon as practicable. There is no reference to that in paragraph 110. It is incumbent on Ozibar to plead (as it did at paragraph 86 in relation to the earlier claimed water entry) the period of time within which Laroar could practicably have attended to the defect once it came under an obligation to do so. It then must plead the impact on its business and trading (as it did at paragraphs 66 and 68 in relation to the earlier claimed disruptions).[50]

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[49] See [277] below

[50] See [203] above

[240] So far as any loss or damage resultant on the alleged breach of the term Ozibar has the difficulty that on its own case it did not suffer the losses alleged in paragraph 110 as a result of the water entry in January 2013 – in paragraph 103 Ozibar pleads that despite the effects of the water entry in January 2013 Ozibar could have kept trading but for the earlier depletion of its capital. As I have said, at best this is confusing.

[241] As it presently stands the pleading is completely opaque as to the effect of the water entry in January – the extent and duration of it and the impact on Ozibar's trading. Each of these matters are needed to meet the requirements of r 157 UCPR – to prevent surprise and to enable Laroar to plead.

[242] Despite the lack of submissions on the pleading I have gone into some detail as I intend to give leave to re-plead and would hope to forestall further argument. In my view, as presently pleaded, the matters alleged in paragraphs 139 to 142 disclose no reasonable cause of action, have a tendency to prejudice or delay the fair trial of the proceeding, and should be struck out.

Section 43(1)(e) of the Act - paragraphs 143 to 146

[243] Ozibar pleads that there was implied in the new lease the term earlier pleaded at paragraph 49 of the statement of claim (in relation to the leases there under consideration). Paragraph 49 in turn referred to s 42(1) and s 43(1)(e) of the Act. The pleading is at paragraphs 143 to 146. The implied term relied on is as follows:

> "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 neglects to … maintain … 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."

[244] Again the method adopted of referring back to numerous paragraphs already pleaded makes it difficult to follow what precisely is being alleged here. Again Ozibar's pleading refers back to a number of paragraphs that I have said should be struck out – 92, 93, 101, and 102 -110. It will be necessary for Ozibar to re-plead to allege precisely what breaches or other relevant acts it says occurred in the relevant period to establish its right to compensation.

[245] However I make the following further comments.

[246] I cannot discern from the present pleading what precise inaction Ozibar alleges that constitutes the neglect to maintain. It may be the failure to remedy the small fissures in the grouting of the northern wall (see paragraphs 32 and 34) or the eastern wall (paragraphs 42 and 44), or it may be the entry of water beneath the fire doors (paragraph 37) or the ponding of water in the car park and entry into the grouting at the foot of the northern wall (paragraph 39). Each of these paragraphs is repeated and relied on in paragraph 144. But nowhere is it pleaded, that I can see, that the term said to be implied required these alleged deficiencies to be remedied to avoid the effects of water entry at the material time ie subsequent to entering into the new lease.

[247] While the pleading asserts that, because of these various defects, rainfall intrusion occurred "from approximately 26 January 2009 to approximately April 2009" with

consequent pooling of water at particular places (see paragraphs 56, 57 and 58) what is not said is that the defects led to water intrusion (or consequent pooling) on the only occasion that such intrusion is said to have occurred subsequent to the entry into the new lease - that of January 2013. That water entry is called up by the reference back to paragraph 101 (oddly, given its essential character, only in the form "and/or" following a reference to 15 earlier paragraphs) in paragraph 144. That is the only matter pleaded that I can discern for which compensation can be claimed for a breach of the term alleged to be implied in the new lease.

[248] Paragraph 145 then calls up the paragraphs earlier discussed[51] - paragraphs 92, 93, 100, and 102 to 110 (but omitting 108 on this occasion). Again the claim is made for the entire profit that Ozibar claims that it would have made during the entire period of the lease and assuming it exercised its option (or the amount for which it could have sold the lease), had it not surrendered the lease in May 2013. Yet the pleading states, as mentioned, that the water entry in January 2013 did not cause Ozibar to cease trading – rather it was the depletion of its capital over the years before.

[249] Again, at best, this is confusing.

