SUPREME COURT OF QUEENSLAND

CITATION:	*Goldsmith & Anor v AMP Life Limited* [2021] QCA 20
PARTIES:	**ANDREW DAVID GOLDSMITH** (first applicant) **JANNE ELIZABETH TIPPETT** (second applicant) **v** **AMP LIFE LIMITED** ACN 079 300 379 (respondent)
FILE NO/S:	Appeal No 7791 of 2020 DC No 419 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2020] QDC 140 (Porter QC DCJ)
DELIVERED ON:	Date of Orders: 11 November 2020 Date of Publication of Reasons: 12 February 2021
DELIVERED AT:	Brisbane
HEARING DATE:	11 November 2020
JUDGES:	Sofronoff P and Morrison JA and Henry J
ORDERS:	**Orders delivered: 11 November 2020** **1. The application for leave to appeal is refused.** **2. The applicants are to pay the respondent's costs of the application on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – FROM DISTRICT COURT – BY LEAVE OF COURT – where from 11 October 2004 Gold Tip (News) Pty Ltd operated a newsagency business in premises that it leased from the respondent at a shopping centre – where the applicants were the owners and managers of Gold Tip and operated the business – where commencing in June 2008, the respondent undertook major renovations to the shopping centre, including an expansion of it – where the renovations took some two years to complete – where during the course of the renovations, Gold Tip moved its business from the original premises to new premises in the newly constructed mall that was part of the centre – where in April 2012 Gold Tip was placed into liquidation – where the applicants took an assignment of Gold Tip's right to bring

proceedings against the respondent – where prior to the commencement of the renovations, Gold Tip and the respondent commenced negotiations for a new lease, new shop, to accommodate the business in a new location but still within the expanded centre – where the second lease commenced on 4 February 2010 when the business commenced operating from the new shop – where the business did not succeed, and Gold Tip was wound up in insolvency on 30 March 2012 – where the applicants alleged that various actions of the respondent in the course of the renovation works gave rise to a right to compensation on the part of Gold Tip for losses caused by those actions – where the right to compensation was said to arise under s 43(1) of the *Retail Shop Leases Act* 1994 (Qld) – where the respondent denied any entitlement to compensation under either lease and contended that any claim under the first lease was statute barred – where it also raised a set-off and counterclaim for unpaid rent due by Gold Tip under the second lease – where the learned trial judge found that reasonable compensation payable under the first lease was the subject of an equitable set-off for the unpaid rent due under the second lease – where the applicants seek leave to appeal under s 118(3) of the *District Court of Queensland Act* 1967 (Qld) – whether leave to appeal should be granted

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – WRONG PRINCIPLE – GENERALLY – where the first proposed ground of appeal was that the learned trial judge erred in finding that the respondent's claim for unpaid rent under the second lease could be set off against any claim for damages under the first lease – where there was no dispute between the parties as to the principles applicable to set-off – where this Court has previously recognised the possibility that an equitable set-off might arise in respect of different legal instruments between the same parties – whether the learned trial judge was correct to hold that the claim for compensation under the first lease could be the subject of a set-off in respect of the rent unpaid under the second lease

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – JUDGE MISTAKEN OR MISLED – GENERALLY – where the second proposed ground of appeal relates to what was called the "extinguishment issue" in the reasons below – where the issue arose because the applicants argued in the final written submissions below

that the dissolution of Gold Tip following the completion of its winding up resulted in the respondent's debt being extinguished, so that it could no longer be raised as a defence to the claims for compensation in respect of the lease – where the learned trial judge stated that the matter was not pressed – where his Honour found that if he were wrong in that view then the argument against it being raised was correct – whether the learned trial judge can be shown to have erred in the conclusions he reached on that point

LIMITATION OF ACTIONS – GENERAL MATTERS – STATUTES OF LIMITATION GENERALLY – where the respondent's notice of contention urged that the decision below could be affirmed on the basis that the applicants' claim (at least in part) was statute barred under s 10(1) of the *Limitation of Actions Act* 1974 (Qld) – where the applicants contended that the claim was an action on a specialty and therefore the time period was 12 years – where the term of the first lease expired on 10 July 2006 – where on 9 November 2006 Gold Tip and the respondent agreed to amend the expiry date and thus extend the term of the first lease until 10 December 2007 – where a document was executed recording the amendment – where in December 2007 the expiry date was extended again and the parties executed an amendment to the lease document which recorded that agreement – where neither the first nor the second lease amendments were registered on the title of the shopping centre – whether from 10 July 2006 when the registered lease expired, Gold Tip continued to occupy the premises under the terms of an unregistered lease – whether on 30 June 2008 when the unregistered lease came to an end, Gold Tip remained in possession by way of an unregistered holding over which attracted the benefits of the registered lease – whether the learned trial judge's conclusion that the action was an action on a specialty was in error

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – PROOF AND EVIDENCE – OTHER MATTERS – where the applicants contended that his Honour did not properly consider certain evidence, and on a proper consideration of other evidence should have concluded that stabilisation did affect the new business, and mistook whether an evidentiary burden had been satisfied or not – whether this aspect of the proposed appeal raises a valid ground for leave to appeal

Corporations Act 2001 (Cth), s 601AH
District Court of Queensland Act 1967 (Qld), s 118

Land Title Act 1994 (Qld), s 67, s 176
Limitation of Actions Act 1974 (Qld), s 10
Retail Shop Leases Act 1994 (Qld), s 42, s 43

Chamberlain Early Learning Centre Pty Ltd v Precious 1 Pty Ltd as trustee for 4 Chamberlain Holdings Family Trust [2017] NSWSC 189, applied
Forsyth v Gibbs [2009] 1 Qd R 403; [2008] QCA 103, cited
Goldsmith & Anor v AMP Life Ltd [2020] QDC 140, approved
Norman v FEA Plantations Ltd (2011) 195 FCR 97; [2011] FCAFC 99, cited

COUNSEL: N Ferrett QC, with C Upton, for the applicants
D Chesterman for the respondent

SOLICITORS: Woods Prince Lawyers for the applicants
Norton Rose Fulbright for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Morrison JA.

[2] **MORRISON JA:** From 11 October 2004 Gold Tip (News) Pty Ltd operated a newsagency business in premises that it leased from the respondent at the Mt Ommaney shopping centre. The appellants were the owners and managers of Gold Tip and operated the newsagency business.

[3] Commencing in June 2008 the respondent undertook major renovations to the centre, including an expansion of it. The works took some two years to complete.

[4] During the course of the works being carried out, Gold Tip moved its business from the original premises to new premises in the newly constructed mall that was part of the centre.

