DISTRICT COURT OF QUEENSLAND

CITATION:	*Returned & Services League of Australia (Queensland Branch) Southport Sub-Branch Inc v The Southport RSL Memorial Club Inc* [2022] QDC 20
PARTIES:	**RETURNED & SERVICES LEAGUE OF AUSTRALIA (QUEENSLAND BRANCH) SOUTHPORT SUB-BRANCH INC** (Applicant) **v** **THE SOUTHPORT RSL MEMORIAL CLUB INC** (Respondent)
FILE NO/S:	BD 2236/2020
DIVISION:	Civil
DELIVERED ON:	16 February 2022
DELIVERED AT:	Brisbane
HEARING DATE:	19, 20 January 2022
JUDGE:	Barlow QC DCJ
ORDERS:	**Judgment for the applicant for damages in the sum of $192,820.**
CATCHWORDS:	LANDLORD AND TENANT - COVENANTS - RUNNING WITH LAND OR REVERSION - COVENANTS WHICH DO NOT RUN - whether the lessee's obligations in one clause within a registered lease are personally owed to the original lessor or run with the land - whether the clause affects the nature, quality, mode of user or value of the land of the reversioner - whether the benefits and obligations of the clause transferred to the new owner upon registration of the transfer or remained obligations of the lessee to former lessor. *Land Title Act* 1994, s 62 *Congleton Corporation v Pattison* (1808) 10 East 130, applied *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237, cited *Queensland Premier Mines Pty Ltd v French* (2007) 235 CLR 81, considered *Swift Investments (a firm) v Combined English Stores Group Plc* [1989]1 AC 632, applied *Vyvyan v Arthur* (1823) 1 B & C 410, cited

COUNSEL:	M Steele, for the applicant
	R Clutterbuck, for the respondent
SOLICITORS:	Porter Davies Lawyers for the applicant
	Turnbull Mylne for the respondent

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Introduction

[1] The applicant (**RSL**) is, as its name suggests, a sub-branch of the Returned and Services League of Australia (the **RSLA**). The respondent (the **Club**) is not affiliated with RSL or the RSLA, but is a separate body that operates a licensed club, for which it is apparently authorised by the RSLA to use the name RSL in its own name and the name of its club.

[2] Until early in 2020, RSL was the owner of land and the building and other improvements on it (the **property**) in Southport from which the Club operates. As owner, it leased the property to the Club under a registered lease. The lease includes a clause (clause 29) that, RSL claims, among other things obliges the Club to allow RSL to use two offices and other spaces within the building and to display its memorabilia within the building, as well as providing other services to RSL and its members.

[3] The lease was originally created and registered in August 2009. It was renewed twice, upon the exercise by the Club of two options granted in the lease. It is now due to expire on 31 August 2024.

[4] In December 2019, RSL sold the property to an unrelated party. The transfer (which was subject to the lease) was registered on 6 January 2020. Thus, the new owner is now lessor and the Club remains the lessee.

[5] In March 2020, the Club informed RSL that it required RSL to vacate the property by 30 April 2020. The Club told RSL that, in making that decision it considered that, by selling the property, RSL had extinguished its right to continue its occupancy. Subsequently, the Club changed the locks on the doors to the offices that RSL had occupied and moved RSL's furniture, equipment and records, together with some memorabilia, into a storage facility.

[6] RSL commenced this proceeding by originating application filed on 6 August 2020. It sought an interlocutory injunction (which it did not subsequently pursue), a declaration that it is entitled to the benefits of the covenants in clause 29 of the lease, specific performance of that clause and damages for breach of the Club's obligations to it under that clause.

[7] At the trial, counsel for RSL informed the Court that RSL no longer seeks specific performance of clause 29.[1] It persists with its claim for a declaration and it seeks damages, for breach of the Club's obligations under the clause, of $192,820,[2] comprising the rent and storage costs that it has incurred and will continue to incur up to the expiration of the lease, having obtained accommodation in other premises.

The lease

[8] The lease was registered, by the registration of a Form 7 instrument of lease and a form 20 annexed to it, on 28 August 2009.[3] It was varied to extend its expiry date,

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1 T1-51:1-2.

2 Counsel handed to the Court a schedule itemising the damages, that I have treated as part of his written submission. The total shown in that schedule is wrong, but RSL has confirmed that it seeks damages in the correct total amount.

