SUPREME COURT OF QUEENSLAND

CITATION:	*Sai Teys McMahon Real Estate Pty Ltd v Queen Street Apartments Pty Ltd & Anor* [2007] QSC 264
PARTIES:	**SAI TEYS McMAHON REAL ESTATE PTY LTD (ACN 101 160 034)** (plaintiff) **v** **QUEEN STREET APARTMENTS PTY LTD (ACN 097 937 365)** (first defendant) **and** **QUEEN STREET PROPERTY MANAGEMENT PTY LTD (ACN 118 455 182)** (second defendant)
FILE NO:	1091 of 2006
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	19 September 2007
DELIVERED AT:	Brisbane
HEARING DATE:	31 May 2007; 22 August 2007; 23 August 2007; 24 August 2007
JUDGE:	Chesterman J
ORDER:	**1. Declaration that the first defendant's purported rescission of the Management Rights Acquisition Agreements between it and the plaintiff dated 25 July 2002 by its letter of 9 February 2006 was a repudiation of those agreements** **2. Judgement for the plaintiff against the second defendant for damages to be assessed.**
CATCHWORDS:	CONTRACTS – CONSTRUCTION AND INTERPRETATION - PRINCIPLES – IMPLIED TERMS - – where plaintiff entered into agreements with the first defendant to act as caretaker and letting agent for residential apartments in buildings developed by the first defendant – where the first defendant had marketed buildings as high cost residential luxury apartments – where prior to the execution of the agreements the shareholders of the plaintiff agreed to sell their shares to a third party Oaks – where that agreement was conditional upon the execution of the agreements between the plaintiff and first defendant – where the first

defendant evidenced concern over the proposed purchase of the plaintiff by Oaks – where the first defendant's concerns regarded the future value of the development if Oaks provided lower cost serviced apartments and hotel style services under the agreement - where the defendant informed that plaintiff that it considered the provision of such services would constitute a breach of the agreements – whether on construction of the agreements between the plaintiff and defendant the provision of such services under that agreement would constitute a breach.

CONTRACTS – DISCHARGE – BREACH - REPUDIATION AND NON PERFORMANCE – WHAT AMOUNTS TO REPUDIATION - where the first defendant demanded the plaintiff enter a deed of variation undertaking not to provide such services – where the plaintiff refused to enter such deed but stated that it would abide by all the terms of the agreements as it understood them - where the plaintiff did not consider that provision of such services constituted a breach – where the first defendants purported to terminate the agreements on the basis that the plaintiff's refusal to enter the deed constituted a repudiation by the plaintiff – where the evidence suggested that the first defendant understood they had no right to insist on the execution of the deed - whether a mistaken view of a party's obligations under a contract can amount to a repudiation - whether the plaintiff's actions constituted a repudiation of the agreement — whether the defendant's purported termination was a wrongful termination.

TORTS – INTERFERENCE WITH CONTRACTUAL RELATIONS – INDUCEMENT OF CONTINUING BREACH - where after the first defendant's initial breach by wrongful termination the first defendant incorporated the second defendant – where the second defendant has identical shareholders and directors as the first defendant – where the first and second defendant entered into a letting agreement – where the second defendant's act of binding itself to that agreement interfered with the agreement by the first defendant in favour of the plaintiff – where that interference resulted in a continuing breach by the first defendant - where the second defendant had knowledge of the breach by the first defendant – where the first defendant argued that the second defendant was incorporated after the initial breach by the first defendant and thus could not have induced the breach by the first defendant - whether the second defendant's participation in the first defendants' further breach of its agreements with the plaintiff is sufficient to establish the tort -–

DC Thompson & & Co Ltd v Deakin [1952] Ch 646, applied
D.T.R Nominees Pty Ltd v Mona Homes Pty Ltd (1977-78) 138 CLR 423, applied

Independent Oil Industries Ltd v The Shell Co of Australia Ltd (1937) 37 SR (NSW), cited
Jackson Nominees Pty Ltd v Hanson Building Products Pty ltd [2006] QCA 126, applied
Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) 166 CLR 623, applied
Multinail Australia Pty Ltd v Pryda (Aust) Pty Ltd [2002] QSC 105, applied
Norco Co-Operative Ltd v Parmalat Australia Ltd & Ors [2006] QSC 38, applied
Secured Income Real Estate (Australia) Ltd v St Marin's Investment Pty Ltd (1979) 144 CLR 596, applied
Short n The City Bank of Sydney (1912) 15 CLR 148, cited
Smithies v National Association of Operative Plasterers [1909] 1 KB 310, applied
Swiss Bank Corporation v Lloyds Bank Ltd (1979) Ch 548
Torquay Hotel Co Ltd v Cousins [1969] 2 Ch 106, cited
Woodar Investment Development Ltd v Wimpy Construction UK Ltd [1980] 1 WLR 277, applied

COUNSEL: Mr H Fraser QC with him Mr D Williams for the plaintiff
Mr S Couper QC for the defendant

SOLICITORS: McMahon Clark Legal for the plaintiff
Home Wilkinson Lowry for the first and second defendants

[1] The plaintiff carries on business as a provider of management and letting services for residential buildings. The first defendant is a developer. It built what is known as the Aurora Tower, Brisbane's tallest residential building, on land located at 420 Queen Street, Brisbane. The tower is 69 stories in height and contains about 478 residential apartments. It also contains lots, on the lower floors, to be used for retail shopping. There was a third part to the development: a separate number of residential apartments adjacent to the tower consisting of a low rise building behind a façade which was included in the Register kept pursuant to the *Queensland Heritage Act 1992*. Each of the residential apartments in the tower, the retail shopping lots and what was called the Heritage area of residential apartments in the low rise building, had its own body corporate created pursuant to the registration of a community titles scheme pursuant to the *Body Corporation and Community Management Act 1997*. The first defendant proposed to sell the residential apartments, and the retail lots, subsequent to the registration of the community title schemes and the issue of separate Certificates of Title for each of the apartments and shops.

[2] The second defendant was incorporated on 21 February 2006. Its directors and shareholders, Mr Potts and Mr Morris, are also the directors and shareholders of the first defendant.

[3] By two agreements each dated 25 July 2002 the first defendant agreed to cause the plaintiff to be appointed the caretaker and letting agent for the residential apartments in the tower and the Heritage area. The appointment would, of course, have to be made by the respective bodies corporate but upon their incorporation the first defendant would control them as the owner of all the issued titles. The terms

on which the plaintiff was to act as letting agent for the residential apartments was set out in Letting Agreements identified by, and referred to in, Management Rights Acquisition Agreements of 25 July 2002. There were two such agreements, one in respect of the tower apartments and the other the Heritage area apartments. I shall refer to them in the singular ("MRA agreement").

[4] By a written contract dated 15 November 2002 the first defendant agreed to sell to the plaintiff proposed Lot 74 in the residential tower. That was the lot from which the plaintiff would conduct its caretaking and letting agency business for the residential apartments.

[5] By another written contract also dated 15 November 2002 the first defendant agreed to sell to the plaintiff proposed Lots 7 and 8 in the retail shopping area.

[6] Each of the contracts was conditional upon the contemporaneous settlement of the others.

[7] The means by which the plaintiff was to be appointed caretaker of the retail shopping area was the subject of another contract in or about May 2005, the detail of which it is not necessary to mention.

