SUPREME COURT OF QUEENSLAND

CITATION:	*Cleret v Sunshine Coast Regional Council* [2016] QSC 208
PARTIES:	**DANIEL CLERET** (plaintiff) **v** **SUNSHINE COAST REGIONAL COUNCIL** (first defendant) **AND** **DENISE BROOKS** (second defendant)
FILE NO/S:	No 6701 of 2014
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	23 – 27 November 2015; 3 – 5 February 2016
JUDGE:	Peter Lyons J
ORDER:	**The plaintiff's action is dismissed.**
CATCHWORDS:	TORTS – MISFEASANCE IN PUBLIC OFFICE – where first defendant had power under s 83 of the *Food Act* 2006 (Qld) (*Food Act*) to issue immediate suspension of food license – where the suspension could only be effected if the licensee was provided with a show cause notice – where plaintiff operated a restaurant – where plaintiff's food license was suspended without the provision of a show cause notice – whether evidence demonstrates that first or second defendants were actuated by malice, or knew that they were acting beyond power TORTS – TRESPASS – TRESPASS TO LAND AND RIGHTS TO REAL PROPERTY – where plaintiff operated a restaurant – where plaintiff's food license was suspended without the provision of a show cause notice – where plaintiff alleges that second defendant entered plaintiff's restaurant unlawfully – where second defendant was authorised by s 175 of the *Food Act* to enter food business premises open for carrying on the food business, or otherwise open for entry – whether premises were otherwise open for entry

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – GOVERNMENT AND PUBLIC AUTHORITIES – where first defendant had power under s 83 of the *Food Act* to issue immediate suspension of food license – where the suspension could only be effected if the licensee was provided with a show cause notice – where plaintiff operated a restaurant – where plaintiff's food license was suspended without the provision of a show cause notice – whether first defendant was under a duty to ensure officers acted within power – whether that duty was breached – whether alleged breaches of duty by defendants caused loss to plaintiff

Food Act 2006 (Qld) ss 8, 9, 20, 21, 35, 36, 49, 51, 78, 79, 80, 82, 83, 165, 167, 175, 176, 182, 209, 210, 211, 274, Part 6, schedule 3
Civil Liability Act 2003 (Qld) ss 11, 36
Uniform Civil Procedure Rules 1999 (Qld) r 149
Protection of the Environment Operations Act 1997 (NSW) s 91

Anns v Merton London Borough Council [1978] AC 728
Benning v Wong (1969) 122 CLR 249
Briginshaw v Briginshaw (1938) 60 CLR 336
Corkhill v Commonwealth [2015] ACTSC 216
Dunlop v Woollahra Municipal Council (1975) 32 LGERA 431
Dunlop v Woollahra Municipal Council (No 2) (1978) 40 LGERA 218
Dunlop v Woollahra Municipal Council [1982] AC 158
Fistar v Riverwood Legion and Community Club Ltd [2016] NSWCA 81
Halliday v Nevill (1984) 155 CLR 1
Holland v Saskatchewan [2008] 2 SCR 551
L (a child) v Reading Borough Council [2001] 1 WLR 1575
Neat Holdings Pty Ltd v Karajin Holdings Pty Ltd (1992) 67 ALJR 17
Northern Territory v Mengel (1995) 185 CLR 307
Perre v Apand Pty Ltd (1999) 198 CLR 180
Plenty v Dillon (1991) 171 CLR 635
Precision Products (NSW) Pty Ltd v Hawkesbury City Council (2008) 74 NSWLR 102
Rejfek v McElroy (1965) 112 CLR 517
Rowling v Takaro Properties Ltd [1988] 1 AC 473
Rush v Commissioner of Police (2006) 150 FCR 165
Sanders v Snell (No 2) (2003) 130 FCR 149

State of New South Wales v Paige (2002) 60 NSWLR 371
Sutherland Shire Council v Heyman (1985) 157 CLR 424
Takaro Properties Ltd v Rowling [1986] 1 NZLR 22
Tepperova v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 1147
Water Board v Moustakas (1988) 180 CLR 491
Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515

Hogg, Monahan and Wright, *Liability of the Crown* (4th ed), Carswell

COUNSEL: R Anderson QC for the first and second defendants

SOLICITORS: Barry.Nilsson. Lawyers for the first and second defendants

[1] In 2010, Mr Cleret owned a property at 5 Elizabeth Street, Kenilworth, on which for some time he had operated a restaurant. Ms Brooks was an Environmental Health Officer employed by the Council. On a number of occasions Ms Brooks inspected Mr Cleret's restaurant and issued notices relating to it. In July 2010, Mr Cleret ceased to operate the restaurant, and the property was subsequently sold by his mortgagee. He has claimed damages against Ms Brooks and the Council for misfeasance in public office, negligence and trespass.

History

[2] Mr Cleret commenced to operate the restaurant (on a part time basis) in about 1989[1]. The first recorded inspection by Ms Brooks was in 2006. She also carried out inspections on 31 December 2008, 22 January 2009, 11 March 2009, 2 June 2010 and 25 June 2010[2]. For all save the first of these occasions, there is a document described as a Food Business Inspection Report (*Report*), the form for each report referring to the *Food Act* 2006 (Qld). The reports generally recorded that corrective action was required. At least for the later of these inspections and reports, Ms Brooks held authority from the Council: a document dated 9 February 2009 signed by Lisbeth Dean as Executive Director Community Services of the Council recorded the appointment of Ms Brooks as an authorised person for, amongst other things, the *Food Act*[3].

[3] On about 25 May 2010, Ms Brooks sent an Information Notice to Mr Cleret giving notice of the requirements for hand washing facilities for licenced food premises[4]. The notice advised of a requirement to have a separate hand wash basin, specifying 12 months as the period for compliance.

[4] The critical inspection occurred on 25 June 2010. On that occasion, Ms Brooks took a number of photographs. Ms Brooks' inspection report book contains both the original and the carbon copy of a report bearing that date (*Report 11244*), stating that she was

1 T 1-9.
2 See Exhibit 61, Exhibit 51, Exhibit 22.
3 Exhibit 20.
4 Exhibit 10 p 70.

unable to complete the report, and that she started to write up a new report. The new report (*Report 11246*) recorded the results of her inspection; that assistance was sought from a police officer stationed at Kenilworth; that the licence had been suspended; that Mr Cleret was to cease to operate the restaurant; and it identified some corrective actions that were required.

[5] On 7 July 2010, Ms Brooks went to the restaurant and left three notices[5] attached to the door[6]. Two were Improvement Notices, issued in reliance on s 83 of the *Food Act*, alleging contraventions of the Act which were likely to continue. Of these, one was dated 6 July 2010, and set out 37 requirements to be complied with. The second was dated 7 July 2010, and required completion of a form called a Food Safety Supervisor Notification. The third notice, dated 6 July 2010, was an Information Notice, also referred to as a suspension notice, issued in reliance on s 83 of the *Food Act*, and gave notice that the licence for the restaurant under the *Food Act* had been suspended with immediate effect. All three notices were signed by Mr Jason Brewer, who held the position of Healthy Places Manager with the Council.

[6] On 16 July 2010, Ms Brooks again attended at the restaurant[7]. On that occasion, she took some photographs[8]. She completed another report (*Report 11258*) which contained a note including the words "Please do not operate as advertised for Sunday" and which referred, amongst other things, to the suspension. It also invited a telephone call to Ms Brooks to arrange an inspection, providing a mobile telephone number[9]. She left a copy of that report attached to the door of the restaurant. Mr Cleret did not attempt to arrange an inspection.

[7] On 3 August 2010, Mr Cleret sent a letter to the Chief Executive Officer of the Council, apparently intended as an objection to the suspension notice[10]. The document set out criticisms of Ms Brooks, and commented on the inspection of 25 June 2010, and on matters raised in Report 11246, the suspension notice and the Improvement Notice dated 6 July 2010.

[8] On 23 August 2010, following a conversation between them, Mr Greg Mulder, the Co-ordinator Environment Health for the Council, wrote a letter to Mr Cleret, giving notice that he intended to undertake an inspection of the restaurant, and inviting Mr Cleret to contact him to provide a suitable time for the inspection[11]. The letter also stated that Mr Cleret was unable to trade until the premises had been inspected, and the "conditions of the improvement notice" had been complied with. Notwithstanding the invitation, Mr Cleret did not contact Mr Mulder to arrange an inspection.

[9] By this time, Mr Cleret had ceased trading. His evidence was that he had continued trading after 25 June 2010, for more than a week. He plainly associated his decision to cease trading with service of the suspension notice and the Information Notices[12], which occurred on 7 July 2010. On Ms Brooks' evidence, there were indications on 16 July

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5 The three documents form Exhibit 72; and see Exhibit 10 pp 53-61.
6 T 5-82, 84.
7 T 6-53.
8 T 5-83; pp 63, 67 of Exhibit 10.
9 See Exhibit 73.
10 See Exhibit 10 p 71ff.
11 Exhibit 10 p 85.
12 See T 1-76 to 79.

that Mr Cleret intended to continue trading. However, her evidence did not establish that he continued trading after that date. It is difficult to reach a firm conclusion about the date when Mr Cleret ceased to trade, other than that it was not long after 7 July 2010.

Some observations about the proceedings

[10] The pleadings on the basis of which the trial was conducted were a Further Amended Statement of Claim dated 20 July 2015 (*FASC*); a Further Amended Defence of the First and Second Defendants dated 17 November 2015 (*FAD*); and a Reply dated 5 January 2015.

[11] The trial commenced on 23 November 2015, and continued over the following four days. It was then adjourned, resuming on 3 February 2016, and continuing for the following two days. In the meantime, in response to an invitation to do so, Mr Anderson of Queen's Counsel provided submissions on questions of law on about 25 January 2016 (*Defendants' Submissions 1*). These dealt with the topics of negligence, misfeasance in public office, trespass, aggravated and exemplary damages, and a statutory defence relied on by Ms Brooks. He provided further submissions dated 3 February 2016 (*Defendants' Submissions 2*); submissions dated 10 February 2016 (*Defendants' Submissions 3*); and submissions dated 28 February 2016 (*Defendants' Submissions 4*). The plaintiff provided written submissions which were undated, but which were filed on 16 February 2016. Oral submissions were made on 5 February 2016.

[12] Mr Cleret represented himself in these proceedings. He is not qualified as a lawyer. He is from France, and English is his second language. It is apparent that he has made substantial efforts to understand the law relating to his claims. Nevertheless, there are significant difficulties with his pleadings. To the extent that an issue or cause of action has been litigated, it seems to me appropriate to determine it, whether or not it has been properly pleaded by Mr Cleret[13].

[13] It might also be observed that the defence does not raise the provisions of the *Civil Liability Act* 2003 (Qld). They were, however, relied upon in Defendants' Submissions 1. No objection was taken to reference to them. It seems to me that, were it to become necessary, I should take them into account. The plaintiff has had an adequate opportunity to deal with them. The provisions seem to me to raise questions of law only, which are not dependent upon any evidence that might have been called if it was not. If I were not to take them into account, then it seems to me I would not be deciding the case according to law; though if I had thought there was any need to do so to ensure fairness to Mr Cleret, I would have provided him with a further opportunity to call evidence or make further submissions.

Statutory background and licence

[14] There are a number of provisions of the *Food Act* which are of some relevance to Mr Cleret's claims.

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[13] Compare *Water Board v Moustakas* (1988) 180 CLR 491, 497.

[15] The main purposes of the *Food Act* are identified in s 8, and include ensuring food for sale is safe and suitable for human consumption; and applying the *Food Standards Code.* The primary means of achieving these purposes are set out in s 9, and include providing for the licensing of particular food businesses; and providing for the monitoring and enforcement of compliance with the Act and the *Food Standards Code.*

[16] There are a number of offence provisions of potential relevance, but it is sufficient to note s 35, which makes it an offence to handle food intended for sale in a way that will make, or is likely to make, the food unsafe, or to sell food that is unsafe; and s 36, which makes it an offence to sell food that is unsuitable[14].