[5] In April 2012 Gold Tip was placed into liquidation. The appellants took an assignment of Gold Tip's right to bring proceedings against the respondent.

[6] The renovations to the centre commenced in June 2008 and continued until at least mid-2010. Prior to the commencement of the work, Gold Tip and the respondent commenced negotiations for a new lease, new shop, to accommodate the business in a new location but still within the expanded centre. The second lease commenced on 4 February 2010 when the business commenced operating from the new shop. The business did not succeed, and Gold Tip was wound up in insolvency on 30 March 2012.

[7] The applicants (the plaintiffs below) alleged that various actions of the respondent in the course of the renovation works gave rise to a right to compensation on the part of Gold Tip for losses caused by those actions. The right to compensation was said to arise under s 43(1) of the *Retail Shop Leases Act* 1994 (Qld). Relevantly s 43 provides:

> "**43 When compensation is payable by lessor**
>
> (1) The lessor is liable to pay to the lessee reasonable compensation for loss or damage suffered by the lessee because the lessor, or a person acting under the lessor's authority -

…

(b) takes action (other than action under a lawful requirement) that substantially restricts, or alters -

(i) access by customers to the leased shop; or

(ii) the flow of potential customers past the shop; or

(c) causes significant disruption to the lessee's trading in the leased shop …"

[8] The respondent denied any entitlement to compensation under either lease. It also contended that any claim under the first lease was statute barred. It sought to raise a set-off and counterclaim for unpaid rent due by Gold Tip under the second lease.

[9] After a seven day trial the District Court ordered that the claims by both the applicants and the respondent be dismissed.[1] At the heart of the learned trial judge's findings was the conclusion that reasonable compensation payable under the first lease was the subject of an equitable set-off for the unpaid rent due under the second lease.

[10] The applicants seek leave to appeal under s 118(3) of the *District Court of Queensland Act* 1967 (Qld). For that purpose they contend that leave should be granted because:

(a) the proceeding concerns the proper construction and operation of ss 43(1)(b) and (c) of the *Retail Shop Leases Act*; further, it was said that there was no appellate authority on the issue, and the construction and operation of that section is a matter of general and public importance;

(b) an appeal is necessary to correct a substantial injustice to the applicants and there are reasonable grounds to conclude that there was an error to be corrected, in that the learned trial judge erred in finding:

(i) the respondent was entitled to set-off the debt claimed under the second lease against the applicants' right to compensation under the first lease;

(ii) the applicants' argument regarding the extinguishment of the debt on deregistration of Gold Tip could not be raised; and

(iii) the actions of the respondent did not cause one or more of the consequences in ss 43(1)(b) and (c) of the *Act*.

Leave to appeal

[11] Leave to appeal is required under s 118(3) of the *District Court of Queensland Act*.

[12] The test for the grant of leave to appeal is well established. In *Pickering v McArthur*[2] it was held that leave would usually be granted where an appeal is necessary to correct a substantial injustice to the applicant and there is a reasonable

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1 *Goldsmith & Anor v AMP Life Ltd* [2020] QDC 140.

2 [2005] QCA 294 at [3].

argument that there is an error to be corrected. That has been consistently followed since.[3]

[13] As will appear, the applicants failed to establish that leave to appeal should be granted, and orders were made on 11 November 2020 refusing leave and also that the applicant pay costs.

The business and the leases

[14] The learned trial judge made a number of findings concerning the nature of the business operated by Gold Tip and the leases under which it occupied the two different locations in the shopping centre. The newsagency commenced operation in 2004, under the control of a different owner. It occupied its area under a registered lease (**the first lease**) which was due to expire on 10 July 2006. That lease was regulated by the *Retail Shop Leases Act*.

[15] The relevant characteristics of the location of the original newsagency included:

(a) it was located on the corner of a right-angled mall in the middle of the centre;

(b) that mall had Coles as the main tenant, with the Coles entry opposite the newsagency;

(c) a pharmacy was located to the south of the newsagency;

(d) the location of the three shops was mutually supportive of foot traffic being attracted to the Coles mall, with each shop being both a destination in its own right, as well as obtaining the benefit of discretionary spending from shoppers attracted to the other shops; and

(e) one of the two main doors to the centre, the south door, was closest to the newsagency, as was the south carpark located in the area of the south door.

[16] The original shop was the only newsagency in the centre. It had a monopoly on the sale of Golden Casket and related lotto business, as well as a monopoly on the supply of newspapers in the centre. However, it provided papers to the supermarkets and some other locations, for the purpose of sale.

[17] Gold Tip took an assignment of the first lease from the existing lessee on about 11 October 2004. At that time the business operated with a full range of traditional newsagency products. In addition, it had a print centre which provided photocopying, laminating, binding and design and production of personalised wedding and event stationery. It also incorporated a book shop.

[18] On 10 July 2006 the first lease expired. Some months later the expiry date was extended until 10 December 2007 (**the first extension**). The extension was documented as a Form 13 Amendment which provided that the "document sets out the amendments to the Lease, which apply from 11 July 2006", and otherwise confirmed "all other clauses of the Lease". That document was not registered.

[19] In mid-2007 Mr Goldsmith was told that a redevelopment would start within two years, and that the business would be moving to a new location. He was also told

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3 *Wash Investments Pty Ltd v SCK Properties Pty Ltd* [2016] QCA 258; *Ant Projects Pty Ltd v Brooks* [2019] QCA 259; *Tutos v Roman Catholic Trust Corporation* [2020] QCA 171 at [12].

that the budget for the redevelopment was about $145 million and the centre was to increase by about 45 per cent, or 20,000m².

[20] On 10 December 2007 the first extension expired. The expiry date of the first lease was further extended to 30 June 2008 (**the second extension**). This was done in the same manner as for the first extension, but again the document was not registered.

[21] The second extension expired on 30 June 2008. There was no further extension of the first lease.

[22] Prior to commencement of the redevelopment works Gold Tip and the respondent negotiated for a new lease (**the second lease**) in respect of where the business would be relocated. The second lease commenced on 4 February 2010 when the business commenced in the new premises.