[250] There can be no objection to Ozibar pleading that there was implied into the lease the term alleged. And Ozibar is quite entitled to plead a breach of that term and its effects. However in my view the present pleading does not disclose what Ozibar's case is. The pleading at paragraphs 144 to 146 has a tendency to prejudice or delay the fair trial of the proceeding and should be struck out. Paragraph 143 is explicable on its face and has relevance elsewhere in the pleading.

Paragraph 151 to 154

[251] These paragraphs plead a claim for damages for breach of the implied covenant alleged in paragraph 76H ie not to derogate from the grant. The claim relates to the "new lease".

[252] The complaint is that the pleading refers back to events that long pre-dated the entry into the new lease and is therefore unmaintainable and inconsistent.

[253] Ozibar's response is: "The Plaintiff repeats its Submissions in relation to paragraphs 123-126". Those submissions are of no assistance here.

[254] Laroar's complaint is accurate. There is a reference back to some 37 previous paragraphs. Ozibar seeks to plead events and complaints that its pleading says were relevant long before November 2012 (when this lease was entered into) as involving, or being relevant to, a breach of this implied term.

[255] In my view the reference back to some 37 paragraphs conceals rather than reveals the case that Laroar must meet.

[256] I suspect that the claim sought to be made is a relatively simple one – that at the time Ozibar entered into the lease the premises were not fit to be used as a nightclub because of the inevitability of water entry following heavy rain and consequent pooling of water in inaccessible places with the effects pleaded at paragraph 59;

[51] See [193]-[197] and [213] above

Laroar had notice of this by reason of Ozibar's many complaints between June 2008 and November 2012; Laroar could have taken steps to prevent water entry in January 2013 and did not.

[257] If the claim is to be made it must be pleaded so as to squarely raise the facts relied on. Most of the facts set out in the paragraphs that Ozibar "repeats and relies upon" are irrelevant to this claim. Again the pleading has a tendency to prejudice or delay the fair trial of the proceeding and should be struck out.

[258] There is however a more fundamental point. If I follow the pleading accurately – and I say that with some hesitation – the claim has the peculiarity I have previously mentioned. Ozibar asserts that Laroar derogated from the grant by leasing to it premises that were unsuitable to be used as a nightclub, that being the only permitted use, despite Ozibar being well aware of that alleged unsuitability when it entered into the lease. I repeat the observations made earlier about the lessee taking the premises as he, she or it finds them.[52] Authority indicates that the claim is not maintainable. The essence of a claim that a lessor derogates from the grant is that the lessor has done an act, or permitted an act to be done that it had the power to prevent, that "materially [alters] the circumstances within which the parties had contemplated that the tenant would utilise the premises", that constitutes a "substantial interference with the tenant's enjoyment of the benefits granted to it under the lease", and that renders the premises "materially less fit for the purpose of enjoyment in accordance with the parties agreement": see *Specialist Diagnostic Services Pty Ltd and Healthscope Limited* [2012] VSCA 175 at [135]; 305 ALR 569 at 594. No such act is pleaded. No authority is cited to support there being any obligation on a lessor to improve the building the subject of the lease. The touchstone is: What was the nature of the grant? What level of enjoyment was contemplated? How are the premises less fit than when the grant was made? Here, on its own case, Ozibar expected to receive a building the walls of which were in such a state that they permitted the entry of rainwater to such an extent that the profitability of its business was lessened. There is no pleading of any material change in the building from the time of the grant. So far as the pleading shows Ozibar got what it bargained for. The facts pleaded simply do not show a derogation from the grant made.

Paragraphs 155 to 159: Claim in nuisance under the new lease

[259] These paragraphs plead a claim in nuisance under the new lease.

[260] The complaint is that the claim is statute barred prior to 8 February 2010; relies on events said to have occurred as early as 2008; and repeats the claims said to derive from paragraphs 127 to 130.

[261] Ozibar submits:

> "Paras 155-159: The Plaintiff repeats the Submissions in relation to paragraphs 127-130. The Plaintiff can rely upon knowledge of the nuisance that the Defendant had or ought to have had prior to 27 November 2012 since the new Lease is a further Lease of Mainstreet, of which the Plaintiff

[52] See [149]

had been the lessee since 23 April 2008. That knowledge is relevant to what was reasonably foreseeable by the Defendant."