[17] Section 49 prohibits a person from carrying on a licensable food business, unless the person holds a licence to carry on the business. There is no suggestion that the restaurant was not a licensable food business. Section 51 prohibits a licensee from contravening a condition of the licence.

[18] Part 6 of the *Food Act* makes provision for the suspension or cancellation of a licence. Grounds include that the licensee has contravened a condition of the licence[15]. Where a local government which had issued a licence believes that a ground exists to suspend or cancel the licence, s 79 then provides as follows:-

> "**79 Show cause notice**
>
> (1) This section applies if—
>
> (a) the local government that issued a licence believes a ground exists to suspend or cancel the licence; and
>
> (b) either the licensee—
>
> (i) has not been given, and it is not intended to give the licensee, an improvement notice about a matter to which the ground relates; or
>
> (ii) has been given an improvement notice about a matter to which the ground relates and the licensee has failed, without a reasonable excuse, to comply with the notice.
>
> *Note—*
>
> Under section 209, an authorised person may give a person an improvement notice requiring the person to remedy, or have remedied, a contravention of a provision of this Act.
>
> (2) The local government must give the licensee a notice under this section (a ***show cause notice***)."

[19] A show cause notice must, among other things, state that the licensee may, within the show cause period, make written representations to the local government to show cause why the proposed action should not be taken[16]. The show cause notice must state the

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[14] The terms "unsafe" and "unsuitable" in relation to food are defined in ss 20 and 21 of the *Food Act.*

[15] See s 78; there is an exception which is of no present relevance.

[16] See s 79(3)(e).

action which the local government proposes taking[17]. The local government is required to consider representations, under s 80(2).

[20] Section 82 then provides as follows:-

> "**82 Suspension or cancellation**
>
> (1) This section applies if—
>
> (a) there are no accepted representations for the show cause notice; or
>
> (b) after considering the accepted representations for the show cause notice, the local government—
>
> (i) still believes a ground exists to suspend or cancel the licence; and
>
> (ii) believes suspension or cancellation of the licence is warranted.
>
> (2) The local government may—
>
> (a) if the proposed action was to suspend the licence—suspend the licence for not longer than the proposed suspension period; or
>
> (b) if the proposed action was to cancel the licence—cancel the licence or suspend it for a period.
>
> (3) If the local government decides to take action under subsection (2), the local government must as soon as practicable give the licensee an information notice for the decision."

[21] An alternative course which might be taken is set out under s 83 as follows:

> "**83 Immediate suspension of licence**
>
> (1) The local government that issued a licence may suspend the licence immediately if the local government believes—
>
> (a) a ground exists to suspend or cancel the licence; and
>
> (b) it is necessary to suspend the licence immediately because there is an immediate and serious risk to public health or safety.
>
> (2) The suspension—
>
> (a) can be effected only by the local government giving an information notice to the licensee about the decision to suspend the licence, together with a show cause notice; and
>
> (b) operates immediately the notices are given to the licensee; and

[17] See s 79(3)(a).

(c) continues to operate until the earliest of the following happens—

(i) the local government cancels the remaining period of the suspension;

(ii) the show cause notice is finally dealt with;

(iii) 30 days have passed since the notices were given to the licensee."

[22] The functions of an authorised person, so far as they relate to the carrying of a food business, include the enforcement of the *Food Act;* monitoring compliance with the Act by inspecting places where a food business is carried on; and helping to achieve the purposes of the Act "by providing advice and information on how the purpose is mainly achieved".[18]

[23] Under s 175 of the *Food Act*, an authorised person may enter a place if an occupier of the place consents to the entry; but the section also confers power to enter a place if

"(d) it is premises at which a person carries on a food business and is—

(i) open for carrying on the food business; or

(ii) otherwise open for entry."

[24] The powers of such a person, after entry, are then set out in s 182, including:

"(3) For monitoring and enforcing compliance with this Act, the authorised person may—

(a) search any part of the place; or

(b) inspect, measure, test, photograph or film any part of the place or anything at the place; or

…"

[25] Section 209 makes provision for the issue of an improvement notice. It includes the following:

"**209 Improvement notice**

(1) This section applies if an authorised person reasonably believes—

(a) a person carrying on a food business—

(i) is contravening a provision of this Act; or

(ii) has contravened a provision of this Act in circumstances that make it likely the contravention will continue or be repeated; and

(b) a matter relating to the contravention can be remedied; and

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[18] See s 167.

(c) it is appropriate to give the person an opportunity to remedy the matter; and

(d) if the person is a licensee—a local government has not given a show cause notice to the person under section 79 relating to the contravention.

(2) The authorised person may give the person a notice (an *improvement notice*) requiring the person to remedy the contravention or have the contravention remedied.

(3) The improvement notice must state the following—

(a) that the authorised person reasonably believes the person—

(i) is contravening a provision of this Act; or

(ii) has contravened a provision of this Act in circumstances that make it likely the contravention will continue or be repeated;

(b) the provision the authorised person believes is being, or has been, contravened (the *relevant provision*);

(c) briefly, how it is believed the relevant provision is being, or has been, contravened;

(d) the period in which the person must remedy the contravention or have the contravention remedied;

(e) that it is an offence to fail to comply with the improvement notice unless the person has a reasonable excuse.

…

(5) The improvement notice may also state the reasonable steps that the authorised person considers necessary to remedy the contravention, or avoid further contravention, of the relevant provision.

Example of reasonable steps—

implementation of a cleaning or pest control schedule at premises where a food business is carried on

…

(7) The person must comply with the improvement notice unless the person has a reasonable excuse.

Maximum penalty—

(a) if a contravention of the relevant provision is an offence—the maximum penalty for contravening the relevant provision; or

(b) otherwise—200 penalty units."

[26] The power conferred by s 209 is qualified by s 210, as follows:

"**210 Approval for particular improvement notice**

(1) This section applies to an improvement notice given to a person by an authorised person appointed by a chief executive officer.

(2) If remedying the contravention, or having it remedied, within the reasonable time stated in the notice would be likely to stop the person's food business from operating, the notice must be approved by the local government before it is given to the person."

[27] Section 211 makes provision for a response by a person to whom such a notice is given, to the effect that the person believes that the notice has been complied with.

[28] In the FAD, Ms Brooks relied on s 274, which is in the following terms:

"**274 Protecting officials from liability**

(1) An official is not civilly liable for an act done, or omission made, honestly and without negligence under this Act.

(2) If subsection (1) prevents a civil liability attaching to an official, the liability attaches instead to—

(a) if the official is the chief executive officer of a local government, an auditor who is an employee of a local government, an authorised person appointed by the chief executive officer of a local government or a person acting under the direction of that authorised person—the local government; or

(b) if paragraph (a) does not apply—the State.

(3) In this section—

official means—

(a) the chief executive; or

(b) a chief executive officer; or

(c) an authorised person; or

(d) a State analyst; or

(e) an auditor who is—

(i) an officer or employee of the department; or

(ii) a health service employee; or

(iii) an employee of a local government; or

(f) a person acting under the direction of an authorised person."

[29] The term "premises" is defined in Schedule 3 of the *Food Act* in the following terms:

> "***premises*** includes—
>
> (a) a building or other structure; and
>
> (b) a part of a building or other structure; and
>
> (c) land where a building or other structure is situated; and
>
> (d) a vehicle."

[30] In 2009 and 2010 Mr Cleret held a Food Business Licence for the restaurant under the *Food Act*[19]. Its conditions required compliance with the *Food Act* and the *Food Standards Code*; and required Mr Cleret to allow an authorised person to have reasonable access to the premises "during normal business hours for the food business".

Misfeasance: the cause of action

[31] In my respectful opinion, some of the elements of this tort are well identified in the case of *Sanders v Snell (No 2)*[20] (*Sanders*). It is uncontentious for the purposes of the present case that the defendant must be the holder of the public office; and the defendant's conduct relied on to establish the tort be, or purport to be, the exercise of a power of that office[21]. The plaintiff must also show that damage has been suffered[22]. The additional elements of the tort fall into two classes. In the first class, the plaintiff must demonstrate that the actuating motive for the defendant's exercise of the power was to inflict harm upon the plaintiff[23], referred to as "targeted malice". This statement seems to me more accurately to describe this form of the tort, than a statement that the defendant, when exercising the power, intended to cause harm to the plaintiff; for a defendant may well have such an intention when exercising a power honestly, for example, where the proper exercise of the power requires the defendant to cause harm to the plaintiff. *Sanders* provides one example[24]. The suspension of a licence of a business selling food to the public which is, in fact, a danger to health, would provide another.

[32] The remaining elements for the second class of case may not be so clearly defined. A tort of this class will be established if it is shown that at the relevant time, the defendant knew that the defendant was acting without authority; and the defendant's conduct is "calculated in the ordinary course to cause harm"[25]; though it may be sufficient that the conduct "involves a foreseeable risk of harm"[26]. Of the relationship between the defendant's conduct and damage to the plaintiff, in *Rush v Commissioner of Police*[27] Finn J said that it must be shown that the defendant "has actual knowledge … that his or her action … would cause or be likely to cause injury or else that (the defendant) has acted with reckless indifference … to the possibility that that action would cause or be

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19 See ex 76.
20 (2003) 130 FCR 149, 171ff.
21 Compare *Sanders* paras [89], [95], [96].
22 *Sanders* [95].
23 *Sanders* [108].
24 See *Sanders* [108].
25 See *Northern Territory v Mengel* (1995) 185 CLR 307, 347 (*Mengel*).
26 *Mengel* at 347; compare *L (a child) v Reading Borough Council* [2001] 1 WLR 1575, 1588, cited in *Sanders* at [97].
27 (2006) 150 FCR 165 at [121].

likely to cause injury". In *Tepperova v Minister for Immigration & Multicultural & Indigenous Affairs*[28], his Honour expressed himself in similar terms. In *Mengel*[29] it was acknowledged that there was much to be said for the view that knowledge that the act was beyond power would include a situation where a public officer recklessly disregards the means of an ascertainable extent of his or her power[30], a test accepted by Finn J in both of the cases mentioned. However, these matters do not seem to be finally settled.

Misfeasance: the cases of the parties

[33] It is not contentious that Ms Brooks was an authorised person under the *Food Act*, and her function was to enforce that Act[31]. While the defendants formally deny that each of them was a public officer[32], no submissions were made in support of this position; rather, the case as conducted for the defendants proceeded as if they were public officers for the purpose of the allegations of misfeasance in public office.

[34] In the FASC, Mr Cleret recited inspections by Ms Brooks and resultant reports, from 13 October 2006 onwards. He alleged that on occasion, she would give notice of a date on which she would reinspect the premises, but that she did not do so.

