SUPREME COURT OF QUEENSLAND

CITATION:	*Harrison v Inala Plaza Pty Ltd* [2002] QSC 293
PARTIES:	**WARREN GEORGE HARRISON** (applicant) **v** **INALA PLAZA PTY LTD** ABN 67 081 899 247 (first respondent) and **MEDIHELP GENERAL PRACTICE LIMITED** ACN 010 695 173 (second respondent)
FILE NO:	S7285 of 2002
DIVISION:	Trial Division
DELIVERED ON:	27 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2002
JUDGE:	Mullins J
ORDER:	**The originating application be dismissed**
CATCHWORDS:	LANDLORD AND TENANT – RETAIL SHOP LEASE – SUBLETTING – premises leased in a shopping centre for permitted use of medical centre – whether proposed sublease of less than 10% of the area of the premises for use of pharmacy would amount to a breach of the tenant's obligations to use the premises for medical centre only LANDLORD AND TENANT – LEASE – CONSTRUCTION – whether permitted use of medical centre allowed for part of the premises to be used as a pharmacy – relevance of the ordinary usage of the words "medical centre" and that shop to be used as the medical centre is within shopping centre where each shop subject to separate lease and specific use – the use of "medical centre" does not include pharmacy *Crosland v North Sydney Council* (2000) 109 LGERA 244 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 *Offshore NL v Southern Cross Exploration NL* (1985) 3 NSWLR 337 PD McMurdo QC and ME Rackemann for the applicant JS Douglas QC and M Gynther for the first respondent

RC Schulte for the second respondent

SOLICITORS: Minter Ellison for the applicant
Corrs Chambers Westgarth Lawyers for the first respondent
John Nagel & Co for the second respondent

[1] **MULLINS J:** By originating application filed on 9 August 2002 the applicant seeks the following declarations:

> "1. A declaration that the use of part of the premises presently leased by the first respondent to the second respondent, being the use under the proposed sub lease from the second respondent to the applicant according to the form of sub lease submitted by the solicitors for the second respondent to the first respondent under cover of a letter of 25 July 2002, is within the use permitted by clause 9.1 of the lease from the first respondent to the second respondent.
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> 2. A declaration that by reason of clause 11 of the lease from the first respondent to the second respondent, the first respondent is bound to consent to the proposed sub lease to the applicant.
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> 3. A declaration that the second respondent is entitled to sublet part of its premises to the applicant in accordance with the proposed sub lease notwithstanding the absence of the consent of the first respondent."

[2] The premises which are referred to in the first declaration, which is sought by the applicant, are known as shop 1 in the shopping centre which is now called Inala Town Centre ("the centre"). Inala Plaza Pty Ltd ("the first respondent") is the assignee of the interest of Maembe Pty Ltd as lessee from the Queensland Housing Commission of State Housing Perpetual Town Lease No 1803 on which the centre is situated. The centre is an enclosed air-conditioned shopping mall containing about 50 tenancies. Although the first respondent is therefore the head lessee and the leases granted by the first respondent are technically subleases, it is convenient to refer to the first respondent as the landlord and the interests granted by it or its predecessor as leases.

[3] Medihelp General Practice Limited ("the second respondent") is the lessee from the first respondent of shop 1 pursuant to the lease which commenced on 6 January 2001 for a term of 10 years. Shop 1 has an area of 670 m². The permitted use of shop 1 under the terms of the lease is medical centre. Prior to the parties' entering into this lease, the second respondent had leased shop 27 at the centre and the permissible use under that lease was also medical centre. The relevant premises had been used by the second respondent for the conduct of the practice of medical practitioners and the provision of radiology and pathology services.