[262] The claim in nuisance here post-dates November 2012. The limitation statute is not relevant.

[263] The claim in nuisance related to the earlier period has not been struck out – see [168]-[186] above. Hence the complaint that the action here "derives' from the claim at paragraphs 127-130 is of no particular relevance.

[264] The complaint that the pleading relies on events said to have occurred as early as 2008 has more substance.

[265] There is a reference back to numerous paragraphs – over 30. I have found that several of those ought to be struck out. If relevant to the cause of action relied on here Ozibar will need to re-plead. Again the repeated reference back to paragraphs earlier pleaded makes the facts alleged here very difficult to follow.

[266] Ozibar's submission, as opposed to its pleading, makes clear that the references back to events prior to the entering in to the new lease are for the purpose of establishing what was reasonably foreseeable to Laroar. That is an essential matter for Ozibar to establish: see *Matthews v AusNet Electricity Services Pty Ltd & Ors* [2014] VSC 663 (23 December 2014) per Osborn JA at [230]. There can be no complaint about a pleading that says precisely that. This pleading does not. Again the method of repeating and relying on numerous prior paragraphs conceals more than it reveals.

[267] As presently pleaded the reference back to the prior paragraphs appears to have a very different purport. That is so because in paragraph 157 Ozibar pleads that by reason of various facts pleaded in 11 previous paragraphs[53] Laroar knew or ought to have known "of the nuisance that they [a reference to the state of the northern and eastern walls] created for the plaintiff from no later than 23 April 2008" or alternatively "the nuisance that they created or were likely to create for the plaintiff, no later than 23 April 2008."

[268] No fact is pleaded in the 11 paragraphs referred to that shows the state of knowledge of Laroar as at, or prior to, 23 April 2008. To plead that Laroar knew of the existence of the nuisance by 23 April 2008 requires that the nuisance exist before that date. There is no pleading, express at least, of any such nuisance.

[269] What is alleged is that Laroar knew or ought to have known of the "state" of the northern and eastern walls. It is pleaded that it is that "state" together with the entry of rainwater that constitutes the nuisance. Absent the entry of rainwater it is difficult to see how the state of the walls could constitute an actionable nuisance. The earliest rainfall pleaded occurred in January 2009.[54] The earliest claimed observable effects from water entry is pleaded to have been in April 2009.[55]

[270] Paragraph 153 pleads that Ozibar "repeats and relies" upon the facts alleged in 29 previously pleaded paragraphs. No distinction is drawn between them as to why

[53] Including a reference to paragraph 65(e) which does not exist in the pleading
[54] Paragraph 56 of the statement of claim
[55] Paragraph 59 of the statement of claim

they might be relevant. The paragraphs nominated include paragraphs 101 to 103 – they are the only paragraphs that deal with water intrusion into the building after the commencement of the new lease. Presumably Ozibar intends to assert that the nuisance complained of is that entry of water. If that is the case it should be clearly stated. That is so because Laroar needs to be able to plead to the precise complaint made.

[271] The further problem is the pleading of damage. Again the plea is by way of repeating and relying on paragraph 110. I have previously pointed out the confusing state of the pleading[56] and see below.[57]

[272] While what I have said is sufficient to show that the matter needs to be re-pleaded there is a more serious problem with the claim. I have received no submissions on the fundamental point of whether a claim in nuisance is maintainable by a lessee against a lessor where the lessee has exposed itself to the alleged nuisance by entering into the lease and into occupation of the leased premises when fully cognisant of the state of the premises that allegedly gives rise to the nuisance complained of. At common law it is a defence to an action in nuisance that the plaintiff consented to the existence of the nuisance or acquiesced in the nuisance.[58] Thus in *Leakey and Others v. National Trust for Places of Historic Interest or Natural Beauty*[59] Megaw LJ accepted that "while it is no defence to a claim in nuisance that the plaintiff has 'come to the nuisance', it would have been a properly pleadable defence to this statement of claim that the plaintiffs, knowing of the danger to their property, by word or deed, had showed their willingness to accept that danger." On the case pleaded I cannot see how Ozibar can avoid a finding of such a "willingness to accept that danger" posed by the rainwater intrusion. On its own case it pleads consent to or acquiescence in the nuisance: Ozibar pleads that it was not aware of the water entry problem when it took up the assigned sub-lease in April 2008 (paragraph 45); but it pleads that it was by January 2010 (paragraph 64) and so before the head lease was assigned to it in November of that year (paragraph 26G) and well before the entry into the new lease two years later (paragraph 76); as previously mentioned it pleads that by the time of entry into the new lease on 27 November 2012 it had suffered losses in excess of $1M because of the problem (paragraph 75A).