[35] Mr Cleret also alleged that, on 2 June 2010, Ms Brooks entered the premises unlawfully, and did so again on 25 June 2010. On the latter occasion, she refused a reasonable request to postpone the inspection. Her notice that the licence under the *Food Act* was suspended immediately, and her direction to cease operating immediately, and not to reopen the restaurant until after a further satisfactory inspection, were unauthorised, because there was not an immediate and serious risk to public health or safety; and the licence could not be suspended, without following the show cause procedures, for a period longer than 30 days. He also referred to the Information Notice of 25 May 2010, and alleged that on 7 July 2010 the Council "unreasonably demanded the plaintiff install a new hand basin immediately", thus treating him in a manner different to other similar local businesses. He contended that the suspension on 10 July 2010 was "a deleterious act to cover up for the second defendant [sic] abuse of power and irresponsible behaviour, unbecoming of an authorised person". The imposition of the suspension without following the show cause procedures, for a period longer than 30 days, was motivated by "the rush to 'fix 'the mess created by The first Defendant". It was also contended that the letter of 23 August 2010 was "a deliberate breach of s 83 of the Food Act" for the same reason. Both the Council and Ms Brooks "engaged in a punitive action against the plaintiff with the desire; 'to teach him a lesson' for challenging their deemed authorities", clearly breaching s 167 of the food [sic] Act". Notwithstanding s 165 and s 167 of the *Food Act*, neither defendant provided advice and information to the plaintiff as to how the purpose of the Act might be achieved. The conduct of the defendants was alleged to be "calculated in the ordinary course to cause damages to the plaintiff"; and to be done with "reckless indifference of the Food Act in order to make sure to maximalise [sic] harm to the plaintiff". It was alleged that each defendant knew the acts were beyond power and involved a considerable risk of

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28 [2006] FCA 1147 at [39].
29 At 347.
30 See also *Sanders* at [93].
31 See FASC IV 1(f)(i); FAD para 7(f)(ii).
32 FAD para 8(d).

harm to the plaintiff; and alternatively, that each defendant recklessly disregarded the means of ascertaining the true extent of the power of that defendant[33].

[36] It is apparent from the allegations as to damages that the conduct said to be the relevant exercise of power was the suspension conveyed by Ms Brooks on 25 June 2010, and the suspension notified on 7 July 2010. As I read the FASC, therefore, the plaintiff's pleaded case is that each of these acts was done maliciously, with intention to cause harm to the plaintiff; and each was done, with knowledge that it was beyond power, damage being reasonably foreseeable; or alternatively, the Council and Ms Brooks were reckless with regard to the question whether their acts were within power.

[37] In his oral submissions, Mr Cleret sought to demonstrate that the sequence of photographs from 25 June 2010, as recorded in the digital files of the Council, could not be correct; and that the likely explanation was that the sequence had been altered while the photographs were being digitally enhanced. He also submitted that Ms Brooks was on the premises only for a period of 10 minutes, and could not have taken the photographs in that time. He also submitted that the log book for the vehicle used by Ms Brooks had been destroyed, as had memory cards for the cameras, to hide evidence. He also submitted that Ms Brooks had said in evidence that she knew on 25 June 2010 that she did not have the power to suspend the food licence for the restaurant. He also submitted that there was no checking of the condition of the premises prior to the issue of the suspension notice of 7 July 2010; and that a number of items included in the improvement notice were of a very punitive character.

[38] In his written submissions, Mr Cleret expanded on his contentions as to the sequencing of the photographs of 25 June 2010, and contended that Ms Brooks knew that the state of the kitchen did not warrant a suspension of the licence, but went to extreme lengths to secure it. He submitted that she comprehensively and fraudulently reorganised and rescheduled her visit to the restaurant, doctored all pictures taken that day, and fabricated a false report timed at 1.15pm (a reference to the time which appears on Report 11244). He also referred to the handwritten notes which Ms Brooks had placed on copies of some of the pictures[34]. He submitted that the evidence of Ms Brooks that she made the notes on the copies of the photographs on or just before 30 June 2010 was a lie, because pictures taken on 7 and 16 July 2010 were not in existence at that time. He also submitted that Report 11244 was fabricated, having been written sometime after Ms Brooks left the premises on 25 June 2010, but before 30 June. He submitted that the photographs taken on 25 June 2010 did not reflect the true state of the kitchen. The trespass allegations were relied upon as evidence of harassment by Ms Brooks. Ms Brooks knew that she did not have the power to suspend the plaintiff's licence on 25 June 2010. Nor did she contact any superior on that date. Consultation between Council staff did not occur before the notices of 7 July 2010. The purported suspension by Ms Brooks on 25 June 2010 was invalid and unlawful. A number of items listed in the improvement notice of 7 July 2010 had not been inspected. The defendant requested a review of the decision on 1 December 2010, which was not acted on. He made other submissions, consistent with his oral submissions.

[39] In their defence the defendants denied they had produced false and corrupted documents. They alleged that the entry by Ms Brooks into the restaurant was lawful.

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[33] FASC IV paras 3-6, 8.
[34] See ex 12.

They alleged that on 25 June 2010, the restaurant posed an immediate and serious risk to public health and safety. They denied that they abused their office by consciously wrongfully exercising their powers under the *Food Act*. They denied that their conduct was calculated to cause damage to the plaintiff, or that they acted with reckless indifference to the harm that might be suffered by him. Nor did they know that the acts relied upon by the plaintiff were beyond power and they did not recklessly disregard the extent of their power under the *Food Act*. The damage claimed by the plaintiff was not reasonably foreseeable.

[40] In their written submissions, the defendants contended that there was no evidence to support the factual findings relied upon by the plaintiff in support of this claim. Although the plaintiff had made submissions about fraudulent conduct, they could not be accepted because fraud must be distinctly alleged. In any event, fraudulent interference with the photographs had not been demonstrated. The plaintiff had not identified any misleading effect from the photographs. The evidence of Mr Diefenbach supported the conclusion that they had not been altered. Errors as to the recorded times at which the photographs were taken is largely irrelevant. The alterations identified by the plaintiff would have achieved little of any moment. The discrepancies in evidence alleged by the plaintiff are explicable, and consistent with natural limitations on the recollection of witnesses.

[41] For the defendants, it was orally submitted that there was no evidence from which an inference of malice could be drawn, and malice was denied by Mr Brewer and Ms Brooks. The evidence was not sufficient to justify a finding that Ms Brooks fraudulently altered the photographs. Her conduct, for example in coming to the premises for an inspection without prior announcement, was consistent with the proper performance of her duties. It was accepted that the delegation to Ms Brooks was insufficient to authorise her to suspend the food licence[35]. Suspension was justified by reference to the Food Safety Laws (*Food Standards Code*).

[42] Mr Cleret's Reply generally repeated the allegations in the FASC, with some factual elaboration.

Allegations of fabricated evidence and harassment

[43] The allegations I am about to consider relate to the conduct of Ms Brooks. It will become apparent that the claim for damages for misfeasance in public office based upon a purported exercise of power by Ms Brooks would fail, whatever my conclusions about these allegations. Nevertheless, given their nature and the prominence they were given in the trial, it seems to me appropriate to deal with them in some detail. I also propose to deal briefly with the question whether Ms Brooks knew she was acting beyond power when she purported to suspend Mr Cleret's licence on 25 June 2010.

[44] The allegation of fraud in the present case arises in somewhat unusual circumstances. It is not a cause of action, or an element of a cause of action, relied upon by the plaintiff. Rather it is conduct from which it is said Ms Brooks' state of mind can be inferred, that is to say, it is evidence of the extent to which she was motivated to do Mr Cleret harm. It is also directed to the reliability of the photographs. I doubt whether the latter circumstance is caught by the rules requiring a party to plead fraud. On the other hand,

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[35] T 8-35.

if it be a basis for inferring malice, a pleading of the facts would be required under r 149 of the *Uniform Civil Procedure Rules* (Qld) (*UCPR*); or possibly under the same rule, to avoid surprise. It is, however, apparent that the defendants anticipated the issue[36], and it was fully litigated. In those circumstances, I would not be prepared to refuse to allow the plaintiff to advance this allegation.

[45] Here, Mr Cleret seeks to prove fraudulent conduct on the part of Ms Brooks. In such a case, the evidence must be "clear and cogent"; as the degree of satisfaction which is required, even when the standard of proof is the balance of probabilities, may vary according to the gravity of the fact to be proven[37]. That reflects the view that, ordinarily people do not engage in fraudulent conduct[38]. There are other matters which I shall later identify, which support the view that Mr Cleret's allegations are improbable.

[46] It is convenient to commence with a consideration of Report 11244.

[47] Ms Brooks gave evidence that she commenced to write this report during her inspection on 25 June 2010 but was unable to complete it because Mr Cleret spilt water on it when she placed it on a bench underneath a microwave oven[39]. She said that she felt that she needed some support. She made phone calls, unsuccessfully. She then went around to the police station and spoke to a police officer. Although he was off duty, she asked him whether Mr Cleret had a liquor licence for the restaurant. She wrote the time 1.15 on this report because she had "probably looked at my watch on that particular occasion … or my mobile phone …"[40].

[48] In cross-examination, Ms Brooks said that some of the notes (in particular, the reference to the police officer) were written later, when the book had dried. Mr Cleret put to Ms Brooks that there should be a brown stain apparent on the book, because a chocolate drink had been spilt in the microwave, the suggestion being that it would have discoloured the water[41]. On Ms Brooks' evidence, the water was spilt as Mr Cleret began to clean the microwave. In cross-examination, Ms Brooks also said that the pages in the book of reports were not always filled in sequentially, as sometimes when she turned the pages she would skip a form. That explained the use of form 11246, rather than 11245, for the inspection.

[49] In his evidence-in-chief, Mr Cleret said that only one form was filled out on 25 June 2010[42]. He denied that he cleaned the microwave oven[43]. He was not given Report 11244 on 25 June 2010[44]. He also indicated that it was his contention that Report 11244 was written after Report 11246[45].

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36 See for example the Affidavit of Mr Diefenbach, Ex 37.

37 See *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Rejfek v McElroy* (1965) 112 CLR 517, 521; *Neat Holdings Pty Ltd v Karajin Holdings Pty Ltd* (1992) 67 ALJR 17; and see the discussion in Fleming's *The Law of Torts* (10th Ed) at [13.30].

38 See *Rejfek*; *Neat Holdings* at 170.

39 T 5-48.

40 T 5-55.

41 T 6-64.

42 T 1-81.

43 T 1-82.

44 T 1-83.

45 T 1-84.

[50] It was not disputed that at some point on 25 June 2010, Ms Brooks left the restaurant for the purpose of attempting to speak to a police officer. Mr Cleret's letter of 3 August 2010 included a reference to Ms Brooks' calling on the police[46]; and in his cross-examination of Ms Brooks', Mr Cleret appeared to accept that she went to speak to a police officer[47]. That she did so is more consistent with her version of the events of that day than with the version of Mr Cleret. If the state of the restaurant was not such as to warrant a suspension of the food licence, it is rather unlikely that Ms Brooks would run the risk that someone might become involved, who could contradict her description of the condition of the premises. On the other hand, if she was concerned about the conduct of Mr Cleret during the course of the inspection[48], as she claimed to be, it is not surprising that she would approach the police.

[51] To my eye, there is apparent on the original copy of Report 11244 some discolouration consistent with the spilling of liquid in the vicinity of items 21 and 22 in the upper right portion of the page. The page itself is not flat, in the way pages regularly are in a book; rather some unevenness or wrinkling is apparent, again consistent with the spilling of some water on it. It seems to me that this, too, provides some support for the evidence of Ms Brooks.

[52] My observations of Mr Cleret and Ms Brooks during the course of her cross-examination gave me the impression that conflict could easily arise between them in the course of an inspection such as that which Ms Brooks said she carried out on 25 June 2010. That is consistent with her evidence of the events that led her to interrupt the inspection. Her evidence that she commenced to write a report, and ceased doing so as a result of Mr Cleret's conduct, is not something that could be attributed to inaccurate recollection. I did not observe anything which led me to doubt her honesty when giving this evidence. For that reason, and because there appears to be some corroboration, I am prepared to accept that her evidence about the writing up of this document is, in substance correct. I also accept her explanation about the failure to use reports in the sequence in which they appear in the book.

[53] Mr Cleret's contention is that Report 11244 was written after Report 11246. There is no evidence which supports that contention. Ms Brooks accepted that part of Report 11244 was written when the form dried out; but that does not show that she had not commenced to write up this report, and perhaps completed it, before she commenced to prepare Report 11246.