[23] Accordingly, from 1 July 2008 until Gold Tip vacated the original newsagency shop and the lease of that shop was terminated on 3 February 2010, Gold Tip was holding over on the terms set out in the first lease.[4]

[24] Clauses 2.2 and 2.3 of the first lease became the focus of submissions at trial and before this Court. Those clauses provided:

> "**Holding over**
>
> 2.2 If the Lessee continues to occupy the Premises after the Expiry Date with the Lessor's approval, it does so under a tenancy for a fixed term of one month and then from month to month which either party may terminate on one month's notice ending on any day.
>
> **Holding over terms**
>
> 2.3 Subject to clause 2.2 the monthly tenancy is on the same terms as this Lease including in relation to payment of Base Rent, Lessee's Contribution, Percentage Rent, and the Marketing Levy (if any) except:
>
> (a) …
>
> (b) [**until 11 July 2006**][5] for those changes which are necessary to make this Lease appropriate for a monthly tenancy (except the Bank Guarantee may not be reduced); or
>
> (b) [**from 11 July 2006**][6] for those changes which are necessary to make this Lease appropriate for a monthly tenancy (except the Bank Guarantee may not be reduced) including the Lessor's requirement that if the Lessee continues to hold over after 11 July 2008, rent will be reviewed on that day, and on that day every year of the hold over period, as if it was a CPI Plus Percentage Adjustment Date.

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4 Subject to amendments agreed to at the expiry dates.

5 This was the text of clause 2.3(b) until 11 July 2006, when it was amended: Appeal Book (**AB**) 297 and 354.

6 This was the text of clause 2.3(b) from 11 July 2006: AB 354.

(c) for those changes which the Lessor requires as a condition of giving its approval to the holding over."

The sequence of the works

[25] The first stage of the works commenced on 18 June 2008. By September 2008 the north door and the north carpark were closed. That saw the loss of about 870 carparks, a 40 per cent reduction in the total number of available number of carparks.

[26] Work on the new north multi-storey carpark commenced in September 2008, and it was completed and open to customers by 23 December 2008. That resulted in 1,600 available parks on the north side of the centre. There were some difficulties with customer lifts and travelators, but these had been resolved by mid-2009.

[27] After closure of the north carpark and the north door, work commenced on an extension to the northern mall. Those extensions were opened in May 2009.

[28] In January 2009, after the new north multi-storey carpark had opened, the south door and south carpark were closed. That resulted in the loss of only 260 carparks to the centre. Work commenced on the construction of the new south mall, and that continued until late 2009.

[29] The respondent accepted at the trial that the works done between June 2008 and June 2009 were extensive and had negatively affected the business of the newsagency. In April 2009 Gold Tip and the respondent reached agreement that some compensation would be provided for that impact. The parties negotiated a rent credit of $30,000 on the basis that it would resolve all claims through to 30 June 2009.

[30] The learned trial judge held that the April 2009 agreement only comprised Gold Tip's entitlement to compensation for loss suffered to 30 June 2009 by reason of conduct before that date, but preserved the right to compensation for conduct before that date if that conduct manifested in further loss or damage after that date.[7] Further, the learned trial judge found that the settlement in April 2009 reflected Mr Goldsmith's contemporaneous view of the magnitude of impact on the newsagency, namely that it was compensable by $30,000.[8]

[31] In October 2008 negotiations commenced for Gold Tip to take a new lease for their shop in the proposed south mall. The agreement to lease was finalised by April 2009 and at that point it was contemplated that Gold Tip would move into the new shop in about November 2009. The new lease specified a different area for the shop and a new location. Instead of being located in the north mall, the business was now located in the south mall and proximate to Coles and Aldi.

[32] The south carpark and customer access to the south mall remained shut for almost all of 2009. By 10 December 2009 the south carpark was complete and the new south mall had commenced trade.

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7 Reasons below at [55]-[56].

8 Reasons below at [57].

[33] On 10 December 2009 Coles and the pharmacy moved into the new south mall. By this time all of the other shops surrounding the newsagency were closed. The result was that the Gold Tip business was left to trade in a "dead end" mall, with no passing customer traffic. It remained in that situation until it moved to the new shop on 4 February 2010.

[34] By February 2010 all entrances to the centre were open, and there were approximately 2,200 carparks open to customers. Thereafter there were no further works carried out at the centre which had the effect of reducing the number of available carparks.

[35] Between February 2010 and June 2010 the remaining part of the works, called the JB Hi-Fi Mall, were completed. During that period the remaining work was carried out predominantly at night, outside business hours. On 10 June 2010 the centre held a grand re-opening event. By June 2010, as the learned trial judge found, the works were effectively complete, both inside and out.

The proposed grounds of appeal

[36] The applicants advanced a number of contentions to support the three general proposed grounds identified in paragraph [10](b) above. I propose to examine each in turn, as well as the point raised in the respondent's notice of contention (that the applicants' claim was statute barred).

The set-off ground

[37] The first proposed ground was that the learned trial judge erred in finding that the respondent's claim for unpaid rent under the second lease could be set off against any claim for damages under the first lease.

Submissions

[38] It was submitted by Mr Ferrett of Queen's Counsel that the error was in concluding that a "sufficient connection" between claims or an "unfair" situation justified setting-off the claims. This was incorrectly applied because in Australia "impeachment" of the original claim remains the binding test.

[39] Further, it was submitted that the applicants' claim was for a breach of the statutory terms implied in a lease, while the set-off was for a debt for non-payment of rent. The claim and the debt were not mutually dependent. Interdependence is fundamental to the availability of equitable set-off even in jurisdictions where the impeachment test has been relaxed. Upon proper consideration, the respondent's claim for unpaid rent does not impeach the applicants' claim for compensation and therefore, the defence of equitable set-off was not available.

Legal principles

[40] There was no dispute between the parties as to the principles applicable to set-off. The learned trial judge referred to the decision of this Court in *Forsyth v Gibbs*[9] where Keane JA said:

> "[9] Consistently with the technique of equity, which does not seek to define what an elephant is but knows one when it sees one,

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9 [2009] 1 Qd R 403; [2008] QCA 103; internal citations omitted.

the principles governing the availability of equitable set-off of cross-claims are couched in open textured terms, such as "sufficient connection" and "unfairness". In some cases, it will be necessary to engage in an evaluation of a range of facts which might establish "sufficient connection" or "unfairness" of the relevant kind. But the principles to be applied are not so vague or subjective that it is never possible to determine, for the purposes of an application for summary judgment, that the facts alleged by a defendant simply fall short of what is required.

[10] It is important to emphasise that the availability of an equitable set-off between cross-claims does not depend upon an unfettered discretionary assessment of whether it would "unfair" in a general sense for a plaintiff to insist on payment of the debt owed to it while the cross-claim remains unpaid. It is essential that there be such a connection between the claim and cross-claim that the cross-claim can be said to impeach the claim so as to make it unfair for the claim to be allowed without taking account of the cross-claim.