[4] While Maembe Pty Ltd was still the landlord, Mr Warren Harrison ("the applicant") acquired the interest of the lessee of shop 33. That lease had commenced on 1 August 1996 and expired on 31 July 2001. The permissible use under that lease was pharmacy. The area of shop 33 was 305 m². The applicant failed to exercise the option to renew that lease and upon the expiry of the lease was unsuccessful in negotiating with the first respondent for a new lease. He held over on a monthly tenancy. On 27 June 2002 the first respondent's solicitors gave the applicant notice

to quit requiring vacant possession of shop 33 to be given up on 31 July 2002. The first respondent then permitted the applicant to remain in possession until 31 August 2002 when the applicant vacated shop 33.

[5] The applicant approached the second respondent about subletting part of shop 1. The applicant entered into an option agreement with the second respondent dated 8 July 2002 whereby the second respondent granted to the applicant an option to sublease part of shop 1 containing an area of about 56.2 m² on the terms contained in the draft sublease annexed to the option agreement. The option agreement must be exercised by 5pm on 30 September 2002.

[6] The first respondent negotiated with Igerwin Pty Ltd to lease premises in the centre containing an area of approximately 800 m² for the purpose of a pharmacy. The offer to lease was signed by Igerwin Pty Ltd on 1 May 2002 and the agreement for lease is dated 21 June 2002.

[7] By letter dated 16 July 2002 from the applicant's solicitor to the first respondent's solicitors, the applicant informed the first respondent of his arrangement for a sublease of part of shop 1 from the second respondent. The letter requested the consent of the first respondent to the sublease.

[8] The first respondent's solicitors replied to the applicant's solicitor by letter dated 25 July 2002. At the time the reply was sent, the first respondent had not received an application for consent to the sublease from the second respondent. In anticipation of such an application, the first respondent's solicitors advised that their instructions were that the application for consent would be refused on the basis that the intended use of the subleased premises as a pharmacy was not permitted under the first respondent's lease.

[9] The second respondent's solicitors made application to the centre manager of the centre for the consent to the sublease by letter dated 25 July 2002. The first respondent's solicitors responded to that letter by letter dated 29 July 2002 which advised that the first respondent was not prepared to grant its consent to the proposed sublease by the second respondent to the applicant for the reasons outlined in the first respondent's solicitors' letter dated 25 July 2002 addressed to the applicant's solicitor.

[10] Although the second respondent was joined as a party to the originating application by the applicant, the matters in issue on the application were pursued by the applicant and the first respondent. The second respondent did not file any material in relation to the application and Mr Schulte of Counsel and his instructing solicitors were given leave to withdraw from the hearing, reserving the second respondent's position to be heard on costs.

[11] The applicant filed a statement of claim on 29 August 2002. The pleading on which the first respondent ultimately relied at the hearing was the second amended defence which was filed by leave given at the hearing. The applicant filed a reply also by leave given at the hearing. It was apparent from these pleadings and the arguments that were developed during the hearing of the application that the issues for determination were:

(a) whether the proposed use of part of shop 1 as a pharmacy would cause the use of shop 1 to lose its character of a medical centre;

(b) whether the applicant is estopped from contending that the words "medical centre" in the lease of shop 1 permit the use of part of shop 1 for a pharmacy; and

(c) whether the first respondent is entitled to require of the applicant and the second respondent the conditions set out in para 6(b) of the defence.

Relevant terms of the lease of shop 1

[12] Clause 9.1 of the lease of shop 1 provides:

> "The Tenant must use the Premises for the Permitted Use only."

The definition of "Premises" is found in cl 1.2(19) of the lease and is defined in such a way that the term refers to the whole of shop 1. There is no clause in the lease which allows the expression "Premises" to be read as referring to any part of shop 1, as an alternative to referring to shop 1 as a whole. This construction is confirmed by cl 9.2 of the lease which deals with restrictions on use in respect of "part of the Premises" in some instances.

[13] There is no definition in the lease of "Permitted Use". The reference schedule to the lease lists key information relating to the lease. Item 11 of the reference schedule has the heading "Permitted Use" with a reference to cl 9.1 and then sets out "Medical Centre". It was common ground between the parties that the permitted use for the purpose of cl 9.1 of the lease was medical centre. The drafting of cl 9.1 amounts to the imposition of a positive obligation on the part of the second respondent to use shop 1 as a medical centre only.