[54] Report 11244 records a time of 1.15pm. It is clear from the evidence of Ms Brooks that she commenced to write up this report prior to going to the police station at Kenilworth. She had also taken photographs before the inspection was interrupted[49]. It is at this point convenient to make some observations about the photographs.

[55] Ms Brooks took photographs of the restaurant on more than one occasion. On each occasion she used a digital camera which created a file, with the time and date recorded by reference to the camera's internal clock. Each photograph (and file) is given a unique identifier commencing with the letter P. I shall adopt the convention used by the parties for identifying each photograph. According to the Council records, the first

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[46] See Exhibit 10 p 73.
[47] T 6-103, 107.
[48] See T 5-48.
[49] T 5-56.

photograph taken on 25 June 2010 was P68, taken at 12.56am; and the last was P114, taken at 2.58am. There is a substantial interval between P106, the recorded time for which is 1.28am; and P107, the recorded time for which is 2.51am.

[56] It is immediately apparent that there is an error in recording all the times as *ante meridiem*, as all of the photographs were taken around the middle of the day or early in the afternoon. The recorded times were in error by something of the order of 12 hours, an error which I shall refer to as the am/pm error. On the evidence of witnesses called by Mr Cleret, photograph P69 was taken about, or perhaps a little before, midday. If their evidence is correct, the times recorded by the camera's clock were in further error by about an hour.

[57] The photographs taken on 7 July 2010 have recorded times between 2.39am and 2.49am. Two of them show documents with a handwritten record of the time of service on that date as 2.45pm, which rather strongly suggests that the camera's clock correctly recorded the time, save for the am/pm error[50]. But for this error, the recorded times for the photographs are consistent, at least in broad terms, with the evidence of Ms Brooks about the inspection on 25 June 2010; and the recording of the time at 1.15 pm on Report 11244. Subject to a consideration of Mr Cleret's contention that the digital files have been altered, I would be prepared to accept the times recorded for the photographs as correct, except for the am/pm error. I am conscious that Mr Cleret[51], Mr Chataway[52], and Mr Minter[53] gave evidence to the effect that Ms Brooks arrived at about midday. I was not convinced about the reliability of this evidence. Nor did Mr Chataway and Mr Minter appear to me to be completely objective witnesses. Nor did I find Mr Cleret's evidence about Report 11244 to be convincing[54].

[58] In my view, the matters on which Mr Cleret relies to allege that Ms Brooks had the photographs altered are not sufficiently convincing to lead me to reject the evidence of Ms Brooks; and in some cases are explicable by reference to the frailty of human recollection.

[59] Thus Mr Cleret submitted that the sequence revealed by photographs P69 and P70 is inconsistent with Ms Brooks' evidence relating to her arrival at the restaurant on 25 June 2010[55]. In the course of her evidence about these events, Ms Brooks said "What had happened-sorry, again, I-it's such a long time ago, and there's so many inspections. I remember…".

[60] The same passage of evidence is relied upon for the proposition that Ms Brooks was inside the restaurant when photograph P70 was taken. The improbability of that submission is apparent from the fact that, even on Mr Cleret's case, the photograph must have been taken on 25 June 2010 (when Mr Chataway was present); and it clearly is a photograph of the street entry to the restaurant premises; but there is no suggestion that any person other than Ms Brooks could have taken the photograph.

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50 See Exhibit 10 pp 55, 57.
51 T 1-81.
52 T 2-76.
53 T 2-94.
54 See T 1-83 to 85; T 4-70 to 71.
55 T 5-49/35-43.

[61] Mr Cleret also submitted that photograph P70 was taken when Ms Brooks left the premises "at the end of the photo-shoot"; and the photograph was wrongly re-positioned in the sequence after it had been manipulated. Mr Cleret's point depends upon the correctness of the evidence of his witnesses about the sequence of events relating to the arrival of Ms Brooks. Having heard them, I am not convinced that their evidence on this matter is sufficiently reliable to lead me to conclude that these photographs were taken in some other order than that revealed by the records from the camera.

[62] Mr Cleret also relied upon the fact that, when Ms Brooks wrote notes on P70, she initially recorded the time as 12.44pm. I note that the date has also been changed, from 16 July 2010 to 25 June 2010[56]. In her evidence in chief, Ms Brooks said that, when she printed the photographs, she may have mixed them up, and looked at the wrong photograph or time[57]. She also said that she believed it might have been close to 30 June 2010 when she made the notation. She did not seem to be firm about the date; and I note that photograph FH001 is a similar photograph of the entry to the restaurant taken from the street, with the recorded time and date being 12.44 pm on 16 July 2010[58]. The fact that the date first written on P70 by Ms Brooks was 16 July 2010 makes it virtually certain that Ms Brooks made the notations on these photographs after that date. It seems to me likely that her explanation for the handwritten time of 12.44 pm is correct; and her recollection of the date is not. Mr Cleret says that her evidence about the date is a lie, but it seems to me more likely to be a mistaken recollection.

[63] In his written submissions, Mr Cleret contended that the sequence in which photographs P98 and P99 were taken, is the reverse of that indicated by the file numbers and recorded times[59]. His argument in support of this contention is difficult to identify. There is nothing improbable about a photograph being taken of the bowl with its contents; and then another photograph being taken separately of the scourer. Nor is there any other evidence which would lead me to doubt that the recorded sequence for these photographs is incorrect.

[64] Mr Cleret also contended that, because photograph P108 showed a can opener fixed to a can of tomatoes, and photograph P109 showed the can without the opener, the sequence for these photographs had been reversed. Relying on the evidence of his son, Guillaume Cleret, he contended that these photographs could not have been taken at 3 pm. There is a degree of probability that the photographs were taken in the reverse of the recorded order. According to the timestamp, almost five minutes elapsed between the times when these photographs were taken. It is possible that the can opener was removed from the can for some reason in this period. The point made by Mr Cleret is not sufficiently convincing to lead me to conclude that the order of the photographs has been reversed. The recollection of events of Guillaume Cleret did not appear to be good[60]. I did not consider that his evidence was sufficiently reliable to lead me to doubt the accuracy of the recorded times for these photographs.

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56 See ex 11, P70; ex 12, photograph 3; and Mr Cleret's written submissions para 19b.

57 T 5-59.

58 See ex 75. The time does not seem to be incorrect; but the file names may indicate the use of a different camera on this date. If the camera used on this date was the same as that used on 25 June, the am/pm error was no longer apparent.

59 Para 24.

60 See, for example, T 2-14/24.

[65] I also do not accept Mr Cleret's submission about photographs P73 and P104[61]. It seems from his evidentiary references, that he intended to refer to P74, not P73. I could not identify any relevant difference between the bottles shown in photographs P73 and P74, if that be relevant. P104 shows a different location. I see nothing in a comparison of these photographs to cast doubt on Ms Brooks' evidence about the sequence in which they were taken.

[66] In his written submissions Mr Cleret also contended that photograph P107 could not have been taken at 2.51 pm as recorded, by reference to photographs P92, P96 and P84; and the fact that chips were cooked for lunch, apparently necessitating the presence of the Frytol container near the deep fryer for that purpose. This argument, it seems to me, is rather weak. It depends upon photographs P92 and P107 showing the same container; and the container not being moved from the dry goods storage area shown in P92 to the cooking area shown in P107, between the recorded times of 1.18 and 2.51. The former proposition may well be correct; but there is no reliable evidence to demonstrate the latter. Accordingly I do not accept that Mr Cleret has demonstrated that the recorded time for photograph P107 is wrong.

[67] One of the difficulties with Mr Cleret's allegation is that, generally, he did not identify any significant changes which he said were made to the photographs themselves. He did not, for example, contend that any of the photographs was not taken on 25 June 2010. He did not suggest that the photographs show things which were not present, or omit things which were present, in the restaurant on that date. Nor did he suggest that where the photographs show dirt, untidiness, poor organisation, or the presence of cobwebs, these things do not reflect the condition of the kitchen when Ms Brooks was present. The nearest he came to identifying the changes was a reference to a change in colour tone, or colour[62]. Throughout his evidence, Mr Cleret generally accepted that marks and the like which appeared in the photographs represented what would be seen, save for the colour tone issue previously mentioned. A possible exception relates to an allegation of an addition of dirt to the top of a container of Frytol[63]. By and large, the alleged enhancement of the photographs is of little significance in assessing the state of the restaurant. Even the suggested alteration to the lid of the container of Frytol is not particularly significant, because the photograph showing the lid in its alleged unaltered state indicates it to be dirty[64]. It seems to me to be quite unlikely that Ms Brooks would have engaged in the exercise asserted by Mr Cleret, to make changes to the photographs which are of little real significance.

[68] On one occasion, Mr Cleret alleged in the course of the cross-examination of Ms Brooks that she had retrieved lettuce from a rubbish bin and placed it in a silver bowl for the purpose of photographs P98 and P99; and that when photographs were digitally altered, the sequence was reversed. In part, the cross-examination about these matters was based on a contention that at one point the bowl was inverted, which in my view is not what the photographs reveal[65]. At one point it was based on a suggestion that Ms Brooks removed a piece of lettuce shown in another photograph from the edge of a rubbish bin and placed it in the bowl for the purpose of taking a photograph reflecting

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61 See para 27.
62 T 2-15/25; T 1-93/5-25; T 1-96/5; T 1-97.
63 T 6-101/30.
64 Mr Cleret tendered Ex 11 on the basis that they were photographs that "haven't been doctored": T 1-34 to 35, esp 1-34/33. See P107, Ex 11 p 40.
65 See T 6-81/30.

badly on the state of the kitchen[66], a suggestion which appears to me not to be supported by a careful examination of photographs P95, P98 and P99, and which I consider to be farfetched.

[69] Mr Diefenbach gave evidence that he carried out an audit of the digital file which recorded the photographs taken by Ms Brooks at the restaurant. That showed that the meta-data for these files had not been accessed, changed or otherwise corrupted since the files were loaded into the Council's Current File System Folder. In the case of the photographs taken on 25 June 2010, downloading occurred on 30 June 2010[67]. He carried out a similar audit in the Council's backup system, and reached a similar conclusion[68]. He also noted that the sequence in which the files were numbered was consistent with the times recorded as the time when each photograph was taken[69]; and that the recorded time when each photograph was taken, the file was saved, and the file was last modified, were exactly the same. That led him to conclude that the photographs as originally taken had not been altered[70].

[70] Mr Diefenbach also examined the digital files using a program called JPEGsnoop. Although it had a database of about 3,000 digital devices, that did not include the digital signature for the camera used by Ms Brooks. The program could not conclusively establish that the files had not been altered, but it could not identify any known software that might have been used with the files, after they were originally created with the camera[71]. Accordingly, he said that he could find no evidence that the files for the photographs had been altered and resaved[72]. In cross-examination, Mr Diefenbach accepted that it was technically possible for "a very trained professional in imagery" to hide and change compression signatures; so that it was "potentially possible" for such a person to have altered the photographs in a way that the program would not detect[73].

[71] Mr Diefenbach was cross-examined about the data produced by JPEGsnoop, which became exhibit 64. It was pointed out, and he acknowledged, that for P110 (a photograph recorded as being taken at 2.57am on 25 June 2010, with camera model DMC-FS42[74]), the program concluded that the image had a high probability of being original, and the program recognised the camera model[75]. Mr Diefenbach said by way of explanation of this result that he attempted to load a digital compression signature for that camera into the program[76]. On the other hand, for P109 the program did not associate the picture with the same camera. Mr Diefenbach appeared to attribute this difference in results to limitations in the software[77]. He also pointed out that, in the case of P109, what were referred to as the EXIF fields indicated that the file was original[78]. The program results for many of the other files were similar to that for P109[79].