[273] For the reasons earlier mentioned the pleading has a tendency to prejudice or delay the fair trial of the proceeding and these paragraphs should be struck out.

Paragraphs 147 to 150

[274] No specific complaint was made about paragraphs 147 to 150 which plead a breach of the covenant in the new lease that Ozibar "peacefully enjoy" the premises. But virtually all that I have said about the deficiencies in the pleading of the previous claims applies with equal force here. There are numerous paragraphs referred to for reasons that do not clearly emerge, with conclusions drawn that do not plainly follow, and an allegation of damages that seems totally unrelated to the breach

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[56] See [215], [240] and [248]
[57] See [275] – [279]
[58] See Halsbury's Laws of Australia 415 Tort, '3 Nuisance' [415-810]
[59] [1980] QB 485 at 515

alleged. I refer also to the section of these reasons dealing with paragraphs 118 to 122 of the pleading.[60]

Loss and damage

[275] Before leaving the matter I should observe that the pleading of damage in paragraph 110, quite apart from its confusing nature and the failure to relate the losses claimed to the precise covenant or duty said to have been breached, assumes an entitlement to the whole of the profit that Ozibar claims it would have made (or the profit obtainable had the lease interest been previously sold) had it not surrendered the lease and had the lease run its course. I do not see how that claim is maintainable absent a plea that Laroar repudiated the lease or absent a plea that Ozibar was entitled to terminate the lease by reason of some serious breach of the lease by Laroar.

[276] As the pleading presently stands Ozibar asserts that it surrendered the lease because it ran out of capital and because water entered the premises in January 2013 reducing its "net profit" (which I take to be a different thing to operating at a loss).[61] In doing so Ozibar was, *prima facie* at least, in breach of the terms of the lease. Pleading one's own breach of a contract does not entitle one to the loss of the benefit of the whole contract.

[277] The various claims made that plead the damages set out in paragraph 110 each have the further peculiarity that the claim effectively put the entire risk of the venture on to Laroar. I know of no authority that would entitle a lessee to assert that it could enter into a lease of premises for a designated purpose, knowing of the risk that its profit would be less if and when it rained heavily because of the known condition of those premises, to then claim that damages were payable upon realisation of the risk. If Ozibar's approach is correct then it follows that a lessee can avoid the inconvenience of actually conducting a business and earning a profit by seeking out premises inadequate for their purpose, ensuring that the landlord knows that fact, and then having the landlord indemnify them for the profits that might have been earned but for the state of the premises.

[278] Consideration of what needs to be shown to establish a right to claim the loss of the benefit of the *whole* contract shows that the claim, as pleaded, is not maintainable. In discussing the damages payable upon a breach of the covenant for quiet enjoyment of sufficient seriousness to justify termination of a lease (and I think it may be said that it matters not whether the claim be described as a breach of such a covenant or a derogation from the grant[62]) Allsop J, as his Honour then was, made the following relevant observations in *Byrnes v Jokona Pty Ltd* [2002] FCA 41:

> 77 The necessity for the effect of the failure or breach to affect the substance of what was intended to be contracted for is reflected in the damages recoverable upon termination: the loss of the benefit of the *whole* contract.
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> 78 However one expresses it, the essential element is the deprivation of a benefit or of an entitlement or the imposition of a burden, sufficiently

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[60] See [144]-[152]
[61] See para 102 of the Statement of Claim
[62] See *Aussie Traveller Pty Ltd v Marklea Pty Ltd* [1998] 1 Qd R 1 at 8 per McPherson JA