[14] Clause 11 of the lease deals with assignment and subletting. Clause 11.1 provides that the tenant must obtain the landlord's consent before the tenant assigns, sublets or deals with its interest in the premises. Clause 11.2 deals with the circumstances when the landlord's consent must be given and provides:

> "The Landlord must give its consent if:
>
> (a) the Tenant satisfies the Landlord that the new tenant is financially secure, has trading experience at least equal to that of the Tenant and has the ability to carry out the Tenant's obligations in this Lease;
>
> (b) the new tenant signs any agreement and gives any security which the Landlord reasonably requires;
>
> (c) the Tenant complies with any other reasonable requirements of the Landlord;
>
> (d) the Tenant is not in breach of the Lease;
>
> (e) the Tenant pays the Landlord's reasonable costs of giving its consent; and
>
> (f) consent to the assignment, subletting or dealing is granted by the Minister for Public Works and Housing under the provisions of the *State Housing Act 1945*."

[15] If each of the matters set out in cl 11.2 is satisfied by the circumstances in respect of the proposed sublease, it follows that the first respondent must give the consent to the second respondent's proposed sublease to the applicant.

[16] This application focused on paras (c) and (d) of cl 11.2. The material relied on by the first respondent during the hearing of the application disclosed what requirements it would seek to impose on any consent to the proposed sublease

between the second respondent and the applicant which therefore raises para (c) of cl 11.2. If the proposed use of pharmacy under the sublease had the effect of altering the use of shop 1 for a medical centre, the second respondent would be in breach of cl 9.1 of the lease which would mean that para (d) of cl 11.2 could not be satisfied.

Other relevant facts

[17] The photographs which are Ex 2 show the set up of shop 33 before the applicant ceased to be a tenant. They depict a well-stocked shop with signs showing that it is a pharmacy with "health and beauty" lines. The applicant calculated that 85% of his business in shop 33 was from filling prescriptions from the various medical centres in the area including that of the second respondent and the doctors' surgery in shop 35 which adjoined shop 33. Another 5% of the business was from the sale of medicines that only pharmacies could sell and the balance of 10% of sales was from general merchandise such as film, toothpaste, toilet rolls and shampoo.

[18] The applicant proposed that if the sublease of part of shop 1 went ahead, he would provide a dispensary service from the shop 1 premises similar to that which he had provided from shop 33, but would confine his retailing to what he described as "pure pharmacy" products, rather than general merchandise. By way of example the applicant stated that he would sell a small range of medicated shampoos, but not sell the brands of shampoos which were found in the supermarkets. The applicant estimated that he would keep about 30% to 40% of the range of products that he had sold from shop 33, but would still be making 90% of the sales which he had made from shop 33.

[19] The photographs which are Ex 3 depict the medical centre presently conducted by the second respondent. It has its own external entrance, so that members of the public proposing to attend at shop 1 do not need to traverse the rest of the centre, if they park in the car park near shop 1.

[20] Clause 7.1 of the lease for shop 33 provided:

> "The Tenant … will be the only tenant in the Centre permitted to dispense prescriptions under the National Health Act."

It was common ground between the parties that the applicant is and was at all material times approved as a pharmacist for the purpose of supplying pharmaceutical benefits at or from shop 33 pursuant to s 90 of the *National Health Act* 1953 (Cth) and that no other pharmacist is or was entitled to approval under that provision for the purpose of supplying pharmaceutical benefits from other premises in the centre.

[21] The first respondent is a nominee for a number of small superannuation funds. When it purchased the centre in 1998, it was in a very poor state. The first respondent subsequently spent between $11m to $12m in renovating and modernising the centre including air-conditioning it. The sole director and secretary of the first respondent, Mr Adrian Abbott, who is a chartered accountant, gave evidence of his knowledge through his profession and in being involved in purchasing, managing and developing three shopping centres that it is the practice to have a medical centre located at a distance from the pharmacy, so that people intending to fill prescriptions pass other retail outlets between the doctors' rooms and the pharmacy.