3 I mention the forms used because, as will become apparent, one of RSL's submissions is that only the Form 7 comprises the lease, not the annexed Form 20 (which contains the full terms of the lease).

upon the registration of a Form 13, on each of 2 September 2014 and 13 December 2019.

[9] Clause 29 of the lease provides the following:

> **29 Traditions & Functions**
>
> The Lessee acknowledges that the Lessor will continue to carry on its traditions & functions of a sub-branch of the Returned and Services League of Australia at the Premises during the Term with the concurrence support & assistance of the Lessee and in particular:
>
> 1) The Lessee will allow & assist the Lessor in the conduct of ceremonies and gatherings of returned and serving members of the armed forces each calendar year in remembrance of -
> i. Kapyong Day on 24 April,
> ii. Anzac Day on 25 April:
> iii. VP Day on I5 August;
> iv. Vietnam Remembrance Day on 18 August;
> v. Remembrance on 11 November, and
> vi. on such other days that shall become of similar significance.
>
> 2) on Anzac Day, the Lessee will provide a *Gunfire Breakfast* and drinks at breakfast free of charge to the returned and serving members of the armed forces who attend at the Premises;
>
> 3) on the other days of remembrance, food and beverages will be supplied to attendees by the Lessee at reasonable bar prices;
>
> 4) on each day that the Lessee's business trades, the Lessee will -
> i. raise the flags at opening time;
> ii. at 6.pm, play the *Ode* over the announcing system and tv network in the Premises and then lower the Flags and store them;
>
> 5) the Lessee will allow the Lessor to appropriately display in the premises the memorabilia of the Lessor;
>
> 6) the Lessee [will] provide free of charge -
> i. offices for the Lessor's Secretary and pension personnel; and
> ii. the use of function rooms, when not they are not being used by the Lessee for its other customers, for meetings of any ex-service organizations.

The parties' contentions

[10] RSL contends that, although it sold the land, clause 29 of the lease created obligations that continue to apply in its favour, notwithstanding that it is no longer the lessor. It contends that the Club's obligations under that clause are personal to the RSL, do not touch and concern the land and therefore did not transfer (nor were they extinguished) with the change of ownership of the land.

[11] The Club contends that, because the clause is incorporated in the lease, and by its very nature, the clause relates to the use of the land. Its benefits therefore passed to the new lessor upon registration of the transfer. It was not a separate, collateral contract that would be enforceable outside and irrespective of the other terms of the lease. Under s 62 of the *Land Title Act* 1994, the rights, powers, privileges and liabilities in relation to the property vested in the new owner upon registration. In accordance with that provision, even if clause 29 contains covenants personal to

RSL, the benefit of those covenants vested in the new owner by reason of the transfer of ownership.

[12] Alternatively, the Club contends, clause 29 at most comprised a bare licence. There was no consideration for the licence, so it is not contractual in nature. That being so, the Club was entitled to terminate the licence at any time on reasonable notice.

[13] In response to the Club's submission about the effect of s 62, RSL contends that the rights and obligations under clause 29 do not "touch and concern" the land, but are personal to the Club and RSL and collateral to the grant of the leasehold estate to the lessee. Therefore, they remain contractual obligations on the Club that did not pass to the new owner upon transfer. Section 62 does not change that analysis, as it does not purport to transfer such collateral rights, nor personal rights, even though they derive from the lease instrument.

[14] Alternatively, RSL contends that the schedule to the lease that contains the terms of the lease is not in fact part of the registered instrument of lease. The registered instrument is in Form 7 under the Act, whereas the terms containing clause 29 are in a separate document in Form 20, which is collateral to, but not part of, the registered lease. Therefore, not every right or obligation in that Form 20 is necessarily "in relation to the lot," as referred to in s 62. It is personal to RSL and enforceable by it.

The nature of a lease

[15] In order to determine the issues, it is necessary first to set out basic principles concerning the nature of a lease and the obligations under it. These principles are so clearly described in a book on real property law that I can do no better than to quote the authors' description.[4]

> Two relationships are created between the parties when land is leased, a contractual relationship and a property relationship. Because a lease is a contract, there is privity of contract between the parties (the lessor and the lessee). Privity of contract means that only the parties to the contract are bound by and entitled to enforce the contract. In addition, on the grant of the lease, the lessee acquires an estate, or proprietary interest, in the land and the relationship of lessor and lessee is established between the parties. There is said to be privity of estate between them.
>
> If B [the lessee] assigns the lease to C, the relationship of lessor and lessee ceases to exist between A [the lessor] and B and instead is established between A and C, provided there is a legal assignment of a legal lease. The assignment of the lease does not affect the existence or enforceability of the contract between A and B.