[8] The various agreements were to be carried into execution on dates calculated by a formula which had as its starting point the registration of the community title schemes. They were not completed. On 9 February 2006 by facsimile transmission from its solicitors to the plaintiff's solicitors, the first defendant purported to rescind the MRA agreement by reason of what it described as the plaintiff's anticipatory, fundamental, breach of the agreement. By return facsimile of 9 February 2006 the plaintiff's solicitors denied, on its behalf, that it had repudiated the MRA agreement and informed the first defendant that it regarded the contracts as remaining on foot and that it required the first defendant to perform its obligations contained in the MRA agreement.

[9] The first defendant persisted in its stance that the plaintiff had repudiated the MRA agreement and steadfastly refused to perform any part of it.

[10] On 10 February 2006 the plaintiff commenced these proceedings by an Originating Application seeking the specific performance of the MRA agreement against the first defendant, and a mandatory injunction requiring the respondent to perform particular terms of that agreement. As mentioned, on or about 21 February 2006 the first defendant's directors incorporated the second defendant and in May 2006 the first defendant instigated meetings of the bodies corporate of the residential tower and heritage apartments to appoint the second defendant as caretaker and letting agent.

[11] Thereafter the action has proceeded against both defendants. The plaintiff claims against the first defendant specific performance of the MRA agreement, and mandatory injunctions, or damages for breach of contract in the event the court declined to grant equitable relief. The claim against the second defendant is for an injunction and/or damages for inducing breach of contract, or interfering with the contractual relations between the plaintiff and the first defendant.

[12] Obviously the execution of the agreements between the bodies corporate and the second defendant creates difficulties for the plaintiff's pursuit of an order for specific performance against the first defendant.

[13] In order to reduce the complexity of the litigation and to obtain a speedy resolution of at least part of the dispute orders were made that questions of relief be heard separately and after the court pronounced upon the question whether the first defendant had lawfully rescinded the MRA agreement by reason of the plaintiff's repudiation of it, or whether the first defendant's purported rescission and subsequent refusal to perform the MRA agreement was itself a breach of the MRA agreement entitling the plaintiff to relief, whether equitable or legal.

[14] The pleadings are long and complicated. They raise and canvass many issues but at the conclusion of the trial only two questions required an answer. They are whether the plaintiff or the first defendant repudiated the MRA agreement in February 2006, and whether the second defendant is liable in tort for inducing the first defendant to break its contract with the plaintiff.

[15] It is necessary to mention some of the terms of the various contracts between the plaintiff and the first defendant.

[16] The MRA agreement recited that the plaintiff wished to acquire the management rights to the apartments 'pursuant to and in accordance with the caretaking agreement and the letting agreement annexed …'. There were two letting agreements but again I shall refer to them in the singular. It also recited that the first defendant had agreed, in consideration of being paid $2,000,000 by the plaintiff to cause the body corporate at its first general meeting to resolve to enter into the letting agreement with the plaintiff. By cl 3 the first defendant agreed to cause the body corporate to hold an extraordinary general meeting immediately following registration and to cause it to resolve to enter into the letting agreement by executing the letting agreement under seal. By cl 4 the plaintiff agreed to execute the letting agreement. By cl 19 it was agreed that the MRA agreement was 'subject to and conditional upon contemporaneous completion' of a contract by which the plaintiff would buy unit 74 in the tower; an agreement for the acquisition by the plaintiff of the letting rights for the apartments in the Heritage area; and a contract for the purchase by the plaintiff of proposed lots 7 and 8 within the retail shopping precinct of the development.

[17] Clause 9 assumes some significance. It provided:

> '9.1 This agreement constitutes the full and complete understanding between the parties with respect to the subject matter of this agreement. There is no other oral understanding, agreement, warranty or representation whether express, implied or collateral in any way extending, defining or otherwise relating to the provisions of this agreement or binding on the parties with respect to any of the matters to which this agreement relates.
>
> 9.2 Each of the parties hereby covenants and irrevocably acknowledges that it has not been induced to enter into this agreement by any statement, warranty, representation,

understanding, act, omission, fact, matter, thing or conduct by or on behalf of any person including the other party, other than as expressly recorded in this agreement.

9.3 The provisions of this section operate and remain in full force and effect, except in the case of fraud by another party to this agreement. No other fact, or matter or circumstance including the breach of the provisions of Part 5 of the *Trade Practices Act* 1974 by a party to this agreement will interfere with or in any way derogate from the operation and effect of this section.'

[18] The contract for the purchase of unit 74 was executed on 15 November 2002. The purchase price was $850,000. The only relevant clauses are 22 and 24. These were common to all the contracts for the sale and purchase of apartments in the tower. Clause 22 provided:

'22.1 Until 12 months after the establishment of the scheme the purchaser appoints the vendor to be … proxy … to vote for the purchaser at general meetings of the body corporate on the following issues:-

22.1.1 … authorising a person as a letting agent …'.

Clause 24 provided:

'24.1 The vendor and the purchaser agree unequivocally that:

24.1.1 There is no

(i) agreement between the vendor and the purchaser for the ongoing letting or management of the lot

24.1.2 The purchaser, as owner of the lot will have, the purchaser's sole and unfettered discretion, the following rights in respect of the lot:

(i) to occupy the lot as a residence;
(ii) to let the lot on either short or long term rental basis.'

[19] By cl 3 of the proposed letting agreement:

'3.1 The body corporate grants to the letting agent the right to conduct the letting business for the term from the commencement date.

3.2 If there is not … an outstanding breach of this agreement by the letting agent entitling the body corporate to terminate it, the letting agent may by giving written notice … extend or renew this agreement … for the further term, otherwise upon

> the same conditions as are contained in this agreement with the exception of this clause 3.2 …
>
> 3.3 In consideration of the body corporate granting to the letting agent the right to carry on the letting business, the letting agent will provide the letting services.'

[20] Letting business was defined in cl 1(1)(i) to be:

> '• The letting of lots for residential tenancies;
> • The sale of lots;
> • The hiring of equipment or items the letting agent considers desirable and … are not contrary to the interests of the body corporate …
> • The provision of any other ancillary services or goods commonly provided in connection with the letting of lots in a complex of the nature of the (tower) and/or which the letting agent wishes to provide.'

[21] By cl 4.3(g) the letting agent promised to 'act fairly and lawfully and not discriminate between owners'. By cl 5 the body corporate promised that it would not itself conduct or grant to any other person the right to conduct a business similar to the letting business.

[22] In the middle of 2005 the shareholders in the plaintiff agreed to sell their shares to Oaks Hotels and Resorts Pty Ltd ('Oaks') for about $6,000,000 which reflected the value to the contracting parties of the letting rights in the Aurora complex. The transaction, had it proceeded, would have netted the plaintiff's original shareholders a profit of about $3,000,000. The agreement for the sale of shares was conditional upon *inter alia* the completion of the MRA agreement and the related agreements on which they were conditional. That event did not occur and Oaks did not become the owner of the shares in the plaintiff.

[23] Oaks is in the business of providing accommodation for travellers, holiday makers and semi-itinerant urban workers. The news that the plaintiff, the proposed letting agent for the Aurora complex, would become an Oaks subsidiary caused considerable anxiety in the minds of the defendants' directors. Rightly or wrongly they associated Oaks with a distinctly plain, perhaps plebeian, approach to the provision of accommodation. To maximise profit from its development the first defendant asked high prices for Aurora's residential lots and promoted the development as one suitable for those who enjoy wealth and its display. They thought that Oaks' reputation and its method of operation would be inimical to achieving that result.