[11] Thus in *Piggott v Williams*, the claim of a solicitor who sued his former client to recover fees for services rendered was successfully met by a plea of equitable set-off on the basis that the fees were only incurred by reason of the solicitor's lack of due skill and diligence. The solicitor's breach of his obligations of skill and diligence was itself the source of the claim for his fees. This case affords an example of what is meant when it is said that the claim to set-off must "impeach" or go to "the root of" the plaintiff's claim.

[12] An example of a failed attempt to assert an equitable set-off, which is particularly pertinent to a summary judgment situation, is afforded by the decision of the Full Court of the Supreme Court of Victoria in *Indrisie v General Credits Ltd*. There, an order for summary judgment was upheld against a guarantor who sought to rely upon a cross-claim for damages available to the principal debtor against its creditor by way of set-off against the guarantor's liability on the guarantee. The Full Court said:

> "… reference to cases such as *Edward Ward and Co v McDougall* [1972] VR 433; *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137; [1979] 2 All ER 1063 and *Eagle Star Nominees Ltd v Merril* [1982] VR 557 shows that, in order to rely upon a cross-claim as an equitable set-off, there must be such a nexus between the claim and cross-claim that the cross-claim can be said to impeach the plaintiff's claim. In the present case the claim for unliquidated damages is founded, not upon the transaction in respect of which the principal debtor is said to be liable, but upon a collateral contract entirely

> independent of that for which the respondent has the benefit of a security for due performance. The appellants' claim clearly does not meet the test to be applied, namely can the cross-claim be said to impeach the title to the respondent's legal demand?""

[41] Whether a claim and counterclaim both arise under one instrument is neither a qualifying nor a disqualifying feature in and of itself.[10] This Court has previously recognised the possibility that an equitable set-off might arise in respect of different legal instruments between the same parties.[11] The Full Court of the Federal Court considered such claims in *Norman v FEA Plantations Ltd*.[12] The Court said:[13]

> "… [a] cross-claim may give rise to an equitable set-off even if the cross-claim does not arise from the lease itself, or directly from the relationship of landlord and tenant, provided that the claim for rent and the cross-claim arising from another contract are so closely connected that the principles affecting equitable set-off can be said to apply."

The claim for equitable set-off

[42] In my view, the learned trial judge was correct to hold that the claim for compensation under the first lease could be the subject of a set-off in respect of the rent unpaid under the second lease. Gold Tip occupied certain premises under a registered, and then unregistered, lease in the respondent's shopping centre. The respondent announced an intention to renovate the shopping centre which would enure to the benefit of tenants, albeit that there might be some disruption to their businesses in the interim. That is what occurred. When the works commenced there was disruption which gave rise to a compensation claim under s 43(1) of the *Retail Shop Leases Act*. That claim was settled, and a reservation was left as to further loss that might be caused because of the work that had been carried out.

[43] As the work progressed Gold Tip's old premises became isolated and untenable. Gold Tip negotiated with the respondent in respect of a new lease. The necessary consequence of the way in which the renovation of the shopping centre was carried out is that Gold Tip had to relocate within the centre. It was in its interest to do so because the old position had become a disadvantageous one. The consequence was that Gold Tip moved to take advantage of the renovated centre, and that necessarily meant that it had to take a new lease. The reason for entering into the second lease is simple. The lease had to identify the particular premises the subject of it and once Gold Tip moved its business, the old lease could not apply given that it was concerned with a different location and the leased area was different.

[44] Once the background is understood, the fact that the entitlement to rent arises under a separate lease from that which was affected for the purposes of compensation under the *Retail Shop Leases Act* ceases to be of relevance. In form, the parties had

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10 *Chamberlain Early Learning Centre Pty Ltd v Precious 1 Pty Ltd as trustee for 4 Chamberlain Holdings Family Trust* [2017] NSWSC 189 at [75]. See also *Hamilton Ice Arena Ltd v Perry Developments Ltd* [2002] 1 NZLR 309 at [37]-[38]; [2001] NZCA 308.

11 *Hill Corcoran Constructions Pty Ltd v Navarro & Anor* [1992] QCA 17.

12 (2011) 195 FCR 97; [2011] FCAFC 99.

13 (2011) 195 FCR 97 at [156]; [2011] FCAFC 99.

two leases. In substance it was one continuing relationship affected by the consequences of the respondent's renovation of the shopping centre.

[45] The learned trial judge identified the continuation of the same business as being the link between the foundations of each claim:[14]

> "[248] The plaintiff's claim under the first lease is for compensation for loss and damage caused by AMP to the business of Gold Tip. AMP's claim is for a debt due to it from Gold Tip in relation to the conducting of that same business. The continuity of the business from the old shop to the new shop was central to the plaintiffs' arguments advanced as to loss suffered after the move to the new shop for conduct affecting the old shop. The claim advanced in this way by the plaintiffs included the period when Gold Tip was not paying the rental on the new shop. The plaintiffs have in fact been successful, albeit very modestly, in respect of that argument.
>
> [249] The relevant connection between the two claims is that they involve claims for damage to, and costs incurred by, the same business as between the same parties. This makes it unfair, in my view, for the claim for compensation to be allowed against AMP without taking account of AMP's claim."

[46] In my view, it cannot be shown that the learned trial judge erred in that analysis. This proposed ground of appeal fails.

Deregistration of Gold Tip – extinguishment of debt

[47] This proposed ground of appeal relates to what was called the "extinguishment issue" in the reasons below.[15] The issue arose because in the final written submissions the applicants argued that the dissolution of Gold Tip following the completion of its winding up resulted in the respondent's debt being extinguished, so that it could no longer be raised as a defence to the claims for compensation in respect of the lease. Having expressed some reservations about the point the learned trial judge disposed of it in this way:[16]

> "[251] The point was not raised in the pleadings and was only raised in final written submissions. Ms Schneider submitted it had to be pleaded and that if it had been raised in the pleadings, AMP could have applied to have Gold Tip re-registered if necessary. For this reason, it was my understanding that Mr Ferret (sic) ultimately did not press the argument. If I have misunderstood, I find that Ms Schneider's argument is correct and that the matter cannot now be raised."

[48] I will return shortly to the reference by the learned trial judge as to Mr Ferrett's not pressing the argument.[17]

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14 Reasons below at [248]-[249].
15 Reasons below at [250]-[251].
16 Reasons below at [251]; internal citation omitted.
17 His Honour had referred to a passage in a transcript at T5-87 lines 1-13.

The pleadings

[49] The applicant's pleading referred to the fact that the applicants were the assignees of Gold Tip's rights to all causes of action for recovery of damages.[18] It also pleaded that Gold Tip went into liquidation.[19]

[50] In the respondent's pleading the assignment of Gold Tip's rights to the applicants was admitted and the respondents went on to plead that Gold Tip was deregistered on 22 November 2013.[20] The same pleading set up the counterclaim for unpaid rent under the second lease, in the sum of about $77,000.