[16] The authors continue:

> **Privity of contract**
>
> [14.840] The terms of a lease are enforceable between the original lessor and the original lessee (the assignor) because of the contract between the parties. This liability is not affected by any assignment. If, therefore, the assignee (C) breaches a covenant in the lease, the original lessee (B) will be in breach of contract, even though B was not the person in occupation. …

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4 Wallace, Weir and McCrimmon, *Real Property Law in Queensland* (Law Book Co, 5th ed, 2020), [14.830]. Footnotes omitted.

> **Privity of estate**
>
> [14.850] Privity of estate is created between the lessor and the assignee because the assignor is transferring an estate in the land to the assignee. … When privity of estate is created between the lessor and the assignee, the assignee will be bound by those covenants that touch and concern the land.
>
> **Covenants which touch and concern the land**
>
> [14.860] Certain covenants in a lease are so closely connected with the leasehold estate that they are said to be attached to and form part of that estate. They define and limit the estate. … Whenever a lease is transferred, these covenants pass with the lease, that is, they run with the land. The result is that the assignee is entitled to enforce the benefit of such covenants and is bound to perform the obligations imposed by them. …
>
> In determining whether a covenant touches and concerns the land a close nexus or connection should be established between the covenant and the leased premises. The covenant should in some way affect the nature, value or quality of the leased land or the way in which it is used or enjoyed, or should affect either the landlord as landlord, or the lessee as lessee.

[17] The authors go on to list examples of covenants that have been held to touch and concern the land or not to touch and concern the land.[5]

[18] It has been accepted in courts, for over 200 years, that the test whether a tenant's covenant touches and concerns the land is that:

> the covenant must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land.[6]

[19] The meaning of the words "per se, and not merely from collateral circumstances", was explained in *Swift Investments* by adopting a nearly 200 year old description. The effect of that description is that a covenant in a lease will touch and concern the land if it is beneficial only to the owner for the time being of the covenantee's interest in the land and no-one else (to the intent that if the covenantee assigns, the person who thereafter benefits is the assignee, not the assignor).[7] But,

> if it be beneficial to the lessor, without regard to his continuing owner of the estate, it is a mere collateral covenant, upon which the assignee cannot sue.[8]

[20] In *Swift Investments*, Lord Oliver went on to say:[9]

> without claiming to expound an exhaustive guide, the following provides a satisfactory working test for whether, in any given case, a covenant touches and concerns the land: (1) the covenant benefits only the reversioner for time being, and if separated from the reversion ceases to be of benefit to the covenantee; (2) the covenant affects the nature, quality, mode of user or

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5 See also, P Butt, *Land Law* (LawBook Co, 7th ed, 2018) at [7.1290].

6 *Congleton Corporation v Pattison* (1808) 10 East 130. This has been adopted in many cases since. Most relevantly, it was adopted and explained by Lord Oliver of Aylmerton (with whom the other Law Lords agreed) in *Swift Investments (a firm) v Combined English Stores Group Plc* [1989]1 AC 632, 640-641.

7 This description, in more modern terms than the original, is taken from P Butt, *Land Law* (above n 5), [7.1290].

8 *Vyvyan v Arthur* (1823) 1 B & C 410, 417. This test was approved by the House of Lords in *Swift Investments*, 640-641.

9 [1989] 1 AC 632, 642.

> value of the land of the reversioner; (3) the covenant is not expressed to be personal (that is to say neither being given only to a specific reversioner nor in respect of the obligations only of a specific tenant); (4) the fact that a covenant is to pay a sum of money will not prevent it from touching and concerning the land so long as the three foregoing conditions are satisfied and the covenant is connected with something to be done on, to or in relation to the land.

[21] These principles have, more recently, been adopted and restated by the High Court, which also noted that these tests have been much applied in Australia.[10]

Does clause 29 "touch and concern the land"?

[22] In my view, clause 29 does not touch and concern the land. It is of no benefit to the owner of the land from time to time, but only to the owner at the time the lease was created: RSL. It is clearly drawn solely for the benefit of RSL. An agreement within a lease, that the lessee will allow the lessor free use of two offices in the building could, in some circumstances, be an obligation and a right that can be said to run with the land. But, when one considers the purposes for which the use of the offices, the display of memorabilia and the other obligations concerning the provision of memorial services were being made available in this case (to enable RSL to carry out its constitutional obligations to its members – its traditions and functions), this agreement, by clause 29, was personal to RSL. The obligations under clause 29 would be of no benefit to any other owner and lessor of the land.