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66 T 6-87/25-45; T 6-89/45.
67 See Exhibit 37 para 4.
68 Exhibit 37 para 5.
69 See T 7-48 to 49.
70 T 7-49.
71 T 7-51.
72 T 7-54.
73 T 7-60.
74 See, for example, exhibit 39.
75 T 7-61 to 62.
76 T 7-61.
77 T 7-65.
78 T 7-65.
79 T 7-73 to 74.

[72] The result of Mr Diefenbach's evidence is that there was a technical possibility that the files for the photographs taken on 25 June 2010 had been altered; though the results of the analysis by JPEGsnoop suggested otherwise; and the alterations could only have been done by someone with a relatively high level of computer expertise. There is no evidence to suggest that Ms Brooks herself had that expertise, nor that the assistance of anyone with such skill was available to her. In my view, the evidence of Mr Diefenbach reinforces my conclusion that the files were not altered.

[73] I also note the reliance by Mr Cleret on apparent differences in colour in photographs produced from the files. Mr Cleret's original position was that the photographs which he produced (exhibit 11) were not enhanced, and the difficulties could be seen by comparing those photographs with the photographs produced by the Council. He later resiled from that position. However, it tends to support the view that the colour differences reflect the variations which may result from differences in the manner in which the photographs were printed, for example, by the use of different printers, or, perhaps, different paper. These differences do not seem to me to be of any significance. Mr Cleret's change of position about the photographs in exhibit 11 tends to confirm that differences occur in the appearance of photographs printed from identical files.

[74] The Information Notice of 25 May 2010 permitted Mr Cleret a period of twelve months in which to provide the required hand washing facilities. The Information Notice of 6 July 2010 required immediate compliance. This represented a change from the position in the earlier notice, and, it may be accepted, from what was required of other licensees. It is apparent that requirement was changed as a result of the inspection by Ms Brooks[80]. There is no reason to think that this was harassing conduct; nor that it demonstrates malice on the part of Ms Brooks. The location and condition of the handwash basin were far from satisfactory; and Ms Brooks identified good reason for thinking that those working at the restaurant did not have good hand washing practices.

Conclusion on allegation of malice against Ms Brooks

[75] The major point in Mr Cleret's case appears to be that it should be inferred that Ms Brooks was actuated by an intention to cause him harm when she issued Report 11246, which included a requirement that the restaurant cease operating immediately, and not open until there had been a satisfactory inspection. This inference was to be drawn from the fact that she fraudulently altered photographs to demonstrate that her action was justified. Mr Cleret's contention was also said to be supported by the fact that Report 11244 had not been produced in the course of the inspection, but was manufactured subsequently. I have rejected both of these propositions.

[76] I accept generally Ms Brooks' evidence about the condition of the restaurant on 25 June 2010, and that the photographs provide a satisfactory indication of its state. The evidence demonstrates that on that occasion the kitchen was disorganised and in places dirty, with substantial evidence that there had been insufficient attention to maintaining cleanliness and avoiding food contamination. Even making allowance for the fact that a plumbing problem had arisen on that day, and that to some limited extent the condition of the kitchen might be attributable to that occurrence, it is not possible to infer simply

[80] T 7-22 to 23.

from the state of the kitchen that the actions taken by Ms Brooks were motivated by malice.

[77] Accordingly, Mr Cleret has failed to satisfy me that, in issuing Report 11246, Ms Brooks was actuated by malice.

Did Ms Brooks know she was acting beyond power on 25 June 2010?

[78] The defendants appeared to accept that Ms Brooks did not have power to suspend the food licence, or to direct Mr Cleret to cease trading, on 25 June 2010[81]. Ms Brooks gave evidence that she believed she had the power temporarily to suspend the licence on 25 June 2010[82]. No reason has been advanced for rejecting this evidence. In addition, Mr Cleret has not referred to evidence establishing that Ms Brooks knew she was acting beyond power on this occasion.

[79] It follows that Mr Cleret has failed to establish that Ms Brooks knew that she did not have power to direct Mr Cleret to cease trading, or to suspend the food licence, on 25 June 2010.

Notices of 6 and 7 July 2010

[80] In the FASC, Mr Cleret alleged that the Council engaged in a punitive action against him, with the desire to teach him a lesson for challenging its authority[83] and that its acts were calculated to cause damage to him[84]. To the extent that this allegation extends beyond the conduct of Ms Brooks on 25 June 2010, it appears to relate to the notices dated 6 and 7 July 2010, left at the restaurant on the latter date. Of them, Mr Cleret submitted that the time which had elapsed after 25 June 2010 showed that the defendants did not consider that there was an immediate and serious risk to public health and safety arising from the continued operation of the restaurant; and that fact, and the fact that a show cause notice was not issued, showed that the notices were issued as "a deleterious act to cover up" for the abuse of power by Ms Brooks and to fix the mess which she created[85].

[81] A ground for the suspension of the licence under s 78 of the *Food Act* is that the licensee has contravened a condition of the licence. If a ground exists to suspend the licence, then the local government that issued the licence may suspend it immediately if it believes that it is necessary to do so, because there is an immediate and serious risk to public health or safety[86]. However the suspension can be effected only by the local government giving an information notice to the licensee about the decision to suspend the licence, together with a show cause notice[87]. The suspension operates immediately

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81 T 8-35/10; 8-36/25.
82 T 7-31/20-30.
83 FASC para 3.
84 FASC para 8.
85 FASC para 3(j)(v) and (vi).
86 See s 83(1) of the *Food Act*.
87 See s 83(2) of the *Food Act*.

these notices are given to the licensee, and continues for a period of no more than 30 days[88].

[82] It was a condition of Mr Cleret's *Food Act* licence that he comply with Food Safety Standard 3.2.2. The suspension notice identified, as a ground for the suspension, that he had contravened Food Safety Standards 3.2.2 and 3.2.3[89]. The steps required to remedy the noncompliance, were identified by reference to the improvement notice of the same date.

[83] The suspension notice recorded, as a ground for the suspension, that there was an immediate or serious risk to public health or safety.

[84] No show cause notice was given to Mr Cleret. As mentioned, the suspension notice purported to be effective until the 37 items in the first improvement notice had been completed.

[85] Mr Brewer gave evidence of the circumstances in which he signed the notices, and authorised their issue[90]. Ms Brooks had prepared the notices in advance. Mr Brewer discussed them, and in particular, the requirements in the Improvement Notice of 6 July 2010, with Ms Brooks. She told him about the condition of the restaurant. He also examined the photographs taken by Ms Brooks on 25 June 2010. In many of them, he identified grime and dirt, evidencing poor cleaning procedures. He also identified a number of surfaces which were not smooth, impervious and easy to clean. These increased the risk of contamination. He also pointed out that some small particles of food had fallen on plates which were apparently intended to be used to serve meals, evidencing an unsatisfactory arrangement of the kitchen area. He also pointed out that it was unsatisfactory to have exposed electrical cords, as these could not easily and safely be kept clean, increasing the risk of contamination. He discounted some matters of a temporary nature, for example, a piece of lettuce on which an insect was visible. He considered that it was not possible for the more significant matters to be dealt with satisfactorily while the restaurant continued to operate. He considered that the restaurant posed an immediate or serious threat to public health and safety. He gave evidence that he believed the suspension notice was effective when he signed it.

[86] There is no reason to doubt the evidence of Mr Brewer about these matters. It was not suggested to him that he was actuated by malice in signing the notices. Nor was it suggested to him that he knew he was acting beyond power when he did so.

[87] I find that Mr Brewer was not actuated by any malice when he signed the notices dated 6 and 7 July 2010, for the purpose of Ms Brooks serving them on Mr Cleret.

[88] I am satisfied that Mr Brewer believed that the condition of the licence had been contravened. In light of his evidence, I am satisfied that Mr Brewer considered that there was an immediate and serious risk to public health and safety. Although his evidence and the suspension notice refer only to an "immediate or serious" risk, I reach

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88 See s 83(2) of the *Food Act*.
89 Exhibit 72.
90 See T 7-82 to 84.

this conclusion in light of his experience in this area. I also note that he was not cross-examined with a view to establishing that his decision was not in accordance with the Act because he reached one conclusion but not the other.

[89] In the FASC, Mr Cleret contended that it could be concluded that his licence was suspended for an improper purpose. That conclusion was said to arise from the fact that the inspection occurred on 25 June 2010, and the power to suspend under s 83 could be exercised where there was an immediate and serious risk to public health or safety, but the suspension was not served until 10 July 2010[91]. Mr Cleret cross-examined Mr Brewer about the time that had passed from the inspection on 25 June 2010, to the signing of the suspension notice. Mr Brewer stated that Ms Brooks had told him that she had been attempting to work for some time with Mr Cleret, but there had not been any improvement, and he had to consider whether Mr Cleret "could get the premises up to speed". He also referred to the improvement notice of 6 July 2010, which required assessment under s 210 of the *Food Act*. I take this to be a reference to the fact that the issue of an improvement notice which is likely to stop a food business from operating required the approval of the local government[92], of which Mr Brewer was a delegate. As I understood Mr Brewer's evidence, he took the view that unless Mr Cleret had closed his business, he would not be able to bring the restaurant to an acceptable standard. He relied upon the previous conduct of Mr Cleret, to conclude the premises remained an immediate and serious risk to public health and safety.

[90] It was not suggested to Mr Brewer that his determination to suspend the *Food Act* licence was motivated by some consideration other than achieving compliance with the requirements of the *Food Act*, and the licence.

[91] Section 83(2) requires that a suspension notice must be accompanied by a show cause notice. Mr Brewer gave evidence that that did not occur in the present case. Mr Brewer gave evidence that he advised Ms Brooks of the requirement for the show cause notice[93]. It was not suggested to him that he knew that it was beyond his power to suspend the *Food Act* licence, because the requirement to issue a show cause notice would not be complied with. I find that Mr Cleret has not established that Mr Brewer issued the suspension notice, knowing that his conduct was beyond the power conferred on him by the *Food Act*.

Conclusions on misfeasance claim

[92] The letter of 23 August 2010 was not an exercise of a power, and may be ignored.

[93] The issue of a suspension notice was an exercise by Mr Brewer of a power on the part of the Council. It has not been shown that he was actuated by malice; or that he knew he was acting beyond power. So far as the misfeasance claim is based on his conduct, it fails.

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91 See FASC para 3(j).
92 See s 210 of the *Food Act*.
93 T 7-84.

[94] The allegations against Ms Brooks appear to be directed in part to the notice of 25 June 2010; and in part to her role in the issue of the 6 July 2010 suspension notice. It may be doubted that the latter is relevant. In any event, it has not been shown that she was then actuated by malice. Nor has it been shown that when she issued the notice of 25 June 2010, she was actuated by malice; or that she knew she was acting beyond power.

[95] Accordingly the claim for damages for misfeasance in public office fails.

The trespass allegations

[96] Mr Cleret has alleged that Ms Brooks breached s 176 of the *Food Act* (which deals with obtaining consent for the entry of an authorised person on to premises)[94], and that on 2 June 2010 Ms Brooks committed an act of trespass[95]. He also alleged that on 25 June 2010 Ms Brooks breached s 176 of the *Food Act*, and entered the restaurant unlawfully[96]. Elsewhere, he alleged that no consent had been given for Ms Brooks to enter the restaurant on 2 June 2010 and 25 June 2010[97]. Mr Cleret pleaded a number of matters in relation to his claims for damages for negligence and misfeasance in public office[98], including the allegation of trespass on 2 June 2010, in support of the claim for aggravated damages[99]. However no relief is sought for trespass.

[97] In his written submissions dealing with the misfeasance claim, Mr Cleret wrote "that the trespass matters be given proper consideration although the plaintiff sees them more in terms of aggravation of the level of harassment they remain criminal offences and an abuse of power by the second defendant …".

[98] The written submissions for the defendants relied on s 175 of the *Food Act.* Pursuant to s 175(1)(d) of the *Food Act*, an authorised person may enter a place if it is premises at which a person carries on a food business, and is either open to carry on the food business, or otherwise open for entry.