[24] The first defendant had two concerns. The first was Oaks' involvement as the letting agent. The second was the operation of 'short term accommodation, serviced apartments or hotel style accommodation typically used as holiday and nightly business or corporate accommodation …' from the tower. Mr Morris anticipated that about one third of the buyers of residential lots would live in the units but the balance, about 320 owners, would let their apartments to tenants. Mr Morris believed that letting a large number of units on a short term basis would be inimical to the first defendant's proposed marketing strategy. As he said:

> '… the operation of a short term accommodation business from the Aurora Tower, particularly of the kind which appears from the Oaks prospectus would be conducted by Oaks, would be completely inconsistent with the way the development had been promoted, advertised and marketed and inconsistent with the type of development that buyers were told it would be.'

[25] Both Mr Potts and Mr Morris were disposed to deny that Oaks' involvement in the letting of units in Aurora was a particular concern. They maintained that it was the prospect of frequent numerous changes of tenants in the building which would reduce its appeal to buyers, regardless of the identity of the letting agent. If it matters I express my satisfaction that Messrs Potts and Morris were particularly alarmed at the thought that Oaks would be the letting agent. Indications of this fear appear in the correspondence, and I thought their denials unconvincing.

[26] I think nothing turns upon the point but because it was much canvassed and has a bearing on the content of the correspondence I must soon rehearse, I will set out some parts of a prospectus issued by Oaks on 15 November 2005 which explains their approach to business.

[27] The chairman's letter introducing the prospectus described Oaks as being:

> 'Positioned in the market as a low cost operator offering value for money, four to five star spacious apartments with limited ancillary frills to guests at attractive returns to the external individual owners of apartments.'

It included the Aurora complex as one of its properties and which it describes as 'Aurora Apartment Hotel (opening mid 2006)'. The prospectus said that:

> 'Oaks operates within the rapidly growing (management and letting rights) industry that is a significant part of the service department sector of the hospitality industry. … The business and property portfolio has consistently grown to now operated 21 high quality four to five star rated strata title apartment hotels and resorts which service the short to medium stay requirements of both the corporate and leisure markets. These properties along with an additional six properties to be added … before June 2007 are summarised in the following table.'

Aurora was one of those six properties. A table suggested that Oaks anticipated becoming entitled to let 200 lots in Aurora. The prospectus claimed that Oaks had a 'growth opportunity' in the area of 'converting permanent rental properties under management to short term apartment accommodation.'

[28] In relation to 'new properties opening during … 2007', which included the Aurora complex, the prospectus said:

> 'These properties are estimated to generate $8.4 million … in FY07 based on:

> (1) Addition of another 534 rooms to Oaks lending pool of services apartments …
> (2) The addition of 100 permanent rental apartments.'

[29] From these statements and some tables appearing in the prospectus the defendants submitted that it was Oaks' intention, once the plaintiff became its subsidiary, to let a very large number of units in the tower as serviced apartments or on a short term basis.

[30] One other provision in the prospectus should be noted. Under the heading 'Zoning Risk' it said:

> 'In respect of four properties … a number of apartments zoned for permanent residential use are being used for short stay serviced apartment accommodation. Accordingly Oaks is applying … to change the zoned use … . There is a risk that these apartments will not be rezoned. If that occurs and the apartments must be used for permanent residential accommodation, this could adversely affect the forecast revenue …'.

[31] The Brisbane City Council issued its Development Approval Package for the Aurora complex on 8 July 2002. Relevantly the complex was approved for 'centre activities (multi unit dwelling, restaurant, office, shop) and works to a Heritage place.' "Centre activities" are defined to include both the operation of a hotel and short term accommodation, but the permitted activities for Aurora are limited by the restriction imposed by the Package to those identified in the parenthesis, i.e. Multi unit dwelling. It was defined as:

> '… a use of premises as the principal place of longer term residence by several discreet households, domestic groups or individuals …'.

It follows that the Approval did not extend to the operation of a hotel or short term accommodation use.

[32] On 18 July 2005 the first defendant's solicitors wrote to the plaintiff's solicitors to ask whether it had 'on-sold the management rights for the Aurora Tower.' The plaintiff's solicitors replied on 3 August 2005:

> 'Our client has not on-sold the management rights. Our client has entered into an arrangement which, if it proceeds … will involve the sale of the shares in (the plaintiff) subject to completion of the various agreements between our client and your client. The arrangement with the proposed purchaser of the shares does not affect the agreements between our client and your client.'

[33] On 25 October the solicitors for the plaintiff and first defendant met to discuss 'two major issues'. One of them concerned the acquisition of the plaintiff by Oaks. The plaintiff's solicitors' file note records the discussion:

> 'Having sold the units to owners on the basis of it being a high quality residential complex … owners would have some claim against the developer and possibly some way of getting out of the

> contracts if it became branded as an Oaks hotel/resort. It was acknowledged that the sale of contract contemplated that … owners could let out units for short term lettings but it was never promoted as a short term letting complex, hotel or resort.'
>
> The (first defendant's solicitors) agreed that even despite reference in the letting agreement to the definition of 'letting business' to the 'letting of lots for residential tenancies', that did not preclude short term letting.
>
> If short term lettings are … to be offered there will be a need … a product disclosure statement under the (managed investments) provisions of the *Corporations Act*. …
>
> If the complex is not to be branded with the Oaks name, then that ceases to be an issue. If it is to be Oaks branded, they want some type of assurance that their contract will not be affected and some worthwhile indemnity if the contracts are affected.'

[34] On 11 November 2005 the first defendant's solicitors wrote to the plaintiff's solicitors:

> 'We refer to (the) meeting … on 25 October 2005.
>
> In the course of that meeting you suggested that:
>
> - In undertaking letting services … your client (albeit with different shareholders …) … may market, brand and operate the complex in the manner of a hotel operation; and
> - Your client proposed to market and promote its operation as "Oaks Aurora Tower" or some derivative of that name.
>
> We confirm our client's concerns … The complex was never promoted to any of the buyers as anything other than an upmarket apartment residential building.
>
> Buyers are paying significant amounts to buy units in the complex and … the value of their units will be diminished if a hotel operation is operated in the complex. That possibility will place some of the sales contracts to which our client is a party at risk.
>
> Our client will … need to be persuaded that such an operation amounts to the lawful exercise of your client's rights under the … letting agreement … We have examined this question and consider that your client will have significant difficulty in establishing that it is entitled to conduct such an operation.
>
> In our strong view a hotel style operation is not a "letting business" within the meaning of the proposed letting agreement and so your client will not be able to conduct the hotel style operation. If it did so it would be acting in breach of the letting agreement.

> As matters stand, in the absence of some more compelling argument by your client, our client is not prepared to allow your client to conduct an operation on the lines it proposes from the complex.
>
> It is certainly an implied term of the management rights acquisition agreements and the proposed … letting agreements that your client will do nothing which derogates from our client's interest in the complex and more critically, its rights under the terms of the sale contracts.
>
> Our client looks to your client to immediately provide appropriate assurances in relation to these issues. In that respect we are preparing a form of undertaking which your client will need to have executed.
>
> If your client will not execute the undertaking then our client will infer that your client intends to proceed along the lines our client fears and our client will consider further its options.
>
> Please let us have your views …'.

[35] The plaintiff's solicitors replied on 16 November:

> 'Whilst it may not have been the writer who made the "suggestions" referred to in … your email, they were certainly matters that were discussed … You will recall that we also discussed that the sale contracts contemplated that an owner might let a lot for short term purposes …
>
> Any form of undertaking will need to be acceptable to our client and its new shareholders. We think it best if you provide us with a draft … for our review … as a matter of some urgency.'