[23] Nor does the clause affect the nature, quality, mode of user or value of the land of the reversioner. It does not prevent the Club from using the land for the purpose provided for in the lease.[11] There is no evidence that it affects the value of the land, nor does it affect the interest of the reversioner in any other way.

[24] Therefore, in my view, the benefits and obligations of clause 29 did not transfer to the new owner upon registration of the transfer. Nor were they extinguished by that transfer. Subject to the other issues raised by the Club, they remain obligations of the Club to RSL.

The nature of the obligations in clause 29

[25] In discussing the nature of the obligations under clause 29, the parties concentrated on the nature of the obligation and right to the use of the two offices. To some extent, they also referred to the obligation to allow the display of RSL's memorabilia. There was very little emphasis on, or analysis of, the other requirements under clause 29. But those requirements are part of the context within which the nature and meaning of all parts of the clause must be construed.

[26] As I mentioned earlier, RSL contends that clause 29 is contractual in nature. RSL gave the Club valuable consideration for those obligations, comprising the other rights granted to the Club under the lease. In return, the Club, as lessee, granted RSL a licence to occupy the offices and to display its memorabilia and agreed to provide the other services set out in the clause for the term of the lease. All the Club's obligations under the clause are enforceable by RSL, even though it is no

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10 *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237, 264-265 [74].

11 As a licensed club: the "permitted use" under item 5 of the schedule and clause 8.

longer the lessor, as there continues to be privity of contract between RSL and the Club.

[27] The Club contends that the rights to occupy and to display memorabilia are merely bare licences for which RSL provided (and still provides) no consideration to the Club. The consideration given by RSL for the Club's lease of the premises does not apply to the obligations under this clause. The other services offered by the Club are also gratuitous. As the clause is not contractual in nature (particularly as there is no consideration for it), the Club was entitled to withdraw the licence and, if it chose, to discontinue the services, at any time with reasonable notice.

[28] I disagree with the Club's contention that RSL did not provide any consideration for the obligations under clause 29. The clause is part of the whole contract comprising the lease. RSL's consideration comprised all the lessor's obligations under the lease. That consideration was for the entirety of the Club's obligations under the same contract. There is no requirement, in the case of a multi-faceted entire contract, for there to be particular consideration given for each obligation arising under the contract.

[29] Notwithstanding the transfer of the land and the consequent assignment of the reversionary estate, there remains privity of contract between RSL and the Club, with mutual obligations under the contract. RSL's consideration is now given by the new owner as lessor, but the Club's obligations under clause 29 remain. To paraphrase the statement quoted at [16] above, these obligations are not affected by any assignment. If, therefore, the assignee (the new owner) breaches a covenant in the lease, the original lessor (RSL) will, absent a clause to the contrary, be in breach of contract, even though it is no longer the owner and lessor.

[30] In fact, in this lease there is a clause to the contrary. Clause 15.7 provides:

> **15.7 Change of lessor**
>
> If the Lessor deals with its interest in the Building so that another person becomes lessor, the Lessor is released from its obligations under this Lease arising after it ceases to be lessor.

[31] That clause overrides the common position at law that, in its absence, RSL would continue to be liable to the Club for the lessor's performance of its obligations under the lease, notwithstanding that it had assigned the lease by transferring the property. There is no clause providing an equivalent release of the Club from its obligations to RSL if RSL deals with its interest in the building. The Club's contractual obligations to RSL remain on foot.

[32] Finally, the Club submitted that the clause does not, in fact, impose any obligations on the Club. It is merely an acknowledgment by the Club that RSL intends to continue to carry on its traditions and functions of a sub-branch of RSLA at the premises, with the Club's concurrence and assistance. The clause is not contractual, as it is drawn in a manner that deliberately does not express an intention to create legal relations between the parties. Therefore the Club could withdraw its "concurrence and assistance" at any time.

[33] Again, with respect, I disagree. The acknowledgment is important because it sets out the special role of RSL in the context of which this clause was drawn. The clause expressly provides that RSL will carry on its traditions and functions with the

"concurrence and assistance" of the Club. "Concurrence", of course, means "agreement", but with the undertone of acting in concert and cooperating.[12] Contrary to counsel's submission, the clause was clearly intended to be an agreement that the Club would cooperate with and assist RSL to carry out its traditions and functions by doing the things set out in the enumerated paragraphs of the clause.