[51] Thus as the pleadings stood at the trial, the issue of whether deregistration resulted in the extinguishment of the respondent's debt was not raised. It was initially contended by the applicants that they were not required to plead the point,[21] but eventually it was accepted that the point should have been pleaded.[22]

[52] That being the case, I can turn to what occurred at the trial.

[53] When the point arose objection was taken on behalf of the respondent, which contended that if the point had been pleaded, and the applicants then put on notice that the point was to be raised, the respondent could have answered the contention by applying for the reinstatement of Gold Tip.[23] The effect of reinstatement would have been that Gold Tip continued in existence,[24] albeit under the control of a liquidator. The respondent contended that it was too late to apply by the time the applicants sought to raise the contention for the first time in written submissions.

[54] Mr Ferrett came to this point in oral address at the trial, urging that deregistration of Gold Tip had the effect that the debt no longer existed and therefore could not be raised by way of set-off.[25] The learned trial judge questioned whether the point had been raised in the pleadings, drawing the frank admission that it had not.[26] His Honour then queried why the applicants could not have re-registered the company for the limited purpose of sustaining the set-off, if the matter had been raised in the pleadings.[27] Submissions on that issue continued:[28]

> "HIS HONOUR: … But I don't know why I should let you raise this now when we all know what the answer is, you just rip along to the Supreme Court and get it registered for the limited purpose of permitting this particular point to be run. It's not hard to do. It's not like getting the winding up terminated, or something like that. It's just a - - -
>
> MR FERRETT: No, no, I understand the point. I understand.
>
> HIS HONOUR: - - - pretty narrow thing – easy thing to do."

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18 Sixth further amended statement of claim, para 1(a)(iv) and para 21; AB 76 and 85.
19 Para 19, AB 84.
20 Fourth amended defence and counterclaim, para 3(a)(vii) and para 4(e); AB 91 and 93.
21 Applicants' outline, para 27.
22 Outline in Reply, para 20.
23 In this regard reference was made to s 601AH(2) of the *Corporations Act* 2001 (Cth).
24 See s 601AH(5) of the *Corporations Act*.
25 AB 1655.
26 AB 1660 lines 30-32.
27 AB 1660 line 34.
28 AB 1661 lines 33-41.

[55] At that point Mr Ferrett made no further submissions on the extinguishment point but moved to a different matter, to do with damages. When submissions on that matter concluded, Mr Ferrett referred to the only other thing on which he was going to address, which was limited to an aspect of quantification of damages and the evidence of a Mr Haley.[29] There was no further submission on the extinguishment point.

[56] The learned trial judge returned to the issue after address in reply:[30]

> "HIS HONOUR: … Mr Ferrett, I have in my head that you don't press the proposition that you can now run the argument about extinguishment following deregistration because it wasn't pleaded, and, if it had been pleaded, Ms Schneider's position could have been that she could have re-registered the company, and that would have solved the problem. So it's not something that can be raised, given that it's not pleaded at this stage. Now, that's how I thought we left it, but I wanted to give you the opportunity - - -
>
> MR FERRETT: I didn't have a better argument to put back to your Honour. I didn't formally - - -
>
> HIS HONOUR: No.
>
> MR FERRETT: - - - abandon anything.
>
> HIS HONOUR: No, you didn't. You just stopped. And I made a note, "Abandoned," but you didn't actually use that word.
>
> MR FERRETT: No.
>
> HIS HONOUR: And I'm going to handle it on that basis, unless you tell me you press it, and then you need to explain to me why you can.
>
> MR FERRETT: Yeah. I just need a moment.
>
> HIS HONOUR: That's all right.
>
> MR FERRETT: I don't have any further submission to make on it, your Honour."

[57] That exchange is the basis of understanding expressed by the learned trial judge, in the passage set out at paragraph [47] above, that it was his understanding that the point was not ultimately pressed.

[58] Ultimately, the finding by the learned trial judge was expressed in alternative ways. First, his Honour said that the matter was not pressed. There is reason in the passages of trial transcript referred to above to understand why his Honour came to that view. Secondly, his Honour found that if he were wrong in that view then the argument against it being raised was correct. That argument was: it had not been pleaded, and if it had been pleaded then an application for re-registration of Gold Tip could have been made.

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29 AB 1679.

30 AB 1686 line 34 to AB 1687 line 13.

[59] In my view, the learned trial judge cannot be shown to have erred in the conclusions he reached on that point. Mr Ferrett ultimately accepted before this Court that the matter should have been pleaded. It was raised in closing submissions at the end of the trial. It is true that no adjournment was sought by the respondent in order to make an application for re-registration, but the learned trial judge was not obligated to deal with it on that basis. An adjournment would have inevitably meant delay and incurring further cost. The alternative was, as a matter of fairness, to disallow it from being raised so late and in an informal way.

[60] There is no merit in this proposed ground of appeal.

Limitation point – the notice of contention

[61] The respondent's notice of contention urged that the decision below could be affirmed on the basis that the applicants' claim (at least in part) was statute barred under s 10(1) of the *Limitation of Actions Act* 1974 (Qld). The applicant's accepted that if the limitation period was six years the claim was out of time. They contended that the claim was an action on a specialty and therefore the time period was 12 years.

[62] Mr Ferrett contended that the effect of clause 2.3 of the first lease was that the terms of tenancy at will were specified by and contained in the registered first lease. This was said to follow because of the words "is on the same terms as this lease" in clause 2.3. The argument then continued, that because of s 42(1) of the *Retail Shop Leases Act*, which specifies that a retail shop lease is taken to include s 43, s 43(1) was deemed to be included in those terms of the extended lease. The argument was then that the term implied by s 43(1) also obtained the benefit of the deeming provision in s 176 of the *Land Title Act* 1994 (Qld). This had the effect, it was said, that the claim for compensation under s 43(1) was a claim made under a deed, and therefore an action on a specialty for which the limitation period was 12 years, and not six years.