[22] The centre manager of the centre, Mr Phillip McGrath, also gave evidence of his experience that the usual practice for many years for shopping centres of the same kind as the centre was for the pharmacy to be located remotely from the site of the medical practices, in order to take advantage of the prospect of customers partaking in "impulse buying" if they have to pass other specialty retailers to reach the pharmacy to fill their prescriptions.

[23] Mr Russell Shaw, who is employed by Knight Frank as an associate director retail services, provided a report for the first respondent which dealt with factors relevant to the placing of tenancies within a retail shopping centre which in Mr Shaw's experience would be expected to be relevant to the centre, including:

> "Within a supermarket based centre it is usual practice in my experience to have a full line "retail" pharmacy as an integral part of the centre's offer. Where a medical centre is also included in the offer it is common for the pharmacy to be the dominant shop in terms of visibility when compared to the medical centre.
>
> In my experience, all retail centres of the type such as Inala Town Centre rely in part in order to generate sales on the customer traffic generated by their fellow traders and the centre environment as a whole.
>
> The configuration and layout of tenancies with a retail centre is usually planned with a view to supporting this traffic flow and exposing as many potential customers as possible to as many traders.
>
> Car parks are strategically placed to ensure an even distribution of customer traffic to entry points to the centre thus maximising internal traffic flows for the benefit of traders."

[24] It was apparent from Mr Shaw's evidence that the usual strategies in placing tenancies did not invariably result in a medical centre being remote from the pharmacy in a shopping centre. Mr Shaw described it as being "not unusual" to see a doctors' surgery, such as that in shop 35 at the centre, adjacent to the pharmacy that had been conducted in shop 33, because the pharmacy was a retail pharmacy sitting on a main corner of the centre with good presentation and the doctors' surgery was off a corridor off the mall adjacent to the pharmacy.

[25] The applicant, as the proprietor of the Harrison Pharmacy Group, conducts 21 large pharmacies located throughout Australia. He has therefore been involved in many lease negotiations with various landlords of shopping centres. The applicant has four pharmacies where the medical centre is inside the pharmacy and has a number where the medical centre is nearby. The applicant stated that he had never heard the theory that shopping centre proprietors like to have medical centres separate from pharmacies, so that customers can walk from one place to the other and therefore may patronise other shops in the shopping centre.

[26] It is apparent from the evidence adduced by the first respondent on this issue (including the location of shop 35 in the centre) that it is not an invariable practice of a landlord to site the pharmacy in a retail shopping centre at a location remote from where medical practitioners conduct their surgeries within the same centre. I accept Mr Abbott's evidence that it is desirable from the first respondent's position

to achieve that separation between medical practitioners within the centre and the pharmacy. In the light of the applicant's evidence, I cannot conclude that it is such a well-known and disclosed practice on the part of a landlord, that it should be taken as underlying any negotiations between a landlord and a tenant seeking to conduct a pharmacy. I therefore cannot conclude that it was a common assumption made by the applicant and the first respondent during the period in which they were respectively tenant and landlord of shop 33 that any pharmacy operating in the centre would be located at a significant distance from any medical centre operating at the centre.

Whether permitted use of medical centre allows part of the premises to be used as pharmacy

[27] The expression "medical centre" is not a term of art or one to which a specific technical meaning applies. The parties agreed that it is a matter of construing the expression in the lease, having regard to the ordinary usage of those words. The expression "medical centre" is not further defined in the lease of shop 1.

[28] A question has arisen as to the extent to which consideration can be given to objective background facts in construing the expression "medical centre". It is appropriate, as the provisions of a lease are also the terms of a contract, to have regard to the rule relating to the interpretation of contracts which was set out by Mason J (as he then was) in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 352:

> "The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious knowledge of them will be presumed."