[34] Therefore, subject to the effect of s 62 of the *Land Title Act*, there continues to remain a contract between RSL and the Club, with consideration now being provided to the Club by the new lessor. The Club continues to be bound, by clause 29, to provide the relevant services and licences.

Section 62

[35] Counsel for the Club summarised his contention about s 62 in his "Oral Outline" that he handed up at the beginning of his address:

> because of its embodiment in the lease, it is a term that is not collateral to the bargain between the parties and is caught by section 62 …

[36] Section 62 relevantly provides:

> (1) On registration of an instrument of transfer for a lot or an interest in a lot, all the rights, powers, privileges and liabilities of the transferor in relation to the lot vest in the transferee.
>
> (3) Without limiting subsection (1), the registered transferee of a registered lease is bound by and liable under the lease to the same extent as the original lessee.
>
> (4) In this section –
>
> > **rights**, in relation to a mortgage or a lease, includes the right to sue on the terms of the mortgage or lease and to recover a debt or enforce a liability under the mortgage or lease.

[37] The Club submits that the obligations in clause 29 are embodied and contained within the registered lease – they are not in a separate and distinct collateral agreement – and therefore the effect of the transfer of the registered lease was to transfer the rights under clause 29 to the new lessor.

[38] Counsel for the Club points to statements in the reasons of Kirby J and Kiefel J[13] in which their Honours appeared to distinguish between rights and obligations contained in an instrument and those contained in a separate agreement between the parties: the former are transferred on registration of the transfer of the land or lease, but the latter remain contractual rights and obligations between the original parties and are not transferred simply because the instrument of lease is transferred.

[39] It is relevant to note that Keifel J explored the history of and the reasons for section 62 and its equivalents in other States. Her Honour recorded that the section was

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12 Definitions of "concur" and "concurrence" in the *Macquarie Dictionary Online* and in the *New Shorter Oxford English Dictionary*.

13 *Queensland Premier Mines Pty Ltd v French* (2007) 235 CLR 81, [15] (Kirby J), [55] (Keifel J). The court was there concerned with a mortgage and a separate loan agreement, not a lease.

about dealings in land and concerns itself with the transaction in its entirety. Her Honour said:[14]

> It extends to the personal liability of the mortgagor for the mortgage debt "because that liability is intimately connected with the rights of property arising out of the mortgage transaction".

[40] Her Honour went on to quote another prior decision of the High Court thus:[15]

> the plan of the legislation is to enable the proprietor to transfer by registration not only the interest in the land, but all the accompanying personal obligations normally incident thereto.

[41] Kirby J, agreeing in the result, also quoted from *ES&A v Phillips*, including that:[16]

> Under the system of registration governing the present case, the statutory charge described as a mortgage is a distinct interest. It involves no ownership of the land the subject of the security. Like a lease, it is a separate interest in land which may by dealt with apart altogether from the fee simple or other estate or interest mortgaged. But, like a lease, it involves, or usually includes, personal obligations. It is impossible to treat the personal obligations in the same way entirely as the interest in land is treated by the registration system. The register cannot be made the source of information as to the fulfilment or performance of such obligations, and the question what rights they continue to confer may depend upon such matters.

[42] The Club's submission, based on this case in particular, is that, as any obligations under clause 29 were created in the lease rather than in a separate agreement, they were transferred to the new lessor by operation of s 62, notwithstanding that they may be personal to RSL in their nature. Therefore RSL could not enforce the obligations and, in effect, being personal to RSL, the Club's obligations under the clause lapsed upon transfer of the registered lease.

[43] What the Club's submission overlooks, with respect, is that the rights and obligations transferred under s 62, the transfer of which is the primary concern of the section, are those "in relation to their interest in the lot."[17] As Mr Steele, appearing for RSL, pointed out,[18] the Club's (or indeed, the lessor's) interest (that is, its registrable interest) in the lot does not include the requirement on the lessee to provide the relevant services to RSL, including the provision of office space and the appropriate display of memorabilia. That is an obligation on the lessee that happens at the premises but does not comprise part of the lessor's (or the lessee's) interest in the lot.

[44] I have found that the rights granted under clause 29 are personal to RSL. They are not rights (nor obligations on the Club as lessee) that touch and concern the land. They do not form part of the leasehold interest in the lot, nor the interest of the reversioner.