[63] The learned trial judge dealt with this argument as follows:[31]

> "[227] The first step in the argument seems correct: the terms of the tenancy at will are set out in the first lease. And it seems to me that the effect of s. 42 is that those terms are "taken to include s. 43". Section 42 operates in an analogous manner to incorporation by reference. The provision does not appear in terms of the tenancy at will set out in the registered first lease, but is deemed to be included. No authority was cited to me dealing with whether, and to what extent, promises or terms conferring rights may be incorporated by reference into a deed so as to give them the status of covenants enforceable under the deed. However, the same principles of construction apply to deeds as to contracts, and incorporation by reference is well known in the field of contract law.
>
> [228] I suspect that there is more to this argument than meets the eye, but on the submissions put before me, it seems correct that the terms of the tenancy at will are (literally) contained in the registered lease, that those terms take effect as a deed between the parties, given the deeming effect of s. 176, and

[31] Reasons below at [227]-[230]; internal citation omitted.

> further, that terms incorporated into that lease also thereby take effect as covenants.
>
> [229] I did not think that Ms Schneider's arguments led to a different conclusion. She focused on establishing that on the proper construction of the first lease, the tenancy at will was a separate tenancy from the indefeasible tenancy created by the registration of the first lease. That proposition seemed correct. However, that argument does not answer Mr Ferret's (sic) argument. His argument is unconcerned with whether the tenancy at will arose as a new lease or a continuation of the first lease. It relies on the fact that the terms of the tenancy at will are contained in a registered instrument.
>
> [230] With some trepidation, I conclude that the plaintiff's argument is right and that the terms of s. 43(1) took effect as covenants. The action on s. 43(1) is therefore an action on a specialty and subject to a 12 year limitation period. AMP's limitations defence therefore fails."

[64] In order to deal with this contention it is necessary to set out the sequence of lease arrangements between the parties and some of the central provisions of the relevant lease.

[65] From July 1999 until 11 October 2004, the premises was occupied by the original lessee under the terms of a written lease with the respondent, registered on the title of the centre. That lease was for a fixed seven year term commencing on 11 July 1999 and expiring on 10 July 2006.

[66] On 11 October 2004 the lease was assigned by the original lessee to Gold Tip, with the consent of the respondent. Gold Tip commenced occupying the premises under the terms of that first lease. On 20 January 2005 the transfer of the lease was registered on the title of the shopping centre.

[67] The term of the first lease expired on 10 July 2006. On 9 November 2006 Gold Tip and the respondent agreed to amend the expiry date and thus extend the term of the first lease until 10 December 2007. A document was executed by each of Gold Tip and the respondent recording the amendment to the lease, and other (presently irrelevant) amendments.

[68] In December 2007 Gold Tip and the respondent again agreed to amend the expiry date of the lease, by extending it to 30 June 2008. The parties executed an amendment to the lease document which recorded that agreement.

[69] Neither the first nor the second lease amendments were registered on the title of the shopping centre.

[70] The questions which arise from that sequence of events were:

(a) from 10 July 2006 when the registered lease expired, did Gold Tip continue to occupy the premises under the terms of an unregistered lease; and

(b) on 30 June 2008 when the unregistered lease came to an end, did Gold Tip remain in possession by way of an unregistered holding over which attracted the benefits of the registered lease.

[71] The lease, which expired on 10 July 2006, contained these terms:

"2.1 Subject to the provisions of this lease, this lease commences on the Commencement Date and expires on the Expiry Date.

Holding over

2.2 If the Lessee continues to occupy the Premises after the Expiry Date with the Lessor's approval, it does so under a tenancy for a fixed term of one month and then from month to month which either party may terminate on one month's notice ending on any day.

2.3 Subject to clause 2.2, the monthly tenancy is on the same terms as this lease including in relation to the payment of Base Rent, Lessee's Contribution, Percentage Rent, and the Marketing Levy (if any) except:

(a) Base Rent will be varied on the first day of the first monthly tenancy in the same manner that the Base Rent was reviewed at the commencement of the last year of the Term;

(b) for those changes which are necessary to make this Lease appropriate for a monthly tenancy (except the Bank Guarantee may not be reduced); or

(c) for those changes which the Lessor requires as a condition of giving its approval to the holding over."

[72] The first extension of that lease was recorded in a Form 13 amendment document, but that document was not registered. The agreement to extend the term was made on about 9 November 2006, and therefore after the first lease had expired. The agreement was recorded in these terms:[32]

> "The parties identified in Items 3 and 4 agree that the instrument/document in Item 1 is amended in accordance with the attached Schedule."

[73] The schedule[33] recorded the amendments which were to apply from 11 July 2006, the day after the first lease term ended. The expiry date was changed to 10 December 2007 and various other adjustments were made to things such as base rent and the marketing levy.

[74] One of the amendments made on 9 November 2006 was to clause 2.3(b). It sought to add words to clause 2.3(b) so that in full that sub-clause then read:

> "for those changes which are necessary to make this Lease appropriate for a monthly tenancy (except the Bank Guarantee may not be reduced) including the Lessor's requirement that if the Lessee continues to hold over after 11 July 2008, rent will be reviewed on that day, and on that day every year of the hold over period, as if it was a CPI Plus Percentage Adjustment Date."

[75] The reference in clause 2.3(b) to 11 July 2008 was evidently recognised as a typographical error because it was amended in the 2009 agreement, by inserting "1 July 2008".[34]

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32 AB 350-351.
33 AB 353-358.
34 AB 361.

[76] The document recording the extension of the lease to 30 June 2008 was executed by the applicants on 19 February 2009 and by the respondent on 8 April 2009.[35] The amendments were to apply from 11 December 2007, the day after the previous expiry date.[36] The amendments were to the expiry date, making it 30 June 2008, and again to items such as base rent and the marketing levy.

[77] The effect of the two amendments to the original lease was not to extend the registered lease. In the course of submissions before this Court Mr Ferrett accepted that the extensions created new leases.[37] That concession was, in my respectful view, correct. The *Land Title Act* 1994 (Qld) makes express provision for amending a lease, in s 67:

> "**67 Amending a lease**
>
> (1) In this section –
>
> ***term*** of a registered lease includes a period of possession under the lease because of –
>
> …
>
> (b) a registered instrument of amendment extending the term of the lease.
>
> (2) A registered lease may be amended by registering an instrument of amendment of the lease.
>
> (3) However, the instrument of amendment must not –
>
> …
>
> (c) be lodged after the lease's term has ended."

[78] The effect of s 67 is that a registered lease can be amended but only if the amending instrument is itself registered, and that occurs before the lease term ends. Neither of those things happened to Gold Tip's lease. The consequence is that the registered lease expired on 10 July 2006. Thereafter, though the expiry date of the tenancy was extended (in the first case by 17 months, from 10 July 2006 to 10 December 2007, and in the second case by just over six months from 10 December 2007 to 30 June 2008), those were dates under the new lease in each case. In neither case was the extended lease a registered lease. Gold Tip's holding over was under an unregistered lease.