[29] In view of the lack of precision about the expression "medical centre", which was highlighted by the competing arguments put forward by the applicant and the first respondent as to the meaning which it should be given, there is an element of ambiguity about the expression which justifies recourse to objective background facts.

[30] One of those objective background facts is that shop 1 is situated in an enclosed shopping centre where there are multiple tenancies which are each designated a specific use. Such a shopping centre is commonplace within Australia and the first respondent's submissions implicitly relied on the general characteristics of such a shopping centre. A summary of those characteristics is set out in M J Redfern and D I Cassidy *Australian Tenancy Practice and Precedents* (Butterworths) at paras [4 20]-[4 30]. Relevantly in relation to the landlord, it is stated at para [4 25]:

> "Particular care should be taken in selecting tenants. The success of the centre (and its goodwill value to the landlord) will depend essentially upon the amount of business carried out in it. Often a centre stands or falls by its ability to provide a wide and easily accessible range of services and if several tenants fall down in their

> service the business of the whole centre may suffer. The landlord will want to choose tenants who have the expertise and capital to provide a full range of products and services and to ensure that all usual necessary services are available within the centre."

And relevantly in relation to a tenant, it is stated at para [430]:

> "Just as the success of the centre for the landlord will depend upon all tenants carrying on business successfully, so success for the individual tenants will depend upon the quality of the other businesses in the centre and the administration of the centre as a whole."

[31] Additionally, the first respondent seeks to rely on the following matters as existing background facts at the time that the second respondent's lease was granted:

(a) there was already a pharmacy in the shopping centre being conducted from shop 33;
(b) that pharmacy had the exclusive right to conduct at least the dispensary of the business in the centre;
(c) the existing pharmacy was operating.

On the basis of these facts, it is submitted that it would be unlikely that the first respondent and the second respondent would have intended by the expression "medical centre" to include a use which was then known to be provided for by another tenant who had the exclusive use to the dispensary part of the operation. It is not apparent from the material relied on in connection with this application that the operation of the pharmacy at shop 33 in any way affected the choice of the expression "medical centre" by the first and second respondents in respect of shop 1. It is therefore not appropriate to take into account these matters put forward by the first respondent as objective background facts relating to the designation of the use for shop 1 as medical centre.

[32] The first respondent also seeks to rely upon the fact that the second respondent's use of shop 27 had been limited to doctors' practices and pathology and radiology services and that would have been taken into account by the first and second respondents in designating the use of shop 1 as a medical centre and as consistent with there not being any intention to change the actual activities carried on from the new premises by the second respondent compared with the activities carried on from its prior premises. It does not necessarily follow from the fact, that the use of the expression "medical centre" was the same for shop 27 as it is now for shop 1, that it was the intention of the first and second respondents that the activities in shop 1 would be the same as those conducted in shop 27. The question must be what falls within the expression "medical centre". I do not accept that the first respondent can rely upon the activities conducted by the second respondent in shop 27 as an objective background fact to assist in the construction of the expression "medical centre" used in the lease of shop 1.

[33] To the extent that ordinary usage of words can be discerned from dictionaries, the word "medical" is an adjective which means "of or relating to the science or practice of medicine": *Macquarie Dictionary* (3rd ed) p 1338 which is reflected by similar entries in other dictionaries. The applicant relies on the definition of "centre" in the *Macquarie Dictionary* (3rd ed) p 358:

> "a building or building complex which houses a number of related specified services: *shopping centre; a sports centre; a medical centre*."

[34] The first respondent submits that the permitted use of medical centre contemplates the premises to be used as a centre for the practice of medicine and that there is a distinction between the practice of medicine and the practice of a pharmacy in which medicines are prepared and sold as part of the stock in trade.