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14 At [45], quoting from *Consolidated Trust Co Ltd v Naylor* (1936) 55 CLR 423, 434.
15 At [46], quoting from *English Scottish and Australian Bank Ltd v Phillips* (1937) 57 CLR 302, 322.
16 At [14], quoting *ES&A v Phillips*, 321.
17 *Queensland Premier Mines Pty Ltd v French* (2007) 235 CLR 81, [55]. Emphasis added.
18 T1-71:17-20.

[45] In my view, s 62 does not affect the operation of clause 29 as creating an obligation on the Club to provide, for the term of the lease, the rights personal to RSL set out in the clause.

[46] It will be recalled that an alternative contention made by RSL was that the schedule to the lease that contains the terms of the lease is not in fact part of the registered instrument of lease. The registered instrument is in Form 7 under the Act, whereas the terms containing clause 29 are in a separate document in Form 20, which is collateral to the registered lease. Therefore s 62 does not apply because the rights and obligations under clause 29 do not arise under the lease, but under a separate collateral agreement.

[47] It is not strictly necessary for me to consider this contention, given my conclusion that s 62 has no application in any event. However, I shall deal with it briefly. In my view, it has no substance.

[48] The registrable instrument of lease is in the prescribed Form 7. But the prescribed Form 20 is not a document separate from the Form 7 lease. Item 8 in Form 7 provides for the rental or consideration to be set out. That item was completed with the words "See attached Schedule". The attached schedule uses the prescribed Form 20 and includes all of the operative terms of the lease. By referring to the schedule, the Form 7 incorporates the terms of the schedule into the registered lease. Indeed, even at the top of the form 7 it says it is "Page 1 of 36" and the first page of the schedule says it is "page 2 of 34". Irrespective of whether the lease has 34 (as it does) or 36 pages in total, pages 2 to the end (each of which is headed "Schedule Form 20") are clearly part of the lease. This view is supported by the title description of a Form 20 set out in the Land Practice Manual published by the Registrar: it is for use as a "Schedule/Enlarged Panel/Additional Page/Declaration". Each Form 20 incorporated into this lease forms part of the lease.

Conclusion: clause 29 is enforceable and the Club breached it

[49] For these reasons, when it purported to terminate RSL's occupation of the offices and the display of its memorabilia, the Club breached its contractual licence granted to RSL. Since then, that breach has continued, but there is no longer any claim by RSL for specific performance of that licence (a remedy that the Club disputed). If RSL has suffered any loss as a result of that breach, it is entitled to recover that loss as damages for breach of contract.

Display of memorabilia

[50] Before I proceed to consider damages, I must deal with another issue raised by the Club, about the extent of its obligation to permit RSL to display its memorabilia.

[51] The memorabilia that RSL had displayed in the building are described in detail, with photographs, by Mr Reibeling, the President of RSL, in one of his affidavits tendered in evidence.[19] They include six display cabinets in which there are such items as Japanese, United States and Australian flags, weapons, uniforms, medals, photographs and other items from World War II and other military conflicts. There are also a Roll of Honour, a wall displaying commemorative shields for recipients of the Victoria Cross and various plaques. I hope I do RSL and the persons and

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19 Exhibit 1, [28], EJR-10 to EJR-22.

conflicts represented and honoured by the memorabilia no disservice in not describing them in greater detail.

[52] Mr Bock, the Secretary of the Club, gave evidence that the Club's board:[20]

> is united in that it does not want weapons of war displayed in its premises. The view of the Board is that the display of such weapons is representative of the post-War era and is not representative of the desires of modern society in the manner it wishes to remember Australia's war dead.

[53] The Club submitted that it is no longer appropriate to display weapons in the club premises and therefore, as clause 29(5) only permits RSL "to appropriately display" its memorabilia, the Club, as the lessee of the premises, is entitled to determine what is an appropriate display. Mr Bock and the Club did not say that it considered that any items other than weapons were inappropriate to display in its premises.

[54] This submission seeks to reverse the order of the words of the clause. They are not "to display appropriate memorabilia," still less "to display memorabilia considered by the Club to be appropriate." It is "to appropriately display … the memorabilia of [RSL]." In other words, RSL can display any memorabilia it wishes to display, provided that it does so "appropriately". The Club has made no suggestion that the manner in which RSL displayed its memorabilia was inappropriate.