[79] Following the end of the last amended expiry date, which on any view ended on 30 June 2008, Gold Tip was holding over pursuant to clauses 2.2 and 2.3. But those clauses as they stood at 1 July 2008 (the first day of the holding over) were clauses in an unregistered lease.

[80] With that in mind one can return to the terms of clause 2.2. It provides that "If the Lessee continues to occupy the Premises after the Expiry Date" with the lessor's approval, then "it does so under a tenancy for a fixed term of one month and then from month to month". Clause 2.2 does not, of itself, give an entitlement to hold over. Any lawful holding over can only occur with the lessor's approval. All clause 2.2

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35 AB 359-360.
36 AB 361.
37 Appeal transcript T1-13 lines 3-5.

does is to provide that if that is the case, then the tenant holds over on a monthly basis.

[81] Consideration of clause 2.3 as it stood on 1 July 2008 provides the source of the terms of the monthly tenancy. It provides that the monthly tenancy "is on the same terms as this Lease", then specifying the continuing terms and amendments to terms. But when clause 2.3, as it stood on 1 July 2008, referred to "this Lease" it was a reference to an unregistered lease.

[82] In my view, clause 2.2 plainly operates to create a new lease on and from 1 July 2008. That lease is only created under clause 2.2 if the lessee "continues to occupy the Premises after the Expiry Date with the Lessor's approval". In that event the tenancy is the monthly tenancy created by the phrase in clause 2.2, "a tenancy for a fixed term of one month". That tenancy was one that could be terminated on one month's notice by either party. Clause 2.3 then refers to the same monthly tenancy when it provides that that monthly tenancy "is on the same terms as this Lease" with the modifications indicated. Clause 2.3(b) recognises that there were necessary changes "to make this Lease appropriate for a monthly tenancy", and clause 2.3(c) contemplates that there might be changes required by the lessor as a condition of giving its approval. One such change was the inclusion of the additional words in clause 2.3(b) recognising rent reviews if the holding over continued after 1 July 2008.

[83] The contention advanced at the trial was that somehow clause 2.3, by providing that the lease was on the same terms as the registered lease, attracted to that lease the benefit of the deeming provisions in s 176 of the *Land Title Act*. In my view it does no such thing. Section 176 of the *Land Title Act* simply provides that "[a] registered instrument operates as a deed." It says nothing about the status of an unregistered instrument except, by inference, an unregistered instrument does not have the deemed operation as a deed.

[84] In answer to the pleading of a limitation point the applicants made this submission:[38]

> "The defendant pleads that the claim in respect of the First Lease is time-barred. At paragraph 24 of the defence, it pleads section 10 of the *Limitation of Actions Act 1974* … Section 10(1) provides that the limitation period for an action on a simple contract is 6 years. But the First Lease is not a simple contract. It was registered on 28 January 2000. By operation of section 176 of the *Land Title Act 1976* it "operates as a deed". The relevant sub-section is 10(3), which provides that the limitation period in respect of an action on a specialty is 12 years."

[85] The simplicity of that approach reflects what the learned trial judge understood of the proposition. The argument seems to be that because the first lease was registered, any holding over is pursuant to a lease "on the same terms" as the registered lease, and any rights under s 43(1) are deemed to be included in those terms. It is the next jump in the contention with which I have difficulty. The next step is to say that s 176 of the *Land Title Act* deems the first lease to operate as a deed, and since the holding over leases are on the same terms as the first lease, that imports the protection under s 176.

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38 Applicants' final submissions, para 138; AB 819; internal citation omitted.

[86] I cannot accept that contention. There seem to me to be a number of considerable difficulties which confront it.

[87] Firstly, the fact is that the registered lease expired on 10 July 2006. The expiry date was amended in two steps to 30 June 2008, but neither of those amendment documents was registered. Under the *Land Title Act* s 67 provides that the only way a registered lease can be amended is by a registered instrument lodged before the registered lease expires. The consequence is that when the holding over commenced on 1 July 2008, Gold Tip had been occupying the premises under an unregistered lease, and continued to do so.

[88] Secondly, at the time the holding over commenced clause 2.2 had the effect of creating a new lease on a monthly basis. In turn, when clause 2.3 of the unregistered lease referred to the monthly tenancy being "on the same terms as this Lease", it was referring to the unregistered lease and not the registered lease.

[89] Thirdly, even if clause 2.3 could be construed as referring to the terms of the registered lease that expired on 10 July 2006, the clause simply served as an identification of the repository of the terms. It could not be construed as importing the benefits of s 176 of the *Land Title Act*, because that section was not a term of the lease. Section 176 of the *Land Title Act* simply operates to deem a registered document to operate as a deed. It does not import any term into the lease.

[90] Fourthly, insofar as Gold Tip remained in possession of the premises that had been the subject of the first lease on a holding over basis, the source of its entitlement to do so did not lie in any provision of the registered lease. Rather, as clause 2.2 provides, the monthly tenancy is created "if the Lessee continues to occupy the Premises after the Expiry Date with the Lessor's approval". It is the agreement between the lessee and the lessor that provides the foundation upon which the lessee remains in possession on a monthly tenancy.

[91] Fifthly, nothing in s 43 of the *Retail Shop Leases Act* serves to import the deeming provisions of s 176 of the *Land Title Act*. Section 42(1) of the *Retail Shop Leases Act* provides that a retail shop lease "is taken to include" s 43. Section 43 in turn merely provides that certain conduct on the part of the lessor can give rise to a liability to pay the lessee reasonable compensation. Nothing in either section imports s 176 of the *Land Title Act*.

[92] Sixthly, it is a curious notion that one by-product of being a registered document can be imported into a document which is not registered without something express to suggest that might be so. Further, the notion flies in the face of s 67 of the *Land Title Act*, which permits a registered lease to be amended only by registered instruments lodged before the registered lease expires.

[93] In my respectful view, the learned trial judge's conclusion that the action was an action on a specialty was in error. Having been commenced more than six years after the cause of action was complete, the claim for disruption under the first lease was statute barred.

[94] That being so, as Mr Ferrett frankly conceded in the course of argument, the applicants' case is not maintainable.

Proposed ground (b)(iii) – error in finding that the respondent did not cause loss

[95] The contentions advanced in respect of this proposed ground of appeal covered a number of areas, but all of them were concerned with the way in which the learned trial judge assessed the evidence of loss. No specific error was advanced but it was said that his Honour did not properly consider certain evidence, and on a proper consideration of other evidence should have concluded that stabilisation did affect the new business, and mistook whether an evidentiary burden had been satisfied or not.