[36] On 23 December 2005 the first defendant's solicitors wrote again. They reiterated their contention that 'the conduct of an hotel operation or serviced apartment operation from the tower would constitute a breach of clause 3.1 of the proposed letting agreement' and referred to the terms of the Development Approval. They repeated their 'strong view' that the use of the complex for such a use would not be lawful. The letter attached a deed 'as a means of clarifying the rights and obligations of the parties.' It was also their 'strong view' that the draft deed did 'not go beyond that which is necessary', and that, the first defendant was not 'inclined to enter into a negotiation process'. The plaintiff was expected to indicate a willingness to execute the deed by 6 January 2006, failing which the first defendant would 'take such steps as it may be advised to enforce and/or preserve its rights.'

[37] The proposed deed redefined 'letting business' to be a "residential tenancy operation" which in terms was defined to mean 'the facilitation of arrangements between the owners of lots and occupiers of lots which is not a serviced apartment operation and the lots are to be let to persons for use as a place of long term residence.' 'Serviced apartment operation' was then defined to be 'the business of

facilitation of arrangements between ... owners and occupiers … under which lot owners make their lots available … for use as part of a serviced apartment, hotel, motel or resort complex …'. It also contained a covenant that the plaintiff would not conduct a serviced apartment operation from the Aurora complex; that it would conduct only a residential tenancy operation; and that a breach of the covenant would occasion the first defendant 'significant loss'. It also contained a provision that the plaintiff should indemnify the first defendant in respect of all costs it incurred 'on a full indemnity basis associated directly or indirectly with the enforcement or attempted enforcement … of its rights under this deed.'

[38] Christmas and New Year intervened. The plaintiff did not share the first defendant's anxiety and did not respond quickly to what some might regard as obnoxiously worded correspondence. On 27 January 2006 the first defendant's solicitors wrote again to insist that the draft deed be executed and returned by 31 January 2006. They said that if the plaintiff did not reply by that date the first defendant would commence proceedings for a declaration that the proposed letting agreement did not extend to the operation of a serviced apartments business, and an injunction restraining the operation of such a business, and indemnity costs.

[39] The plaintiff's solicitors replied on 1 February 2006. They wrote:

> 'Our client does not agree to the proposed deed.
>
> Our client intends to act lawfully and to abide by the management rights and acquisition agreement and letting agreements.
>
> Any suggestion that our client intends to breach any contractual obligation to your client is misconceived.
>
> Moreover, although there is no obligation upon it so to do, we are instructed to relay our client's acceptance that the existing development approval in respect of the relevant property does not allow it (or anyone else) to engage in the provision of short term accommodation within the meaning of City Plan 2000.'

[40] The first defendant's correspondence became even more bellicose on 7 February 2006. Its solicitor wrote:

> 'The management rights acquisition agreement clearly imposes an obligation on your client to enter into, comply with and perform its obligations under the proposed letting agreements.
>
> Your client has clearly foreshadowed an intention to operate a short term accommodation business from the tower and you are aware of our client's position in relation to that. …
>
> Other than a general assurance that your client would not breach the proposed letting agreements, your client has declined to provide our client with the comfort it seeks.
>
> Our client is unable to allow those risks to crystallise. We invite you now to put forward some measure that would provide our client with

> the assurance it seeks. Your failure to do so, coupled with your client's refusal to sign the document that we sent to you, would lead to an unavoidable inference that your client does indeed intend to operate a short term accommodation business from the tower.
>
> Unless we hear from you by 4.00 pm tomorrow, 8 February 2006, our client will assume that your client does not intend to respond. In those circumstances, our client would treat your client's refusal to sign the document … or put forward some other measure that would provide our client with the assurance it seeks, as a clear indication that you client does indeed intend to operate a short term accommodation business from the tower. Our client would regard that as a repudiation by your client of its obligations under the management rights acquisition agreement and would accept that repudiation and terminate the … agreement forthwith.'

[41] The plaintiff's solicitors replied in a commendably measured tone. They responded:

> 'Our client has entered into a written agreement with your client which your client now seeks to vary. Our client is not minded to do that.
>
> It is manifestly erroneous for you to assert … that our client has "clearly foreshadowed an intention to operate a short (term) accommodation business from the tower …". The terms of our letter of 1 February 2006 are plain and specifically refute that.
>
> Notwithstanding the explicit terms of our last response you do not identify … any "obligations under the proposed letting agreements" which our clients are not going to abide. In good faith our client instructed us to send you the last response to give the *quietus* to your client's concerns. Your client has no grounds whatsoever … to continue to assert that our client presently intends to operate a short term accommodation business from the property. Your contention is baseless and ought not to have been made in light of our last response.
>
> Any failure by your client promptly and fully to perform its obligations under the existing agreements including the execution of further agreements … will be met with application by our client for injunctive relief or orders or specific performance …'.

[42] The first defendant was not satisfied. Its solicitors wrote on 8 February 2006:

> 'You … assert that your letter of 1 February 2006 plainly and specifically refuted our assertion that your client has foreshadowed an intention to operate a short term accommodation business from the tower. With respect, your letter … does nothing of the sort.
>
> That your client has such an intention is clear from the Oaks prospectus to which we have referred … . In correspondence … we have invited you to provide an assurance that your client does not

> have any such intention and your client has carefully avoided that. Your letter of 1 February … reinforced our client's suspicion because of what it did not say. Frankly, the concession that the "existing development approval" for the tower does not allow your client to engage in the provision of short term accommodation is no concession at all, for … the proposition could hardly sensibly be denied … .
>
> If, as you say, "our client has no grounds whatsoever … to continue to assert that our client presently intends to operate a short term accommodation business from the property" and that any such contention is "baseless", we invite you now (as we have over past weeks), to have your client execute the document which we sent to you. That document does nothing more than clarify the definition in the proposed letting agreements … to put the issue beyond doubt.
>
> … if your client is prepared to do that, our client will proceed. Otherwise … our client will move to terminate the agreement on the basis of an anticipatory breach by your client of its obligations … .
>
> We await your response.'

[43] The first defendant did not wait long. At 9.00 am the next day, 9 February, the first defendant's solicitors wrote:

> 'Please be advised that our client regards your client's refusal to confirm that it does not intend to operate a short term accommodation business from the tower as an anticipatory breach of its obligation under the management rights acquisition agreement to perform its obligations under the terms of the letting agreements.
>
> The breach is fundamental … . … Our client terminates the … agreement forthwith.'

[44] On the same day the plaintiff's solicitors replied on its behalf to deny that there had been any repudiation of the MRA agreement and to contend that the first defendant's purported termination of the agreement was in itself a repudiation of the agreement. Their letter went on to indicate that the plaintiff did not accept the repudiation and required the first defendant to perform the MRA agreement. As I have mentioned, proceedings commenced immediately.

[45] The first question to be determined is whether the plaintiff had, as the first defendant insisted, repudiated the MRA agreement; whether it had evinced an intention not to be bound by the agreement. Repudiation does not depend upon the subjective intention of a party to a contract but upon an objective assessment of the party's conduct, what it said and did. The question is whether that conduct would reasonably be calculated to persuade a reasonable person who observed it to infer that the party had repudiated its contractual obligations. See *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 647-8 per Brennan J and 657-8 per Deane and Dawson JJ.

[46] In this case two subsidiary questions are bound up with the ultimate question, did the plaintiff repudiate the MRA agreement? The subsidiary questions are:

(i) whether the letting agreement prohibited the plaintiff, as letting agent, from letting residential lots for short terms; and

(ii) whether, if it did, a breach of the letting agreement would amount to a (fundamental) breach of the MRA agreement.