[35] The applicant concedes that there is a difference between a pharmacy and a medical centre. The nub of the applicant's submission is that a medical centre is likely to comprise a number of parts, a pharmacy is of the same character of other components of a medical centre and the inclusion of a pharmacy comprising less than 10% of the area of shop 1 does not preclude the use of shop 1 from still being characterised as a medical centre. The applicant submits that it is not to the point the one component of a medical centre, considered alone, would not constitute a medical centre.

[36] The applicant relies on the statement by Bignold J in *Crosland v North Sydney Council* (2000) 109 LGERA 244, 250:

> "In my opinion, the proposed development accords with the current day understanding and experience of the existence in our community of medical centres or health centres, being places offering an extensive range of professional services of medical and health care to the local community.
>
> The range of such services has not, however, become standardised. Nor has there emerged any concept of a minimum range in the variety of such services. Such matters are necessarily variable depending upon the scale of the medical or health centre.
>
> However, what clearly distinguishes the modern day medical or health centre from, for example, a general medical practitioner's practice of a group practice of general medical practitioners, is the fact that there is available at the one place (i.e., the medical or health centre) a variety of specialised medical or health services."

[37] The issue in *Crosland v North Sydney Council* was whether a proposed development could possibly be characterised as "hospital" within the meaning of the relevant definition in the *North Sydney Local Environmental Plan 1989* (NSW):

> "'hospital' means a building or place used as:
> (a) a hospital;
> (b) a sanatorium;
> (c) a health centre;
> (d) a nursing home; or
> (e) a home for aged persons, infirm persons, incurable persons or convalescent persons;
>
> whether public or private, and includes a shop or dispensary used in conjunction therewith, but does not include an institution."

> The proposed development was a two-storey building where the ground floor was to be used as medical consulting rooms and the upper floor was to be used as a dwelling unassociated with the use proposed for the ground floor.

[38] Although Bignold J considered that the proposed development would provide a small range of medical or health services "within the overall spectrum of services that nowadays are commonly provided at medical or health centres" (at 250), his Honour concluded that the proposal would provide a sufficient range of medical and health services, as to properly and reasonably qualify its existence as a medical or health centre and therefore within the permissible purpose "hospital" in terms of the relevant plan.

[39] The statements made by Bignold J in *Crosland v North Sydney Council* are of limited assistance, as they are made in the context of the construction of the term "health centre" in a town planning instrument. In general terms, land use planning is a public process and part of the process of regulating competing considerations, so as to promote an orderly balance of land use in the community: 12 *Halsbury's Laws of Australia* at para [180-4000]. That is a different and much broader context than the construction of a permitted use in one particular lease in a shopping centre containing about 50 leases where, as set out previously, the shopping centre is operated by the landlord as a business with each of the tenants operating a separate business, but with each tenant usually having some dependence on the successful operation of the other businesses in the shopping centre.

[40] It is misleading to extrapolate the general comments of Bignold J made in a planning context about the distinguishing features of "the modern day medical or health centre" when any particular set of premises relied upon as comprising the medical or health centre may or may not be the subject of separate leases which permit each of the specific purposes comprising the relevant medical or health centre.

[41] When the construction of the expression "medical centre" is considered in the context of the permitted use of shop 1, it is the one premises within the centre to which that permitted use applies. Shop 1 is not a separate complex comprising different parts, but one shop which itself is part of the centre.

[42] There is no doubt that a pharmacy is an allied health service where goods are sold and services are provided that relate to the health and wellbeing of its customers, but in the context of a shopping centre a pharmacy remains a distinct use from the practice of medicine.

[43] In the context of the permitted use of medical centre relating to shop 1 within the centre, a sublease of 56.2m^2 of the area for shop 1 for a pharmacy leaving approximately 600m^2 to be used for the medical centre has the consequence of the use of shop 1 being for both a medical centre and pharmacy and thus for two distinct uses. The use of part of the premises for a pharmacy, even though less than 10% of the whole of the area of the premises, means that the second respondent would no longer be carrying on the use of a medical centre only, as required by cl 9.1 of the lease.