[55] Frankly, the attitude of the Club's board expressed by Mr Bock beggars belief when one considers that:

(a) by its very name, the Club seeks to be associated with the RSLA and RSL – an association that the Club clearly considers to be of advantage to it;

(b) it is notorious that the RSLA and its sub-branches frequently display, at their premises, all sorts of memorabilia of war – wars in which weapons were used by and against Australian and allied (and enemy) countries' military personnel, who have been killed and injured in the course of their duties to their country; such displays serving both as a form of historical museum and as a form of honouring the past and present military personnel, particularly Australian personnel;

(c) it cannot, therefore, on any reasonable view, be inappropriate to display such items in premises occupied by an RSL sub-branch or otherwise associated with the RSLA.

[56] The proposition, that the Club is not still obliged to display such of RSL's memorabilia as RSL wishes to display appropriately at the Club's premises, is wrong. Even though RSL no longer occupies the premises, it remains entitled to display its memorabilia there for the remaining term of the lease. The Club continues to breach its obligation under clause 29(5) while it refuses to allow RSL to do so.

Damages

[57] RSL claims damages for breach of clause 29, comprising rent for different premises and storage costs for its furniture and memorabilia, in the sum of $192,820.

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20 Exhibit 10, [20].

[58] RSL claims that, as a consequence of being ejected from the Club's premises, it was obliged to find other premises from which to carry out its traditions and functions – in particular, to provide services to its members. It came to a temporary arrangement to use the boardroom at the Southport Bowls Club from October 2020, for which it is paying $660 a month. More recently, it has come to an arrangement with that club to rent the entire top floor of its building for $5,000 a month (having initially paid $2,000 a month from October to December 2021). It is in the process of renovating that floor and, during that process, it continues to use and pay for the boardroom as well as paying the rent for the top floor. It anticipates being in that position until May 2022, after which it will rent just the top floor. Thus the first component of its claim is for damages equivalent to the rent that it has paid and will pay up to the end of the lease (August 2024): a total of $182,000.

[59] RSL contends that it is appropriate to claim the entire rent, even though the area to which it will now have access is at least four times larger than the area of the offices in the Club's premises to which formerly it had access. In the Club's premises it had two offices for its exclusive use, a number of places where its memorabilia took up substantial space being displayed, as well as being entitled to use the Club's function rooms, when they were not being used by the Club for its customers, for meetings of any ex-service organisations. Without access to those areas at the Club's premises, RSL now needs its own space to display its memorabilia and to carry out its functions. Mr Reibeling gave evidence that RSL intends to fit out its premises at the bowls club to provide offices for its treasurer, its secretary and its veterans support officers and to make space available for use by the Young Veterans Australia Society.[21]

[60] Mr Reibeling's evidence was also that, as a result of having no permanent office, it has had to store furniture, files and some memorabilia in a commercial storage facility since July 2020 and it will continue in that position until it completes its renovations at the bowls club. Thus the second component of its claim is for damages equivalent to the storage fees that it has paid and will pay up to and including May 2022. Those fees will amount to $10,820.

[61] Thus, RSL claims damages in the sum of $192,820.

[62] The Club denies that it is liable for any of the expenses incurred by RSL. It contends that it offered to pay for suitable alternative accommodation for RSL, but RSL refused. Thus, the necessity for RSL to pay for its own accommodation and ongoing storage was caused by its refusal of that offer rather than its ejection from the Club's premises.

[63] It is necessary, therefore, to consider the evidence about that offer.

[64] In his affidavit,[22] Mr Bock said:

> [RSL] was offered fine accommodation at commercial offices immediately adjacent to the Club, with the Club picking up the rent to the order of $60,000 per annum, but it trenchantly refused the accommodation unless the Club guaranteed to pay the rent in perpetuity. Despite the Club explaining that it would need to allocate the funds each year from its grant funds and a new application would be required each time, the offer was refused.

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21 Which, by its name, appears to be an ex-service organisation.

22 Exhibit 10, [16].

[65] In his oral evidence, Mr Bock elaborated on the offer. He said that the Club's board agreed to pay $60,000 for the first year with the proviso that future donations (which he preferred to call it) would go through the Club's normal donation process, under which people apply to it for charitable grants. The board intended that, provided it had funds available, after going through the application and donations process it would make ongoing annual donations to RSL to enable it to pay future rent.[23]

[66] Mr Reibeling was cross-examined about that offer and RSL's decision to refuse it. He said that the office space offered was ideal for RSL's purposes, but the Club's officers told him that RSL would have to make a grant application in order to get the money to pay the rent. There was no guarantee that the grant would be provided, especially as RSL would have to apply again each year and there was no guarantee that each year's application would be successful. RSL's board therefore saw it as an offer of accommodation for one year, albeit with the possibility of that period being extended from year to year.[24] I infer that the board considered that to be unsatisfactorily impermanent.