Unless the first defendant obtains an affirmative answer to both these questions it will fail in its endeavour to establish that the plaintiff's solicitors' correspondence evinced its intention not to be bound by the MRA agreement.

[47] This should be expanded. The first defendant's point is that it could lawfully rescind the MRA agreement because the plaintiff intimated that as letting agent under the Letting Agreement it would provide residential apartments for short term accommodation. That conduct could only justify termination if it was a breach of contract, and of the contract which the first defendant sought to rescind.

[48] The first defendant was not to be a party to the letting agreements. That contract was to be made between the bodies corporate of the Aurora complex and the plaintiff. The first defendant seeks to overcome this problem by finding in the MRA agreement between plaintiff and first defendant an implied term that the plaintiff should do all things necessary to enable the first defendant to have the benefit of the MRA agreement. The benefit the first defendant identified was the sale, at high prices, of the residential lots in the Aurora complex. This benefit would be lost or diminished should the plaintiff not perform the letting agreement according to its terms. The breach complained of is letting apartments for short terms.

[49] Should these two preliminary questions be answered favourably to the first defendant it will be necessary to consider whether the plaintiff's solicitors' correspondence evinced its intention to break the letting agreement and therefore the implied term in the MRA agreement. The first defendant will fail if it does not obtain an affirmative answer to both questions.

Did the letting agreement preclude short term lettings?

[50] Put this way the question is easily answered. Before it can be put that way it is necessary to ignore a number of statements, demands and threats in the first defendant's solicitors' correspondence. In the end they sought from the plaintiff only an assurance that it would not, as letting agent, conduct a short term accommodation business.

[51] In its letter of 7 February 2006 the only focus of complaint was the plaintiff's alleged intention 'to operate a short term accommodation business' and the first defendant's belief that the plaintiff would 'ultimately seek to establish and operate a short term accommodation business'. It requested an assurance that the plaintiff would not operate a 'short term accommodation business'.

[52] Earlier correspondence had reiterated fears that the plaintiff might conduct a hotel in the tower or else let out lots as serviced apartments. The first defendant must have overcome these fears, or at least put them aside, by 7 February 2006 when it sought

only an assurance that the plaintiff would not conduct a short term accommodation business. It was the plaintiff's failure to provide what it regarded as a satisfactory assurance on that point that led to its purported termination.

[53] It should perhaps be noted briefly that the possibility of the plaintiff operating a hotel from Aurora Tower was so slight as to be disregarded by any sensible person. The building is not suitable for use as a hotel. It does not have sufficient lifts, storage space, staff quarters or vehicular access to function as a hotel. This was accepted by all parties. The first defendant cannot sensibly have thought that the plaintiff, or Oaks, would conduct a hotel from the tower.

[54] It is possible to let a substantial number of the units as serviced apartments but to do so would require some physical alteration to the building. There would need to be a large storage room for bed linen and towels and probably facilities for the cleaning staff. These alterations could only occur with the approval of the body corporate. The consequence is that the letting agent could only let a large number of apartments as serviced ones with the approval of the body corporate which would have to effect the alterations on its common property. The first defendant could hardly complain about lots let as serviced apartments if the parties to the letting agreement agreed on that course and, if necessary, varied the letting agreement to effect it.

[55] The only question then is whether the letting agreement precluded the provision of short term accommodation. Relevantly the letting business which the plaintiff could conduct pursuant to the letting agreement was, by cl 1(1)(i) 'the letting of lots for residential tenancies'. To succeed the first defendant must add words to qualify the contractual definition so as to limit letting to "long term residential tenancies." The agreement itself provides no warrant for that qualification.

[56] I set out my understanding of the appropriate principles to apply when construing a commercial document in *Norco Co-operative Ltd v Parmalat Australia Ltd & Ors* [2006] QSC 38 at 11:

> '(1) The court must first look at the words of the document which constitutes the contract between the parties. The whole of the document must be considered and a construction should be attempted which will make all clauses operate harmoniously. If the words are plain and unambiguous the court must give effect to them even though the result may appear one sided or even unreasonable. See *Australasian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109.
>
> (2) If the language of the contract is ambiguous, or open to two constructions, or if the plain meaning of the clause renders it inconsistent with another, the court shall resolve the ambiguity, or reconcile the inconsistency, by adopting a construction which accords with "business common sense" or the commercial purpose of the agreement which appears form its terms and the knowledge, common to the parties, which form the background to the formation of their agreement. See *Australasian Broadcasting Commission; Hide & Skin*

Trading Pty Ltd v Oceanic Meat Traders Ltd (1990) 20 NSWLR 310 at 313-4 per Kirby P.

(3) If the words of the contract, while plain and unambiguous, lead to a result which is not only unreasonable but absurd, the court should construe the contract, if necessary by supplying, omitting, or correcting words to avoid the absurdity: *Watson v Phipps* (1985) 60 ALJR 1 at 3; *Westpac Banking Corporation v Tanzone Pty Ltd* (2000) NSWCA 25 paras 19 and 20. Before this was put into operation it must, I think, be unmistakeably clear that the parties cannot have meant what they said was their bargain.'

[57] The letting agreement is 'plain and unambiguous'. To be let a lot for 'residential tenancies' means that the lots must be let only for residential purposes: the accommodation of human beings. They are not to be let for commercial or industrial purposes. The letting must be in a manner which can be recognised as a 'tenancy'. There may be scope for disagreement about what in a particular case constitutes a tenancy. It may, for example, exclude the occupation of a lot or room for a period of less than a day in the manner of a hotel guest. As long as the lot is let as a residence and on a basis that it is recognisable as a tenancy the letting will be within the definition found in the letting agreement. The text of the agreement itself does not require the tenancy to be a short one. The words are, as I say, plain and unambiguous. Both short and long tenancies of a residential lot are residential tenancies. To give the definition that meaning does not make the contract absurd, or unreasonable, or one sided. The court should not import words into an agreement which the parties have omitted if the agreement be capable of functioning perfectly well without them.

[58] The first defendant relies upon surrounding circumstances known to the parties and the purpose and object of the transaction to overcome the difficulty which regarding only the words of the agreement would pose for it.

[59] The first circumstance is the evidence provided by the design and structure of the tower. The submission is that 'the building was not designed for the conduct of a business of a short term accommodation or serviced apartment operation.' The evidence, as I understood it, was that the building could not be used as a hotel and could be used to operate a serviced apartment business only if modification was made to it. This evidence is irrelevant to the question whether the lots may be let on short term tenancies. The evidence did not touch that point. It is obvious that such tenancies do not necessarily require the provision of hotel services or even regular changing of linen and cleaning which would be incidental to a serviced apartment. Lots may be let on short terms without the provision of services.

[60] The first circumstance does not help the first defendant. The second circumstance is the term of the Development Approval which, it will be recalled, allowed only 'longer term residence by several discreet households.' The submission is that 'the agreement provides for the provision of letting services of a type which were lawfully permitted by the relevant town planning constraints.'

[61] The plaintiff points out that there is a distinction between what it was entitled to do pursuant to the letting agreement and what may or may not have been lawful at any

particular time pursuant to local authority development approval or zoning. The two concepts are entirely separate. They are designed to achieve wholly different ends. Moreover, development approvals can change over time in response to altered circumstances. The plaintiff's submission continued that a development approval given at any one time does not govern the construction of the letting agreement. In particular it is pointed out that the wide description of 'letting business' in contra-distinction to the limited residential use permitted by the Development Approval points to the conclusion that the two do not conform and were not meant to. This does not mean there is a conflict between the two documents. It is a term of the letting agreement that the plaintiff act lawfully. To do so it could let lots only for longer term residence. But that constraint does not influence the meaning of 'residential tenancies'. It only means that the plaintiff could not lawfully let out lots for a short term. I accept the submission.