[44] On the proper construction of the expression "medical centre" in cl 9.1 of the lease between the first respondent and the second respondent, it is not possible for the

second respondent to use an area of 56.2 m^2 for a pharmacy without being in breach of the lease.

[45] It therefore follows that the applicant is not entitled to the three declarations sought in the originating application and the originating application should be dismissed.

Estoppel by convention

[46] It is therefore not necessary to consider the alternative basis which the first respondent raised as precluding the relief sought by the applicant. As the issue of whether the applicant was estopped from seeking the relief was fully argued, I will deal briefly with it.

[47] In para 3 of the second amended defence the first respondent set up a number of common assumptions on which it sought to rely, either cumulatively or alternatively, as underlying the transaction between the applicant and the first respondent in respect of the lease of shop 33. Because the first respondent alleged that it relied on those assumptions to enter into the agreement for lease with Igerwin Pty Ltd, the first respondent claimed that the applicant was estopped from contending that the expression "medical centre" in the lease of shop 1 permitted the use of part of those premises from being subleased to the applicant for a pharmacy.

[48] The dispute between the applicant and the first respondent which is the subject of this application arises out of the proposal by the applicant to sublease part of shop 1 from the second respondent. This transaction has arisen after the expiry of the holding over period of the lease by the applicant of shop 33 in the centre. Each of the common assumptions relied upon by the first respondent is in the context of the applicant's holding the lease of shop 33 from the first respondent. Estoppel by convention can operate in proceedings only arising out of the transaction into which the parties entered upon the basis of the assumed facts: *Offshore NL v Southern Cross Exploration NL* (1985) 3 NSWLR 337, 341. The first respondent therefore cannot raise an estoppel by convention in respect of a dispute with the applicant which is beyond the lease formerly held by the applicant from the first respondent. It is therefore not necessary to consider whether the first respondent has proved each of the alleged common assumptions.

Reasonable requirements in respect of the consent to sublease

[49] The first respondent has set out in para 6(b) of the second amended defence its position in respect of para (c) of cl 11.2 of the lease:

> "(b) the first defendant is entitled to require the plaintiff and the second defendant to ensure, among other things:
>
> (i) that the configuration of the proposed sub-leased premises is appropriate;
>
> (ii) that necessary utility services and other works for the proposed sub-leased premises can be provided and carried out in an appropriate way;
>
> (iii) that the nature of the pharmacy business to be conducted on the proposed sub-leased premises would satisfy the reasonable requirements of customers of 'Inala Town Centre';

(iv) that the proposed sub-lease would not prevent the establishment of a second pharmacy within 'Inala Town Centre' capable of:

1. satisfying the reasonable requirements of customers of 'Inala Town Centre' as to the size of the premises and the range and availability of product lines; and
2. enhancing its value;"

[50] Although during the course of the hearing of this application the position of the first respondent was that the time for identifying the reasonable requirements of the first respondent in relation to any consent had not yet arisen, because of the dispute as to whether the applicant and the second respondent were entitled to enter into the proposed pharmacy sublease, at the conclusion of the hearing Mr Douglas QC, on behalf of the first respondent, indicated that his instructions were that the first respondent would not seek to impose any conditions apart from those referred to in para 6(b) of the second amended defence.

[51] The requirements that can be imposed under para (c) of cl 11.2 of the lease must be directed to the second respondent. Although it is not necessary to decide whether each of the requirements can be characterised as reasonable requirements of the landlord relevant to any consent to the proposed sublease, I will make some observations about the requirements.

[52] Requirements (i) and (ii) appear unobjectionable. The arguments of the applicant were primarily directed to requirements (iii) and (iv). Those requirements are directed at the desirability of a pharmacy being conducted from within shop 1 and therefore cannot be characterised as requirements of a consent to the sublease for the use of part of shop 1 as a pharmacy.

Conclusion

[53] I will hear submissions from the parties on costs.