> serious as to change the character of the grant to, or of the obligations or entitlements of, the other party to the contract to such a degree that it can be said to be a commercially different bargain. Such a rendering of difference from that which was intended may be caused by the breach, the actual consequences of the breach or the foreseeable consequences of the breach: see Carter *op.cit.* p.164 Article 24. Or, as Burchett J put it in *Amann Aviation Pty Ltd v Commonwealth* [1990] FCA 55; (1990) 22 FCR 527 at 553, if the breach is of such seriousness that (to borrow from Jordan CJ in *Tramways Advertising, supra* and Brennan J in *Laurinda Pty Ltd v Capalaba Park Shopping Centre* [1989] HCA 23; (1989) 166 CLR 623 at 642) it can be inferred that the innocent party would not have entered the contract unless assured that a breach of that gravity would not occur. See also here Treitel *Remedies for Breach of Contract* p 351 ftnt 61.
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> 79 In respect of breaches of the required seriousness it can be said that the breach went to the `root' of the contract (properly construed), that commercially it could not be performed (as originally contracted for) and that the party has been deprived of substantially the whole benefit of the contract (as originally agreed) - even if some residual contractual purpose or benefit is provided, if it is not what, in substance, was contracted for. In this respect see the discussion by Samuels JA in *Tricontinental Corporation v HDFI Ltd* (1990) 21 NSWLR 689 at 703 of the reference by Jordan CJ in *Tramways Advertising, supra* to the phrase `substantial performance' and its relationship to the development of the innominate or intermediate term after *Hongkong Fir, supra.*

[279] Far from showing that Ozibar "would not have entered the contract unless assured that a breach of that gravity would not occur" the pleading shows that Ozibar entered into the contract knowing that Laroar effectively refused to give that assurance – it refused to indemnify Ozibar if water entry did occur.[63] There is no pleading of "breaches … [that] went to the `root' of the contract (properly construed), that commercially it could not be performed (as originally contracted for) and that the party has been deprived of substantially the whole benefit of the contract (as originally agreed)."

Conclusion

[280] Ozibar seeks leave to "amend the Claim filed in this proceeding in accordance with the Amended Claim contained in Ex GCL1 to the affidavit of Gregory Charles Long". Given that much of the Amended Claim is not, in my view, maintainable I would refuse the leave sought. Leave should be given to file a further amended Claim as the Plaintiff may be advised.

[281] On 4 December 2015 I gave Ozibar leave to file such amended statement of claim as it may be advised within 28 days of that order. As mentioned the pleading now sought to be filed was not delivered until more than 28 days had passed. The delay is not of importance but the content of the pleading is. More than half of the present proposed pleading should be struck out. In the circumstances the simplest order is to refuse Ozibar leave to file the Amended Statement of Claim out of time but again

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[63] See [93] above

give Ozibar leave to re-plead. In the circumstances I propose to simply dismiss Ozibar's application of 27 January 2016.

[282] Laroar seeks an amendment to the costs order previously made which is not opposed. The order will be as proposed in paragraph 2 of the draft tendered by Ms Heyworth-Smith. Ozibar did argue that there should be a stay of the assessment process until after trial but no sufficient reason was shown as to why that should occur and there is good reason why it should – parties should be aware of the costs implications of their decisions.

[283] The orders will be:

(a) The Plaintiff's application filed 27 January 2016 is dismissed;

(b) The Plaintiff is given leave to file such amended Claim and Statement of Claim as it might be advised on or before 4 pm on 10 May 2016;

(c) Paragraph 3 of the Order made on 4 December 2015 is vacated and the following order substituted:

> 3. The Plaintiff, Gregory Charles Long and Narelle Long are ordered to pay the costs of the Defendant of and incidental to this Application and the Defendant's costs thrown away by reason of:
>
> (a) the striking out of paragraph 46 to 50 and 80 to 118 of the Statement of Claim; and
>
> (b) any subsequent amendment to the Statement of Claim.

(d) The Plaintiff, Gregory Charles Long and Narelle Long are ordered to pay:

(i) the costs of and incidental to the application filed on 27 January 2016 by the Plaintiff;

(ii) the costs of and incidental to the further hearing of the application filed on 17 September 2015 by the Defendant; and

(iii) the Defendant's costs thrown away by any subsequent amendment to the Statement of Claim;

(e) the parties have liberty to apply on the giving of three days' notice to the other.