[62] One does not need to resort to extrinsic circumstances to construe the letting agreement. There is, however, one such circumstance that is of assistance in showing that residential tenancies encompass both short and long term lettings. Clause 24.1.2 of the standard contract for the sale of the apartments gave all purchasers, in their unfettered discretion, the right to let their lot 'on either short or long term rental basis'. The clause also gave owners the right to appoint the letting agent who had made the letting agreement with the body corporate, or any other person to let its lot. The terms of clause 24.1.2 was a circumstance known to the parties when they negotiated and made the MRA agreement. It is a strong indication that lots could be let for short term and that the letting agent could effect such a tenancy.

[63] I conclude that the letting agreement should not be construed as the first defendant contends. Adding words to limit the duration of tenancies is not necessary to give it business efficacy, or to remove any ambiguity or uncertainty, or to remove absurdity or to make it consonant with extrinsic circumstances. The parties did not include that limitation in the document they executed to record their agreement. There is no basis on which the court should restrict the agreement the parties made.

[64] It follows that by demanding that the plaintiff bind itself to perform the letting agreement in that restricted way the first defendant was insisting upon a performance the contract did not give it. The plaintiff could ignore the demands without danger to the continued existence of the contract.

Did the MRA agreement contain an implied term that the plaintiff would perform the letting agreement according to its terms?

[65] It is not necessary to answer this question because the construction of the MRA agreement which I favour means that the first defendant had no contractual right to insist upon receiving the assurances it sought and any failure by the plaintiff to provide it was not a repudiation. Nevertheless I will deal with the question briefly.

[66] It is not easy to articulate the content of the implied term. Mr Couper QC described it as requiring the plaintiff to perform the letting agreement according to its terms so as to give the first defendant the benefit of the contract. The reason it should be implied is said to be that the first defendant had, by issuing a disclosure statement with the standard form of contract for the purchase of the units, informed those who bought units that there would be a letting agent who would conduct the letting

business as defined in the agreement so that the first defendant 'had a real interest in the performance of the letting agreement'. The conclusion is said to be reinforced by the terms of s 112 of the *Body Corporate Act* which provides that an original owner must exercise reasonable skill, care and diligence, and act in the best interests of the body corporate, when appointing a letting agent to ensure that the terms of the engagement achieve a fair and reasonable balance between the interests of the agent and those of the body corporate.

[67] I do not know that s 116 has much to say of relevance. It requires the exercise of care in making an agreement, the terms of which fairly balance the rights of the body corporate with those of the letting agent. It says nothing about the exercise of care in the selection of an agent in an endeavour to ensure that the agent will comply with the terms and it imposes no obligation on the original owner to ensure that one or both parties to a letting agreement perform their obligations.

[68] Were it not for clause 9 of the MRA agreement one could accept that it contained an implied term that the plaintiff would do all such things as were necessary on its part to enable the first defendant to have the benefit of the contract. Authority for the implication of such a term is readily found: *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607 approving *Butt v M'Donald* (1896) 7 QLJ 68 at 70-71.

[69] It is difficult, at least in this case, to identify the benefit of the contract which the first defendant would lose if the plaintiff should not perform the letting agreement according to its terms. Mr Couper's submission was that 'the first defendant was interested not only in … payment under the MRA agreement but the performance by the [plaintiff] of its obligations under the letting agreement. The uncontradicted evidence of Mr Morris and Mr Potts is that the first defendant was exposed to substantial financial risk if the first defendant did not perform its obligations … but conducted a short term accommodation business.'

[70] Mr Morris made it clear what the first defendant's commercial interests were. He said:

> '… our view was and remains that the owners who bought … some … were investors, some … were long term residents (who) would have had a belief … that it was going to be a long term … residential building and that if a short term business took up operation there … a lot of these people would be concerned. Our concern then became that they wouldn't settle. We still had units to sell in the building. Some of those were expensive penthouse units and we were concerned …'. (T123.25-35)

He also said:

> 'We did have a concern that buyers of the units might wish to get out of their contracts.
>
> …
>
> … your own concern then was that if anyone conducted a hotel operation in the building that might upset purchasers? – That's correct.' (T103.32; .50-.55)

He explained explicitly:

> 'Our concern was … that in contacting the owners [the plaintiff] would represent to the owners short term letting arrangements and we had contracts with the owners and it had always been represented long term letting and given that the building was almost completed and … we had peak debt on the project at the time … we didn't want to put any of the pre-sales at risk.' (T107.49-.55)

[71] This may be true but to equate financial or commercial benefit with contractual rights is not always justified. If the contract by its terms conferred that financial benefit then it is no doubt right to say that the parties to a contract should perform it so as to confer the benefit it contemplated. One first must analyse the contract to see what performance it requires of the parties. The point was made by McMurdo J (with whom Jerrard JA agreed) in *Jackson Nominees Pty Ltd v Hanson Building Products Pty Ltd* [2006] QCA 126. His Honour noted the distinction between an obligation, implied in every contract, to give the other contracting party the benefit bargained for, and performing acts which would enhance the commercial value of the contract for the other party. According to McMurdo J:

> '… the duty to do … to enable the other party to have the benefit of the contract is limited to acts which are necessary to the performance of obligations under the contract. To assess the scope of the duty in a particular case, it is first necessary to define the relevant obligations, and in particular, to define the circumstances in which the parties have agreed that a certain obligation must be performed. It is not a duty upon one party to act so as to enhance the commercial value to the other party of the contract.'

[72] It appears to be the first defendant's submission that the plaintiff should perform the letting agreement so as to enhance the first defendant's commercial benefit from the sale of lots, and a term should be implied to that effect. This is to distort the legal principle apposite to implied terms.

[73] The party with an interest in ensuring performance of the letting agreement by the letting agent is the body corporate. It seems anomalous to imply a term into the MRA agreement allowing the first defendant to insist upon performance of the letting agreement in a particular way when the body corporate may be content with performance in another way, or agree with the letting agent that the other way is what the agreement between them requires. The implied term would confer a right to interfere in a contract between others.

[74] A further difficulty with implying the term is found in cl 9.1 of the MRA agreement. It provided that the written agreement itself constituted 'the full and complete understanding between the parties' with respect to the agreement and that there was no other agreement or warranty, express or implied, relating to the provisions of the agreement or binding the parties with respect to any matter to which the agreement related.

[75] Such a clause is effectual to exclude the introduction of a term which might otherwise be implied: *Hope v RCA Photophone of Australia Pty Ltd* (1937) 59 CLR 348 at 357-8 per Latham CJ and 363 per Dixon J with whom Rich J agreed. The

first defendant relied on *Hart v MacDonald* (1910) 10 CLR 417 at 421 for the contrary proposition, that such a clause does not prevent the implication of terms. But in *Hart* the implication arose from the express words found in the contract. The implied term for which the first defendant contends is not of that type. Indeed *Hart* is probably not a case of an implied term but a case in which the proper construction of the contract required its words to be given a meaning beyond their literal one.

[76] For these reasons I conclude that it was not an implied term of the MRA agreement that the plaintiff promised the first defendant it would perform the letting agreement according to its terms. An anticipatory breach of the letting agreement by the plaintiff would not have constituted a breach of any term of the MRA agreement. The first defendant had no basis for rescinding the MRA agreement by reason of any apprehension that the plaintiff had repudiated the letting agreement.