[96] The first area contended that the learned trial judge did not properly consider sales evidence. Principally this concerned the performance of the business after it moved to its new premises in February 2010. In various findings the learned trial judge found that the new business did not perform well, did not experience a material increase in its turnover, and did experience a decline in its gross profits. This was said to be contrary to "uncontested sales evidence" which the learned trial judge failed to properly consider.[39]

[97] There are, in my view, a number of difficulties with this aspect of the contentions. Firstly, the respondent points out that in the trial submissions the applicants did not refer to the evidence identified in this part of their case. That seems to be correct. If it was not urged as part of the case during submissions below, that makes the case inapt for the grant of leave to appeal to this Court.

[98] Secondly, some of the material said to be the uncontested sales evidence is derived from the respondent's management monthly and quarterly reports, the report of Mr Haley, and annexure B to the respondent's written submissions below. Annexure B and Mr Haley's report were the subject of detailed consideration in the reasons below.[40]

[99] Thirdly, the submission focuses on evidence of sales but, as the learned trial judge pointed out, the applicant's case was that reasonable compensation should be measured by reference to gross profit.[41] That claim was articulated in Mr Haley's report and given detailed consideration by the learned trial judge.

[100] Fourthly, the learned trial judge did focus on customer numbers and turnover as part of his analysis.[42] Because the applicants had led no evidence of customer count figures for their premises, his Honour turned to the respondent's annexures to their submissions, including annexure B, which contained turnover figures for the total centre, the supermarkets in the centre, and for Gold Tip. His Honour pointed out that those figures were not challenged by the applicants.[43] His Honour analysed trends shown in the turnover figures for the business by reference to annexure B.[44]

[101] Fifthly, the learned trial judge considered that the turnover figures in annexure B were a reliable basis for determining if the business was affected by the works. That was consistent with Mr Haley's evidence in adopting gross profits as the measure of damage, an approach accepted by the learned trial judge.[45]

[102] These considerations demonstrate that this aspect of the proposed appeal does not raise a valid ground for leave to appeal.

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39 Applicant's outline, paras 32-34.
40 For example, [106]-[125], [176]-[178] and [214].
41 Reasons below at [174].
42 Reasons below at [100]-[113].
43 Reasons below at [106].
44 Reasons below at [112].
45 Reasons below at [116]-[117].

[103] That conclusion disposes also of the second contention raised under this proposed ground, namely that the learned trial judge should have found that a provisional evidentiary burden was cast upon the respondent and that burden was not met. The contention depended upon the findings relating to sales figures and proof that the respondent's works in the shopping centre caused loss.

[104] Further, these contentions seem to be directed towards the way in which the business performed under the second lease. The learned trial judge dismissed the claim for compensation in respect of the new premises.[46] Those reasons are not the subject of challenge on the proposed appeal.

[105] Further, the learned trial judge's approach was entirely orthodox in this respect. It was up to the applicants to prove the loss they alleged and that burden did not shift to the respondent. The applicants adduced evidence to prove their loss on the basis of a gross profit approach, and turnover and therefore the growth in the business was a central element of that approach. The respondent for its part adduced a considerable volume of statistical evidence as well as expert evidence. The parties' contentions were explored both in evidence and in submissions. To now suggest that the case should come to this Court on some suggestion of an evidentiary burden being discharged does not raise a basis for the grant of leave to appeal.

[106] The third basis upon which the proposed ground depends is that the trial judge did not properly consider the evidence of witnesses regarding disruption and stabilisation at the shopping centre.

[107] This proposed ground once again relies upon consideration of the evidence concerning the respondent's monthly and quarterly reports and average figures for turnover. Those matters were examined by the learned trial judge in the course of his analysis. The learned trial judge dealt specifically with the question of stabilisation[47] and noted the applicants' reliance on the evidence of a particular witness, Ms Meulman. The learned trial judge concluded that the evidence of that witness was hard to reconcile with the objective evidence concerning recovery in customers and turnover in the second half of 2009. For that reason his Honour was not persuaded that the concept of stabilisation assisted the applicants in their claims.[48]

[108] The contention seems to be that a better analysis of the monthly and quarterly reports and the moving annual turnover should have led his Honour to reach a different conclusion. The contention is neatly expressed as being that the learned trial judge failed "to properly consider the sales evidence and the evidence of witnesses from both parties". The learned trial judge examined the evidence and made findings as to what it signified. His Honour also considered the evidence of the nominated witness, Ms Meulman, and therefore any suggestion that he did not properly consider that witness's evidence cannot be sustained. Insofar as the contention relies upon the sales evidence which was not urged below, the contention faces the same difficulty.

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46 Reasons below at [166]-[170].
47 Reasons below at [182]-[186].
48 Reasons below at [185]-[186].

[109] The contention also involves the proposition that the learned trial judge found that the centre "did not experience a period of stabilisation".[49] That is not what his Honour found. At paragraph [185] his Honour found that the evidence did not assist in identifying any specific stabilisation pattern for the centre and that the evidence was not "meaningfully probative of any actual stabilisation effect on the new shop".

[110] Paragraphs [179]-[186] of the reasons below reveal that the learned trial judge carefully considered the issue of stabilisation. The suggestion that he did not lacks merit.

[111] That is sufficient to demonstrate that this contention does not raise a ground warranting the grant of leave to appeal.

[112] The final contention is that the learned trial judge did not properly consider the character and objectives of the *Retail Shop Leases Act*.[50] This proposed ground has no merit in terms of an appeal to this Court. So far as the reasons below reveal, the character and objectives of the *Retail Shop Leases Act* were not in dispute, nor was there any serious dispute at all about the meaning of s 43 of that Act. The focus of the trial was on proof of loss connected with the disruption caused by the respondent's renovations to the shopping centre. None of the matters raised in this contention cast sufficient doubt about the learned trial judge's approach to that issue. Insofar as this contention draws in the question of stabilisation, that advances the matter no further.

Conclusion and disposition of the application

[113] For the reasons that I have outlined above none of the proposed grounds for appeal have sufficient merit to warrant the grant of leave to appeal to this Court. It is not necessary to correct a substantial injustice to the applicant and there is no reasonable argument that there is an error to be corrected. That is particularly so given that the suggested claims under the first lease are statute barred.

[114] For the reasons above I joined in the following orders made on 11 November 2020:

1. The application for leave to appeal is refused.

2. The applicants are to pay the respondent's costs of the application on the standard basis.

[115] **HENRY J:** I have read the reasons of Morrison JA and agree with those reasons and the orders his Honour proposes.

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49 Applicants' outline, para 52.

50 Applicants' outline, paras 61-65.