[99] Ms Brooks gave evidence that on 2 June 2010 she walked in through the front door and stood at the counter[100]. When cross-examined about her attendance at the restaurant on 2 June 2010, Ms Brooks said that a door was open, and she could see into the kitchen[101]. This evidence was not challenged.

[100] In his evidence-in-chief, Mr Cleret said no one was at the restaurant on 2 June 2010. Mr Cleret said that on 25 June 2010, he said to Ms Brooks that no one had been present at the restaurant on 2 June 2010, and the doors were closed[102].

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94 See FASC II-1.
95 FASC II-2.
96 FASC II-3.
97 FASC IV-3(h) and (i).
98 FASC para 13.
99 FASC para 13F(b).
100 T 5-47/10; see also T 5-47/30.
101 T 6-114/45.
102 See T 1-68/20.

[101] On Mr Cleret's evidence, he was not present when Ms Brooks came to the restaurant on 2 June 2010. He did not give a basis for saying that the door was closed when she arrived. Ms Brooks' report of that date appears to be based on what she then saw, consistent with her evidence[103]. Nothing in my observation of Ms Brooks when she gave this evidence would lead me to reject it. Accordingly, I accept that the door to the restaurant was open on 2 June 2010.

[102] It is apparent from the photographs that some seating for customers of the restaurant was provided outdoors. Ms Brooks gave evidence that there was an outside coffee area[104]. Customers obtained access to the indoor area of the restaurant along a path from the street[105]. It follows that the "premises", for the purposes of s 175, at which Mr Cleret carried on the food business included both the land and the building on it. It is apparent from s 175(1)(d) that the right of entry conferred on an authorised person may be exercised when the premises is not "open for carrying on the food business", if it is "otherwise open for entry". There was no suggestion that there was any impediment to entry on to the land from the street on 2 June 2010. In that sense, the outdoors area of the premises was, on that occasion, open for entry. Since I have accepted the evidence of Ms Brooks that the door of the building was open, it follows that the building itself was also open for entry. Accordingly, I find that the entry of Ms Brooks into the restaurant on 2 June 2010 was authorised by s 175(1)(d).

[103] There has not been any suggestion that the premises were not open for entry on 25 June 2010. Again, it follows from s 175 that the entry of Ms Brooks on that occasion was authorised.

[104] In *Halliday v Nevill*[106] Brennan J said, "a police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits trespass … unless his entering or remaining on the premises is authorised or excused by law". It follows that, since the entry by Ms Brooks on to the restaurant premises on 2 and 25 June 2010 was authorised by s 175 of the *Food Act*, she committed no trespass on either occasion.

The allegations of negligence and other breach of duty

[105] In the FASC, Mr Cleret alleged that each defendant had a duty to exercise its or her powers in a lawful manner, which they breached by consciously, wrongfully exercising their powers under the *Food Act* with respect to the operation of the restaurant [107]. He alleged that neither defendant complied with its obligation to provide advice and information to him as to how the purposes of the *Food Act* might be achieved[108]. He alleged that the Council owed him a duty of care to ensure that the provisions of the *Food Act* were complied with; and a further duty of care to ensure that authorised persons which it retained complied with the provisions of that Act[109]. Mr Cleret alleged that it was foreseeable that, if the Council did not comply with these duties, he would

[103] T 5-47/30; and see Report 11155.
[104] T 5-47/30.
[105] See for example P69 and P70.
[106] (1984) 155 CLR 1, 10; cited with approval in *Plenty v Dillon* (1991) 171 CLR 635, 639.
[107] FASC para 2.
[108] FASC para 6.
[109] FASC para 10.

suffer damage[110]. The Council breached the first duty, it was alleged, by the conduct of Ms Brooks on the occasions of her inspections and other visits from October 2006 until 25 June 2010; by the notices served in July 2010; by Mr Brewer's letter of 23 August 2010; and by its failure to provide advice and information to Mr Cleret about how the objects of the Act might be achieved. It breached the second duty by the same conduct, save for that relating to the notices in July 2010, and the letter of 23 August 2010[111]. These breaches were said to have resulted in loss to Mr Cleret[112].

[106] In their pleading, the defendants denied that they owed Mr Cleret a duty to exercise their powers in a lawful manner[113], or that they exercised their powers wrongfully[114]. They also denied that the Council owed Mr Cleret a duty of care to ensure the provisions of the *Food Act* were complied with; and that the damage which he claimed to have suffered was reasonably foreseeable by them at the time when they acted[115]. They alleged that the acts relied upon by Mr Cleret did not constitute breaches of the duties which he had alleged[116] and they denied that he had suffered damage as a consequence of such acts or omissions[117].

[107] Mr Cleret's submissions do not materially advance his pleaded case in negligence.

[108] For the defendants, it was submitted that, Mr Cleret's loss being purely economic, a duty to exercise statutory powers in a lawful manner will only arise in exceptional circumstances. The loss claimed by Mr Cleret being of that character, the existence of a duty of care is to be determined by reference to the five principles identified by McHugh J in *Perre v Apand Pty Ltd*[118]. Mr Cleret was not vulnerable. The defendants did not have actual knowledge of the risk of the loss, nor of its magnitude. Moreover, the relevant powers were conferred for the protection of public health and safety. The duty to protect the public from an unhygienic kitchen was said to outweigh any duty owed to Mr Cleret in relation to the procedure to be adopted at the time of suspension of the licence. The test set out in s 36 of the *Civil Liability Act* was not met. It was not appropriate, by reference to s 11 of that Act, for the scope of the liability of the defendants to extend to the harm alleged.

Some preliminary considerations relating to the allegations of negligence and other breach of duty

[109] The reference to s 165 of the *Food Act* in paragraph 6 of the FASC is both obscure and unexplained. Accordingly, I propose to ignore it.

[110] Under s 167(c) of the *Food Act*, one of the functions of an authorised person is to help achieve the purposes of the Act by providing advice and information on how the purposes might be achieved. I shall leave to one side any question as to the existence of an obligation arising from this provision, breach of which might sound in damages. If

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[110] FASC para 11.
[111] FASC para 12.
[112] FASC para 13.
[113] FAD para 8(f).
[114] FAD para 9.
[115] FAD para 13(e) and (f).
[116] FAD para 13(g).
[117] FAD para 13(h).
[118] (1999) 198 CLR 180, 220.

Mr Cleret was intending to suggest that performance of the function set out in s 167 would have meant that he would have been given advice which would have avoided the issue of a suspension notice, he has not shown that he was not given such advice. He was given advice about steps to be taken to maintain proper standards in the reports which Ms Brooks issued to him; and in the Information Notices served on the premises in July. He has not shown that if he had received further advice and information, the loss he claims would have been avoided. It might be noted that he did not respond to the invitation of Ms Brooks on 16 July to telephone her, or that of Mr Mulder on 23 August.

[111] The allegation that each defendant "consciously wrongfully" exercised powers under the *Food Act* was particularised by reference to the inspections of Ms Brooks between October 2006 and 25 June 2010; by the issue of the notice in July 2010; and by the letter from Mr Brewer of 23 August 2010. I have already found that Ms Brooks did not knowingly act in excess of her powers; and that the letter of 23 August 2010 was not an exercise of any relevant power.

[112] The allegation that the Council owed Mr Cleret a duty of care to ensure that the provisions of the Food Act were complied with, seems to be an allegation of some obligation by the Council in relation to its supervision of Ms Brooks. The alleged breach does not relate to the conduct of Mr Brewer (save, perhaps, in relation to s 167, already dealt with). It is unnecessary at this point to consider whether the alleged duty existed, in relation to the conduct of Ms Brooks up to and including 25 June 2010. Mr Cleret did not cease trading as a consequence of the conduct of Ms Brooks particularised in paragraph 3(a) to (i) of the FASC. He gave no evidence to show that this conduct played a role in his decision to cease trading, and the subsequent loss which he alleges that he suffered; nor is it an inference I would be prepared to draw from the sequence of events, in light of his evidence about continuing to trade, and the significance of the notices served in July 2010. The loss claimed by Mr Cleret could not be said to be caused by the conduct of Ms Brooks, prior to 25 June 2010. Accordingly, his claim on this basis is not made out.

[113] In light of my characterisation of one of the alleged duties as a duty relating to the supervision of authorised persons, it would seem that the other alleged duty was one with which Ms Brooks and Mr Brewer, as employees of the Council, were required to comply, and for breach of which the Council was vicariously liable. Since I have already concluded that Mr Cleret has failed to demonstrate that any loss was caused by the particularised conduct of Ms Brooks, it remains to consider the case so far as it relates to the conduct of Mr Brewer.

Was Mr Brewer under a duty of care to ensure compliance with the provisions of the *Food Act*?

[114] Some support for the alleged duty might be found in the following statement from *Mengel*[119]:

> "Governments and public officers are liable for their negligent acts in accordance with the same general principles that apply to private individuals and, thus, there may be circumstances, perhaps very many circumstances,

[119] At p 352-353, per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ.

> where there is a duty of care on governments to avoid foreseeable harm by taking steps to ensure that their officers and employees know and observe the limits of their power. And if the circumstances give rise to a duty of care of that kind, they will usually also give rise to a duty on the part of the officer or employee concerned to ascertain the limits of his or her power."

[115] In *Takaro Properties Ltd v Rowling*[120] the New Zealand Court of Appeal upheld the finding made at first instance that the New Zealand Minister of Finance had a duty of care to a company applying for approval for the issue of its shares to a Japanese company. Cook J stated that the duty owed by the Minister to the company included, "a duty to take reasonable care to ensure that he acted within his legal powers". Although the Privy Council referred to "certain considerations which militate against imposition of liability in a case such as the present", their Lordships expressly refrained from determining the existence of a duty, finding that there was no breach[121].

[116] On 10 June 1974, Woollahra Municipal Council passed resolutions limiting the number of stories and providing for mandatory setbacks for buildings on certain properties. These resolutions were held to be invalid[122]. The owner of one of the properties to which the resolutions related then sued the Council, unsuccessfully[123]. Yeldham J considered whether the Council owed to the plaintiff "a duty of care when purporting to regulate the number of stories which could be contained in his proposed building, such duty involving at least the ascertainment by it of the extent of its power to do so, or whether such a power existed at all"[124]. Although expressing "considerable doubt", his Honour was prepared to assume that the Council owed the alleged duty to the plaintiff, but found it did not breach that duty[125]. The matter ultimately found its way to the Privy Council, where their Lordships shared the "considerable doubt" of Yeldham J as to the existence of such a duty of care[126].

[117] It is at this point convenient to note some statements by Brennan J in *Mengel*. The first is as follows[127]:-

> "Different considerations apply when a tort other than misfeasance in public office is relied on as a source of liability. Public officers, like all other subjects, are liable for conduct that amounts to a tort unless their conduct is authorised, justified or excused by statute. A statute is not construed as authorising, justifying or excusing tortious conduct unless it so provides expressly or by necessary intendment. In particular, a statute which confers a power is not construed as authorising negligence in the exercise of the power. Thus liability may be imposed on a public officer under the ordinary principles of negligence where, by reason of negligence in the officer's attempted exercise of a power, statutory immunity that would otherwise protect the officer is lost[128]".

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120 [1986] 1 NZLR 22.
121 See *Rowling v Takaro Properties Ltd* [1988] 1 AC 473, especially at 501-503.
122 (1975) 32 LGERA 431.
123 *Dunlop v Woollahra Municipal Council (No 2)* (1978) 40 LGERA 218.
124 See *Dunlop (No 2)* at p 237.
125 *Dunlop (No 2)* at p 239.
126 *Dunlop v Woollahra Municipal Council* [1982] AC 158, 171.
127 *Mengel* at 358.
128 *Benning v Wong* (1969) 122 CLR 249, 256; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 458, 484.