Did the plaintiff repudiate the MRA agreement?

[77] It is now doubly unnecessary to answer this question but I will discuss the point briefly out of respect for the careful and comprehensive submissions of the parties and against the chance that my opinions so far expressed might not ultimately prevail.

[78] The first defendant's submission is that the plaintiff's solicitors' correspondence intimated an obdurate insistence upon performing the MRA agreement in a manner which would constitute a breach of that agreement properly construed. Put in less abstract terms the first defendant's contention is that the plaintiff intimated it would let residential lots on short terms when the letting agreement gave it no such right.

[79] The first defendant calls in aid the principle described by Stephen, Mason and Jacobs JJ in *D.T.R. Nominees Pty Ltd v Mona Homes Pty Ltd* (1977-78) 138 CLR 423 at 432:

> '… there are cases in which a party, by insisting on an incorrect interpretation of a contract, evinces an intention that he will not perform the contract according to its terms.'

In such a case the party repudiates the contract. The principle has to be applied with caution. Their Honours went on:

> 'But there are other cases in which a party, though asserting a wrong view of a contract because he believes it to be correct, is willing to perform the contract according to its tenor. He may be willing to recognise his heresy once the true doctrine is enunciated or he may be willing to accept an authoritative exposition of the correct interpretation. In either event an intention to repudiate the contract could not be attributed to him. As Pearson LJ observed in *Sweet & Maxwell Ltd v Universal News Services Ltd*:
>
> > "In the last resort, if the parties cannot agree, the true construction will have to be determined by the court. A party should not too readily be found to have refused to perform the agreement by contentious observations in the course of discussions or arguments …" '.

[80] The principle was expressed this way by Lord Parmoor in *Morris v Baron & Co* [1918] AC 1 at 41:

> 'The question arises whether the persistent maintenance of an untenable construction of a contract on a matter of essential substance should be regarded as not consistent with the continuing intention to observe the contractual obligations. I think that the answer should be in the affirmative.'

The passage was approved by Isaacs J is *Summers v Commonwealth* (1918) 25 CLR 144 at 152. Note the words 'untenable construction' and on a matter of 'essential substance'.

[81] In *Woodar Investment Development Ltd v Wimpy Construction UK Ltd* [1980] 1 WLR 277 Lord Wilberforce said (283):

> '… the proposition that a party who takes action relying simply on the terms of the contract and not manifesting by his conduct an ulterior intention to abandon it, is not to be treated as repudiating it is supported … by *James Schaffer Ltd v Findlay Durham & Brodie* … and *Sweet and Maxwell Ltd v Universal News Services Ltd*. In contrast to these is the case … of *Federal Commerce and Navigation Co Ltd v Molena Alfa Inc* … which fell on the other side of the line. Of that case I said …
>
> > "The two cases … (*Schaffer* … and *Sweet and Maxwell* …) … would only be relevant here if the owner's action had been confined to asserting their own view – possibly erroneous – as to the effect of the contract. They went, in fact, far beyond this when they threatened a breach of the contract with serious consequences."
>
> … It would be a regrettable development of the law of contract to hold that a party who bona fide relies upon an express stipulation in a contract in order to rescind or terminate a contract should, by that fact alone, be treated as having repudiated his contractual obligations if he turns out to be mistaken as to his rights. Repudiation is a drastic conclusion which would only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations.'

[82] These authorities establish that the assertion by a party to a contract of a mistaken view as to what it obliged him to do will not by itself amount to a repudiation of the contract. At the most this is what the first defendant complains that the plaintiff did. Putting to one side the conclusions I have reached that the plaintiff was correct in its view of the contract, and that the subject matter of the disagreement between the parties did not concern any term of the agreement between them, the plaintiff's correspondence did not contain an unequivocal refusal to perform (what the first defendant asserts was) the contract between them. There is nothing repudiatory in the language employed by the plaintiff's solicitor.

[83] The first defendant first demanded an assurance that the plaintiff would not conduct a hotel from the tower. It is accepted on all sides that the building could never be put to that use and no-one ever thought it could. The defendant insisted that the plaintiff execute a Deed of Variation limiting the scope of business that the plaintiff could conduct pursuant to the letting agreement. It had no right to insist that the plaintiff agree to the variation and it knew that its insistence lacked any legal justification. The terms which it sought unilaterally to impose into the varied agreement were obnoxious. Nevertheless it threatened to terminate the MRA agreement which conferred substantial benefits upon the plaintiff if it did not sign the Deed.

[84] The first defendant then insisted in the most strident and peremptory tones that the plaintiff not let lots on short terms, and threatened to bring proceedings for a determination whether the letting agreement would allow the plaintiff to let on short terms. That sensible course was abandoned and the first defendant turned again to hectoring. With admirable restraint the plaintiff's solicitors replied on its behalf to give an assurance that it would not let apartments for short terms. They pointed out the plaintiff could not lawfully do so by reason of the Development Approval. They expressed the plaintiff's intention to comply with the letting agreement. The first defendant continued to insist upon receiving an assurance it already had as to short term letting. Without waiting for the response it said it wanted the first defendant rescinded the contract.

[85] The plaintiff's correspondence was explicit. On 1 February its solicitors wrote that the plaintiff intended to act lawfully and to abide by the MRA agreement and letting agreement. It disavowed any suggestion that it intended to breach the contract in any respect. It accepted that it could not engage in the provision of short term accommodation.

[86] Even if there were some uncertainty about the term of the agreement with which the plaintiff intimated it would abide; or uncertainty about how the plaintiff construed those terms there was nothing in the correspondence which remotely approached a clear refusal of an obligation at the root of the contract. There is no indication of a persistent maintenance of an untenable construction on a matter essential to the contract. On its face the letter indicated an acceptance of the plaintiff's obligation to abide by the contract, whatever it meant. It must be remembered that the first defendant had indicated it would approach the court for a construction of the contract which would resolve any dispute on that point. The plaintiff's commitment to the contract should, I think, properly be seen as a commitment to the contract as construed by the court. Even if that part of the letter was ambiguous and the plaintiff was asserting a right to let on short terms, such a view of the contract was not untenable. The first defendant's solicitor had acknowledged that the letting agreement did not appear to "preclude" such letting. The letter contained no hint that if its view of the agreement was wrong it would not perform the contract in accordance with its true meaning.

[87] It follows that the first defendant was not justified in rescinding the MRA agreement on 9 February 2006. Its purported rescission was itself a repudiation of the agreement in which it persisted. The plaintiff is entitled to a declaration to that effect.

Plaintiff's claim against second defendant

[88] The second defendant was incorporated on 21 February 2006 when the plaintiff was insisting that the MRA agreement was in force and that the first defendant should perform it and cause the bodies corporate to enter into the letting agreements with it. In May 2006, when the plaintiff was maintaining its stance, the first defendant, which then controlled the bodies corporate, caused them to enter into letting agreements in identical terms with the second defendant. As I mentioned the shareholders and directors of both defendants are identical.

[89] The plaintiff claims a mandatory injunction requiring the second defendant to do all things necessary to grant the plaintiff the rights conferred by the letting agreements. Alternatively it seeks damages for the tort of inducing or facilitating the first defendant's breaches of the MRA agreement with the plaintiff.

[90] As conventionally expressed the tort requires the proof of three elements:

(i) that the defendant intended to induce the party who had contracted with the plaintiff to break that contract;

(ii) the defendant did induce that party to break the contract it had with the plaintiff i.e. the defendant's conduct in fact caused the party to break the contract;

(iii) the plaintiff suffered loss as a consequence.