[67] I consider that RSL was justified in refusing the Club's offer, given that it was for one year only and for future years it depended on the RSL applying for a yearly grant and the Club being able and agreeing to provide the rent. It is also likely (although there is no evidence and there was no submission to the effect, so it is not a matter I take into account) that, in order to secure the office space, RSL would have been obliged to enter into a lease, probably for a period of more than one year. But, even if that were not so, the insecurity of the Club's offer justified RSL refusing it. Therefore, that refusal did not cause RSL's loss.

[68] Mr Clutterbuck of counsel, appearing for the Club, also submitted that the fact that RSL will, from May 2022, occupy premises that are at least four times the size of the two offices it occupied at the Club's premises should be taken into account in determining the extent of any damages awarded to RSL. He suggested that the amount of any rental component of the damages should be reduced by three quarters to account for the difference in area.[25]

[69] I disagree with that proposition. It may be fortuitous that RSL was able to locate far larger premises than the offices that it had occupied at the property, for the same amount of rent per annum as the Club had offered to fund for one year and possibly longer. However, RSL did not simply need to replace the office space that it had occupied. It also needs room to display its memorabilia appropriately and to replace its entitlement to use the Club's function rooms from time to time for meetings of ex-service organisations. In the interim two years, it has suffered considerable inconvenience in being able only to occupy one room at the bowls club, particularly as it needs to provide confidential services to its members, which necessitates other officers or volunteers sometimes having to vacate the room for a period. It also will incur (but does not claim) the cost of renovating the upper floor to suit its purposes.

[70] I find that it has acted appropriately in finding and negotiating the rent for its premises at the bowls club. It was obliged to find that accommodation (both temporary and more permanent) because the Club decided no longer to provide it the

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23 T1-54:38 to T1-55:9.

24 T1-36:39 to T1-37:4; T1-39:5 to T1-40:32.

25 The Club does not suggest that the rent payable to the bowls club for the space to be occupied by RSL is excessive.

office space and other space to which it was entitled under clause 29 of the lease. I find that the amount claimed for rent to the end of the lease period is reasonable and appropriate to award as a component of damages for breach of clause 29.

[71] There was no real suggestion by the Club that RSL acted inappropriately or incurred excessive costs in storing its possessions until it has space to use and to display them. I find that RSL incurred those costs as a direct result of the Club ejecting it from its premises and refusing to display its memorabilia. The monthly cost will continue to be incurred until the renovations are completed in about May 2022.

[72] I therefore propose to award damages in the amount claimed: $192,800.

[73] RSL does not seek interest on damages, so I need not consider such a component.

Declaration

[74] The Club continues to be in breach of its obligations under sub-clauses 29(5) and (6). However, it apparently continues to perform its obligations under the other sub-clauses.

[75] As I have said, RSL no longer seeks specific performance of the obligations under sub-clauses 29(5) and (6). It appears to have accepted that it is better advised to separate physically from the Club and its premises. However, it seeks a declaration that it is entitled to the benefit of the covenants in clause 29.

[76] I have found that it is entitled to those benefits, although it no longer seeks the benefits under sub-clauses 29(5) and (6). It therefore remains entitled to the benefits of the remainder of clause 29.

[77] However, a court will ordinarily only make a declaration of parties' rights and obligations if there is a controversy about those matters. The Club has made it clear that it will continue to provide the services described in the balance of clause 29, "either in conjunction with [RSL], at the option of [RSL], or independently."[26] Mr Bock also said, in his affidavit, that the Club "will continue to fulfill all ceremonial days of remembrance with or without the sanction or co-operation of [RSL]."[27] There is no evidence that the Club has not continued to fulfil those obligations, nor that it has resiled from that position. There is therefore no controversy about the existence and fulfilment of those obligations and no good purpose for making a declaration in the terms sought.

[78] In the circumstances, I do not consider it necessary or appropriate to make the declaration that RSL seeks. I decline to do so.

[79] I shall hear from the parties about the costs of the proceeding.

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26 Exhibit 10, [17] and TB-5: letter, 18 June 2020 from the Club's solicitors to RSL's solicitors.

27 Exhibit 10, [17].