[118] However, his Honour also said[129],

> "Where a public officer takes action that causes loss to a plaintiff – in the present case, by giving directions – and the sole irregularity consists of an error as to the extent of the power available to support the action, liability depends upon the officer's having one of the states of mind that is an element in the tort of misfeasance in public office. That element defines the legal balance between the officer's duty to ascertain the functions of the office which it is his or her duty to perform and the freedom of the individual from unauthorised interference with interests which the law protects. The balance that is struck is not to be undermined by applying a different standard of liability – namely, liability in negligence – where a plaintiff's loss is purely economic and the loss is attributable solely to a public officer's failure to appreciate the absence of power required to authorise the act or omission which caused the loss. The law does not speak with a forked tongue when dealing with the limit of liability of a public officer."

[119] In *Holland v Saskatchewan*[130] the Supreme Court of Canada upheld a decision of the Court of Appeal of Saskatchewan striking out part of an appeal claiming damages for negligence based on invalid governmental action which resulted in the downgrading of the status of the plaintiffs' herds. The Supreme Court classified the claim as "a claim for negligently acting outside the law", the fault relied upon being, "failing to act in accordance with the authorising acts and regulations"[131]. In determining whether the duty of care existed, the Court applied the two-stage test in *Anns v Merton London Borough Council*[132], upholding the striking out on the basis that policy considerations would negate the recognition of liability. The identified policy considerations were "the chilling effect and specter of indeterminate liability"[133]. Text writers[134] point out that a little earlier, the same Court had rejected a claim that recognising a duty owed by police officers to suspects would have a chilling effect on the investigation and prevention of criminal activity, because there was insufficient evidence to support such a chilling effect, despite numerous studies. It would seem to follow that the significance of these considerations may vary with the context of a particular alleged duty of care.

[120] A case of some assistance in the present case is the decision of the New South Wales Court of Appeal in *Precision Products (NSW) Pty Ltd v Hawkesbury City Council.*[135] A regulatory authority had issued a notice under s 91 of the *Protection of the Environment Operations Act* 1997 (NSW). The holding is identified in the headnote as being that an authority issuing such a notice "does not owe the recipient a duty of care to avoid causing economic loss beyond that which it is reasonably necessary to cause in the proper administration of the Act"[136]. The claim was based on the proposition that two such notices issued to Precision Products were invalid. The Statement of Claim alleged that the Council owed a duty of care to the appellant "to see that proper skill and care

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[129] *Mengel* at 359.
[130] [2008] 2 SCR 551.
[131] *Holland* at [7].
[132] [1978] AC 728.
[133] *Holland* at [10].
[134] Hogg, Monahan and Wright, *Liability of the Crown* (4th ed), Carswell at p 247.
[135] (2008) 74 NSWLR 102.
[136] *Precision Products* at p 102.

was exercised in investigating and in the issuing of the two notices"[137]. Allsop P (with whom the other members of the Court agreed) said of the pleading[138],

> "The asserted duty or duties can be taken to have as its or their essence that the Council will take reasonable care in issuing the notices so as to avoid causing the appellant foreseeable economic detriment by the issue of a notice that would not be issued or would be issued in different terms had due care been taken in the circumstances of its issue".

[121] His Honour rejected the existence of such a duty[139]. His Honour referred to High Court decisions that endorsed an approach based on the presence of "salient features" sufficient to give rise to a duty of care, a number of which his Honour considered. Those of most significance were reliance, assumption of responsibility, and the vulnerability of the plaintiff[140].

[122] As I read his Honour's reasons, Allsop P placed considerable weight on the responsibilities placed on the Council by the *Protection of the Environment Operations Act*, saying[141],

> "To cast on the EPA, or an authority such as the Council, the responsibility of taking into account the interests of the person who is, or may be, responsible for the pollution and requiring the authority to exercise care (enforceable by damages at common law) in going no further than is reasonable or necessary or proportionate to protect the environment is to infuse into the statutory process considerations that may have a tendency to discourage the due performance of the principal statutory duty."

[123] His Honour then said[142]

> "The imposition of a duty of care to have regard to the economic interests of a person in the position of the appellant in the way proposed would be to subject the Council, whose responsibility is to exercise the power in the public interest, to a duty to have regard to the conflicting interests and claims of the party whose conduct (on this hypothesis) may have endangered the environment and the public interest. The setting up of this tension between the statute and the common law should not be permitted: *Sullivan v Moody*[143]."

[124] His Honour considered the availability of an administrative remedy to be a feature of some significance[144]. His Honour then made reference to a "lack of coherence with administrative law", characterising the appellant's complaints as being rooted in that branch of the law[145]. Thus his Honour stated[146],

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137 *Precision Products* at [15].
138 *Precision Products* at [103].
139 *Precision Products* at [104].
140 *Precision Products* at [105]-[106].
141 At [112].
142 At [114].
143 (2001) 207 CLR 562 at 582; see also *Precision Products* at [115].
144 *Precision Products* at [113].
145 *Precision Products* at [116].
146 *Precision Products* at [119]-[120].

> "119 The lack of coherence between administrative law doctrines and the imposition of monetary compensation for the flawed or failed exercise of governmental power is illustrated later in these reasons in the discussion of breach of the posited duty. As will be seen, if standards of administration are to be regulated and enforced by recourse to the recovery of damages at common law, the courts must necessarily become involved, not just in the constitutional role of ensuring legality, but also in laying down standards of administrative conduct by reference to a standard of reasonable care. This standard setting and its enforcement by the courts would be in relation to the exercise of power of another branch of government and in circumstances where there exist machinery and techniques for the setting and maintenance of good administration and good government. The courts, of course, play a central role in that machinery in supervising the legality of the activity of government. To infuse common law duties and the recovery of damages in such a field as the issuing of notices under s 91 where governmental (EPA supervision) and legal (judicial review) controls already exist would introduce an undesirable incompatibility and lack of coherence to the regime of environmental protection.
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> 120 The above is not to deny the continued force of *Caledonian Collieries* and like cases. When a Council examines a power to build a structure, approve a plan, give permission for an act or otherwise engage in activity, it may well be required (on pain of liability in damages) to exercise care in relation to someone who may be affected by the power's exercise. What tends to strike at the coherence of administrative law here is the positing of a duty to exercise reasonable care not to make a flawed decision by, for instance, failing to give procedural fairness or failing to confine the power within statutory limits. Such a duty, as contended for here, would tend to open public authorities to the spectre of compensation for flawed decision making, in circumstances where the validity of the exercise of power can be tested and resolved by judicial review, and where standards of competence and skill are well able to be dealt with by an appropriate regime of governmental administration."

[125] In the course of considering whether the proposed duty, if accepted, would result in a lack of coherence with administrative law, Allsop P[147] drew on the reasons of Spigelman CJ in *State of New South Wales v Paige*[148]. In *Paige*, Spigelman CJ discussed whether the Department of Education owed the Principal of a High School a duty to take reasonable steps to prevent psychological injury to its employees, and to provide a safe system of work, including a safe system of investigation and decision making, in an investigation into the manner in which the Principal had handled complaints. Spigelman CJ concluded his discussion with the following[149]:

> "There is, in my opinion, a real issue of coherence with administrative law if the law were to recognise a duty of care in the conduct of investigations, the laying of charges and the hearing of disciplinary proceedings. Where a

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147 *Precision Products* at [116], [118].
148 (2002) 60 NSWLR 371 at [156]-[177].
149 *Paige* at [177].

> decision-making process can be done again, then that should enable, in many cases, the injured party to be put in the same position as he or she would have been in the absence of error. However sometimes, as in the present case, it may not be likely or even possible that a new decision-making process can have such an effect. The line between the two will often be contestable. The coherence of the law, in my opinion requires restraint even in such a context."

[126] In *Corkhill v Commonwealth*[150], Refshauge J had to consider proposed amendments to a claim based on the fact that a deceased employee of the Commonwealth had not become a member of a superannuation scheme. It was proposed to allege that the defendant owed a duty of care (to the deceased person's wife) to facilitate and duly process an application to include the deceased in a superannuation scheme, and it negligently failed to perform that duty[151]. His Honour carried out an extensive review of authorities including *Dunlop v Woollahra Municipal Council* and *Rowley v Takaro Properties*, as well as *Paige* and *Precision Products*. His Honour concluded[152]

> "I do not consider that any of these decisions support the proposition that a public authority, such as the Commonwealth, is not liable in negligence in respect of any administrative action."

[127] His Honour concluded that neither the legislation nor coherence in the law required rejection of the duty[153], and that the proposed cause of action was arguable[154].

[128] The question whether the Council owed the alleged duty of care to Mr Cleret in the present context is, it seems to me, one of some general importance. Not surprisingly, Mr Cleret has not been able to identify the relevant considerations, including the relevant authorities, and advance them. No doubt for that reason, the matter has not been fully argued by the Council, although I have had the assistance of some helpful submissions made on its behalf. Since I consider that I can determine this claim without making a finding about the existence of the alleged duty of care, I propose to do so; and will assume, for the balance of these reasons, that such a duty exists. Nevertheless, I propose to make some brief observations about matters which seem to me to be relevant to the existence of such a duty in this case.

[129] Unlike the duty considered by Allsop P in *Precision Products*, it seems to me that the alleged duty does not require the Council to consider the potential impact of taking action, when deciding whether to do so under the relevant provisions of the *Food Act*, on a person who has breached conditions of a licence, or otherwise has breached a statutory provision. It requires no more than the taking of reasonable care (what specifically will be required will depend on the particular circumstances of each case) to ensure that its actions, if any, are within the power conferred on it. It is difficult to see that the existence of such a duty would in truth having a chilling effect of any relevance on the performance by the Council of its responsibilities under the *Food Act*. Regardless of the proposed duty of care, it seems to me that the taking of reasonable care to ensure that when a body exercises a power to require a person to cease trading, it

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[150] [2015] ACTSC 216.
[151] *Corkhill* at [39].
[152] At [70].
[153] At [74].
[154] *Corkhill* at [77].

acts within the limits imposed on it by statute, is something which it should in any event do.

[130] When a person receives a notice, apparently authorised by statute, and coming from a body in authority, such as a Council, which requires that person to cease an activity immediately, and where non-compliance would appear to amount to a criminal offence, it seems to me there is a sense in which that person is vulnerable, or unable to protect himself or herself[155]. Since the notice calls for immediate action, and its invalidity is something which the recipient is unlikely to be able to determine immediately, the recipient has no real choice but to comply. Otherwise the person runs the risk of committing a criminal offence. But compliance will almost inevitably carry with it some form of economic loss. It might be added that the Council (or a person authorised to act on its behalf) will be expected to have some anterior knowledge of the scope of the relevant power, and some familiarity with the legislation; as well as some experience in making decisions whether or not to exercise the power. The recipient of the notice is unlikely to be in that position.

[131] It is difficult to see that the risk of indeterminate liability is a significant factor in a case like the present one. Notices of the kind in question are usually addressed to an individual, or at least the proprietor or proprietors of an individual business.

[132] A question which seems to me of some significance, is that raised by the statement by Brennan J in *Mengel*, quoted earlier, relating to the limit of liability of a public officer. However, it is by no means unknown for the law to recognise that more than one cause of action might arise from what is substantially the same factual matrix[156]. Nor, it seems to me, would a duty to take reasonable care to ensure that a proposed action is within the confines of a statutory power result in a lack of coherence with administrative law remedies. It would not call for review by the Court of the merits of the decision whether to exercise the power.

[133] The first difficulty with this aspect of Mr Cleret's claim in negligence is that he has not identified how it is said that the Council, through Mr Brewer (representing the Council), failed to take reasonable care to ensure that he acted within power when issuing the suspension notice. Mr Cleret has identified bases on which he contends this conduct was beyond power; but does not seek to establish that this was the result of a failure to take reasonable care.

[134] Mr Brewer gave evidence that when he signed the notices, he drew the attention of Ms Brooks to the requirement for a show cause notice[157]. This evidence was not challenged, nor were arguments advanced for rejecting it. Nor was any argument advanced that this was insufficient to meet the requirements of the alleged duty. On the basis of Mr Brewer's evidence, I would not find that he failed to take reasonable care to ensure that a show cause notice issued.

[135] Ms Brooks gave evidence that she was not aware that she needed to deliver a show cause notice[158]. While that evidence might raise a doubt about Mr Brewer's evidence, I

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[155] See *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at [23].
[156] See *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81 at [48] and especially at [49]-[51].
[157] T7-84, 98.
[158] T8-17.

would, on balance prefer his evidence. He was aware of the need for the show cause notice; and it seems to me rather likely that he would have raised this with Ms Brooks. He also appeared to me to have a better recollection than Ms Brooks of the events relating to the issue of the show cause notice.

[136] Ms Brooks referred to following that procedure in the Council's system[159]. This was not expressly relied upon by Mr Cleret as demonstrating a breach of a duty of care. It is not a basis on which I would be prepared to make a finding in his favour, without proper notice. It would require investigation of the state of the Council's system, at the time when the suspension notice issued.

[137] The other matter which was advanced by Mr Cleret in the FASC was that a suspension notice could not operate for more than 30 days; but the suspension notice served on him potentially purported to operate for a longer period until the actions identified in the Improvement Notice of the same date had been taken. Mr Cleret did not advance a case seeking to demonstrate that the Council had failed to take reasonable care in relation to this aspect of the notice.

[138] Accordingly, I would not be prepared to find the Council breached the duty of care alleged by Mr Cleret.

[139] There is also a problem in relation to causation of the loss alleged by Mr Cleret. If care had been taken, it is likely that a show cause notice would have accompanied the suspension notice and the information notices. Likewise, the suspension notice would not have had a purported operation for a period (potentially) longer than 30 days. Mr Cleret has not shown that, if care had been taken, he would not have suffered the loss which he claims.

[140] In my view, Mr Cleret has failed to demonstrate that he is entitled to damages by reason of the negligent failure of the Council to take reasonable care to ensure that it acted within power, when issuing the Suspension Notice.

Loss

[141] Part of Mr Cleret's claimed loss, is loss of income particularised in an amount of $226,557.70, for the period from 25 June 2010 until an anticipated date of trial on 23 November 2015. This appears to have been calculated by reference to payments made to the mortgagee of the premises said to amount to a sum of $32,313.44 yearly from 2006; and an additional sum of $288.75 per week, described as "the minimum of money the Australian government deemed necessary to survive"[160].

[142] The plaintiff did not produce any tax returns to demonstrate what income he had earned prior to June 2010. He did not produced any financial records to demonstrate that at any time the restaurant had been profitable. Since Mr Cleret at the time worked as an engineer, there is no way of knowing from the evidence the extent to which repayments to the mortgagee came from income generated from the restaurant, rather than from other sources.

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[159] T8-17.
[160] FASC p 13 para 13D.

[143] In a document tendered as part of his evidence, Mr Cleret said that the repayments of interest on the loan from the mortgagee had been made from the income from the restaurant[161]. The defendants called Mr Green, a chartered accountant, to give evidence about some aspects of Mr Cleret's damages claim. He took issue with what Mr Cleret had said about his repayments to the mortgagee[162]. Mr Green pointed out that the statements issued by the mortgagee record that on five occasions from 10 November 2006 to and including 10 February 2010 repayments were dishonoured. He concluded that Mr Cleret was not meeting his financing repayment obligations at times[163]. He also recorded that Mr Cleret increased his level of indebtedness. The loan from the mortgagee (originally in an amount of $305,000) was taken out in August 2006 to refinance a loan from Westpac, Mr Cleret's level of indebtedness to Westpac at that time being $168,000[164]. In July 2006, July 2007 and October 2009, Mr Cleret increased his level of indebtedness, on the last occasion to $350,000[165]. By 9 July 2010, the indebtedness had increased to $354,165.42[166]. While some of the increased indebtedness may be explained by the cost of improvements to the property, I am not satisfied that this explanation accounts for all of the increase.

[144] The loan activity statements record repayments generally throughout the period from October 2006 until July 2010. There seems to me to be, however, a real reason to doubt that these repayments came solely, or even principally, from the restaurant. As already indicated, there is no objective corroboration of that fact, nor documentary evidence to support it. The restaurant did not operate for about six months prior to 25 June 2010, save for a period around Christmas, and a period around Easter. Yet substantial repayments were made, in a number of cases at times when the restaurant was not operating[167]. A substantial repayment was also made in September 2010[168]. In the absence of better evidence, I am not prepared to make a positive finding that to any significant extent repayments were made to the mortgagee from income generated by the restaurant. I do not consider the evidence of Mr Cleret sufficiently reliable to act on.

[145] Mr Cleret has not proven that he has suffered any loss of income as a result of closing the restaurant; and accordingly, as a result of any alleged tortious conduct on the part of either defendant.

[146] Mr Cleret gave evidence about work which had been done to improve the property, and the restaurant, over many years, including some evidence of his recollection of the cost of that work. Had Mr Cleret established tortious conduct by either defendant, he would have been entitled to an award which would have placed him in the position in which he would have been had the tort not been committed. His allegation of loss, other than loss of income, is based on the proposition that because he was forced to close the restaurant, and could not earn income, he could not generate income to enable him to make payments to the mortgagee, resulting in the sale of the property. In the absence of some other more appropriate measure, if his case about income from the restaurant were

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[161] Exhibit 13 para 6.
[162] See Exhibit 69 p 50.
[163] Exhibit 69 p 56.
[164] Exhibit 69 p 53.
[165] Exhibit 69 p 53.
[166] Exhibit 69 p 114.
[167] Exhibit 69 pp 112, 114.
[168] Exhibit 69 p 114.

accepted, that would mean that Mr Cleret would be entitled to recover as damages the extent, if any, to which monies credited to him as a result of the sale of the property were less than its true value. Mr Cleret has not demonstrated that some other basis for the assessment of his damages is appropriate. In particular, he has not demonstrated that he is entitled to be paid the costs of the improvements which he made.

[147] Valuations for the property were tendered both by Mr Cleret and by the defendants. The valuers recorded their enquiries relating to the property. At least to the extent to which I shall now recount them, I understand there to be no challenge to the accuracy of what they record.

[148] The mortgagee gave notice of its intention to exercise its power of sale in about October 2010[169]. The property was listed with a real estate agent in Kenilworth for approximately 10 months[170]. An auction, apparently unsuccessful, was held in September 2011[171]. The property was ultimately sold in December 2012 for $352,000[172]. The purchaser removed the improvements[173]. Mr Walker, called by Mr Cleret, valued the property (without improvements) at 1 September 2010 at $380,000; and at 5 February 2015 at $320,000[174]. Mr Kamitsis, called for the defendants, valued the property (improved) at $350,000 as at 10 June 2010[175]; although he did not consider the improvements added to the value of the property[176].

[149] It is not clear from Mr Walker's evidence how he came to his conclusion. His valuation records sales of five properties in Elizabeth Street, where the restaurant was located, and where all the commercial development in Kenilworth is found. He also records six residential sales in George Street, in a newly developed estate a short distance to the north of Elizabeth Street. While there is a brief description of the improvements of the Elizabeth Street properties, it is apparent that Mr Walker analysed the sales of the Elizabeth Street properties to determine the value of the land (without improvements) sold. How he made use of the analysis in the valuation of the land formerly owned by Mr Cleret is not further explained. The sales of Elizabeth Street properties range over a period of seven years. The areas of land (excluding Mr Cleret's property) range in size from 210 square metres to 1,035 square metres, substantially smaller than Mr Cleret's property with an area of 2,023 square metres. The derived rates per square metre vary from $160 per square metre to $500 per square metre. Without a better explanation of the use to be made of the analysed sales in Elizabeth Street, it is difficult to have confidence in Mr Walker's conclusion.

[150] Mr Walker relied on the sales of vacant residential land in part to provide evidence of market movement. Broadly speaking, these lots are all of similar size, and in a relatively similarly location. Generally speaking, they indicate a reduction in the rate per square metre between 2009 and 2014. Rather strikingly, adjoining properties at 43 George Street and 41 George Street were sold respectively in 2009 and early 2013; and the rate paid per square metre reduced from $203 to $136. It seems to me they provide

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169 See Exhibit 19.
170 Exhibit 69 p 33.
171 Exhibit 69 p 45 para 11.
172 Exhibit 69 pp 8 and 34.
173 Exhibit 69 pp 9 and 32.
174 Exhibit 69 p 9.
175 Exhibit 69 p 37.
176 Exhibit 69 p 44 para 5.

reasonably reliable evidence of a falling market for such property in Kenilworth. Although I acknowledge difficulties in applying such a conclusion about residential land, to market movement for commercial land, in the absence of other evidence I would be prepared to accept the view of Mr Walker that the market for commercial land also fell relatively significantly over this period.

[151] However, Mr Walker also used the sales as directly relevant evidence for determining the value of Mr Cleret's land, on the basis that properties in Elizabeth Street might also be used for residential purposes[177]. To the extent that there is some justification for that course, it comes from the fact that two of the sale properties included dwellings, as well as commercial premises. However, it seems to me likely that the properties in Elizabeth Street derived their value from their potential for commercial use; and it seems to me appropriate to be critical of Mr Walker's reliance on residential sales to determine the value Mr Cleret's property.

[152] Mr Kamitsis relied principally on the sale of Mr Cleret's property in 2012, to derive its value in 2010. Obviously, a sale of the property to be valued is important evidence, though it would be necessary to take into account market movement between the date of sale and the date of valuation. Mr Kamitsis considered that there had been no market movement in this period; and there was little or no change in the relevant property market between 2010 and 2012[178].

[153] While I have indicated that I accept there was a relatively significant fall in the market between 2009 and 2014, it is difficult to determine the extent to which the market for commercial property in Kenilworth fell in that period; and it is more difficult to determine whether there was a fall in the market between 2010 and 2012. It seems to me that such evidence as is available is insufficient to determine that question.

[154] Mr Kamitsis better explained his comparison between the sale properties and Mr Cleret's property. While some criticism was made about the extent of his knowledge of the improvements on some of the sale properties, that does not seem to me to be a matter of great significance, given the extent of his reliance on the sale of Mr Cleret's property. Accordingly, I prefer the valuation of Mr Kamitsis of Mr Cleret's property as at June 2010, to that of Mr Walker at September 2010, though I recognise the prospect that Mr Kamitsis' value may be low.

[155] However, I do not consider this conclusion to be critical for the determination of damages. No basis was advanced for saying that the damages should be determined by reference to the value of the property in 2010. There was no suggestion in Mr Cleret's evidence that he would have sold the property about that time, had he continued trading. Nor was there any suggestion that the property was sold in 2012 for less than its true market value. No doubt the proceeds were applied to reducing Mr Cleret's indebtedness to the mortgagee; and I note that the evidence indicates that the remaining debt was subsequently written off[179].

[156] In light of my conclusions about the causes of action, I do not propose to consider Mr Cleret's claim for aggravated damages and exemplary damages. Mr Cleret has also

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[177] T5-23/15.
[178] Exhibit 69 p 37.
[179] Exhibit 69 pp 112, 124.

claimed damages for stress, but in light of my earlier conclusions I do not propose to consider that claim either.

Conclusion

[157] My conclusions make it unnecessary to consider the provisions of the *Civil Liability Act* relied upon by the defendants.

[158] The plaintiff's action should be dismissed.