See *Multinail Australia Pty Ltd v Pryda (Aust) Pty Ltd* (2002) QSC 105 paras 23-24.

[91] The second defendant pounces on this analysis. It points out that if the first defendant breached its contract with the plaintiff (as I have found it did) by its letter of purported rescission of 9 February 2006 the breach occurred before the second defendant existed. Prior to incorporation it could not possibly have done anything to induce or persuade or procure the first defendant to commit the breach.

[92] This is true, but the scope of the tort extends beyond the occurrence of the initial breach of contract. It reaches cases of inducing continuing breaches and further, subsequent, breaches.

[93] The plaintiff did not accept the first defendant's repudiation of the MRA agreement. It maintains it is on foot and seeks to enforce it. It follows from my findings that the first defendant's repudiation was ineffective without the plaintiff's acceptance of it, and the plaintiff had not accepted it. The consequence is that the MRA agreement remained in force in May 2006 when the first defendant instigated the bodies corporate to enter the letting agreement with the second defendant, and the second defendant bound itself to that agreement.

[94] The first defendant's failure to recognise the existence of the MRA agreement and its refusal to perform it as the plaintiff demanded meant that it committed continuing breaches of contract for as long as it refused performance. It committed a further breach of the agreement when it caused the bodies corporate to make the letting agreement with the second defendant.

[95] The second defendant's acts in binding itself to that agreement interfered with performance of the MRA agreement by the first defendant in favour of the plaintiff. The first defendant thereby put it out of its power to give the benefit of the letting agreement to the plaintiff. There are substantial, if not insuperable, difficulties in the way of the plaintiff in obtaining specific performance of the first defendant's obligations under the MRA agreement. The bodies corporate are no longer controlled by the first defendant and their consent is necessary if the letting agreement is to be assigned to the plaintiff.

[96] The first question to address is whether the second defendant's participation in the first defendant's further breach of its agreements with the plaintiff, after it had repudiated the agreement and refused to perform it, is sufficient to establish the second element of the tort. Its act of participation was binding itself to the letting agreement which had been promised to the plaintiff. The rights conferred by the agreement are, it will be remembered, very valuable.

[97] The authors of Salmond and Heuston on the Law of Torts 21st edition say (p 349):

> 'A deliberate interference with contractual relations is actionable if it prevents or hinders one of the parties to that contract from performing his primary obligations under it, even though he is not thereby in breach of it. To that extent a direct and deliberate interference with a trade or business of another is now a distinct tort.'

[98] Following that general statement the authors set out (351) a number of cases in which 'the necessary ingredients of an actionable interference with contractual rights will exist.' The third case is

> 'When a third party and the contract breaker deal together in a manner which the third party knows to be inconsistent with the contract, eg when A pays for and takes delivery of a new car from B, knowing that it is offered to him in breach of a covenant against the resale of new cars. … it is the interference with existing contractual relations which is the essence of the tort, not the inducement to break them.'

The authority cited for the first sentence is *B.M.T.A. v Salvadori* (1949) Ch 556. It is very close in character to this case. The second defendant took the letting agreement knowing that it was offered in breach of contract by the first defendant to deliver it to the plaintiff.

[99] Balkin and Davis in their work Law of Torts, 2nd edition say (p 604):

> 'Even though the defendant is not responsible for the initial breach of a contract liability will accrue if he or she is responsible for continuing the breach of a still subsisting contract.'

They suggest (footnote 25):

> 'There must be a continuing obligation at the time of the defendant's inducement or procurement. Thus, if A has agreed to sell a house to

> B, but subsequently repudiates that obligation, C would commit the tort if he … bought the house from A prior to B's acceptance of A's repudiation …'

[100] The authority cited was *Smithies v National Association of Operative Plasterers* [1909] 1 KB 310. Mr Couper QC submits that the case does not support the proposition, but I think it does. It involved, as many cases in this area of the law do, a trade or industrial dispute. The defendant was a union which called its members out on strike. Two of them worked for the plaintiff but the defendant did not know that they were employed pursuant to a contract which obliged them to work for a fixed term. During the strike the union learnt of this but continued to give them strike pay 'to keep the men in a fighting humour'. So the defendant union had induced the employees to break their contract of employment but had not done so intentionally because it was ignorant of the existence of the contract. However by encouraging or inducing them to remain on strike in breach of their obligation to work for the plaintiff it was found liable in damages.

[101] Buckley LJ said (p 335):

> 'In so doing the union was procuring Forrester and Eccelsby to commit continuing breaches of the contracts which bound them to serve the plaintiff for the residues of unexpired terms. … there were acts done with actual knowledge in support of the men in continuing a breach of contract and that from such ratification or acts there resulted liability.'

Similar remarks were made by Vaughan Williams LJ at 329 and by Kennedy LJ at 339. The latter said:

> '… when the defendant… subsequently learnt that Forrester and Eccelsby were breaking their contracts … the defendant … by paying strike pay … ratified the action of the Branch ….
>
> … by the same action … the defendant association further, and apart from ratification, made themselves liable because they thereby induced and procured a continuing breach of contract on the part of the men.'

[102] The example given in footnote 25 is indistinguishable in principle from this case. I think *Smithies* case supports the suggestion. It would seem artificial in such a case to limit the reach of the tort to the acts of a defendant in procuring the initial breach but not subsequent breaches when great harm might be done to a plaintiff by procuring a continuation of the breach. I have not come across any sensible reason why the tort should extend to one situation but not the other.

[103] The same view is taken by Clerk and Lindsell on Torts 19th edition. They say (25-26) citing *Smithies* as an authority:

> '… it is immaterial that the breach complained of is not the first breach of the contract provided that the contract is still subsisting and that the breach is knowingly and intentionally procured, or its continuance is similarly encouraged by the defendant …'

[104] Another case of assistance is *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106. The hotel had a contract for the supply of fuel oil. It was a term of the contract that neither party would be liable to pay the other damages if it could not perform any of its obligations contained in the contract by reason of labour disputes. The hotel was picketed by union members and the supplier declined to make deliveries. The hotel sued the general secretary of the union for inducing breach of contract with the oil supplier, and succeeded. Lord Denning MR said (p 137-138):

> '… I am prepared to assume that Esso would not be guilty of a breach of contract (in not supplying oil because of the union picket). But I do not think that would exempt the trade union officials from liability if they unlawfully hindered or prevented Esso from making deliveries. The principle …extends not only to inducing breach of contract, but also to preventing the performance of it.
>
> First, there must be *interference* in the execution of a contract. The interference is not confined to the procurement of a *breach* of contract. It extends to a case where a third person *prevents* or *hinders* one party from performing his contract, even though it be not a breach.'

[105] In *DC Thompson & Co Ltd v Deakin* [1952] Ch 646 Jenkins LJ expressed what is now regarded as the authoritive statement of the elements of the tort of inducing breach of contract. He said (p 697) they were

> '… first, that the person charged with actionable interference knew of the existence of the contract and intended to procure its breach; secondly, that the person so charged did definitely and unequivocally persuade, induce or procure the employees concerned to break their contracts of employment … thirdly, that the employees so persuaded … did in fact break their contracts of employment; and, fourthly, the breach of the contract forming the alleged subject of interference ensued as a necessary consequences of the breaches by the employees … of their contract …'

[106] Speaking of that case in *Merkur Island Shipping Corporation v Loughton* (1983) 2 AC 570 Lord Diplock (with whom the other Law Lords agreed) said (607-8):

> '*Thompson* … was a case in which the only interference with contractual rights … was procuring a *breach* by a third party of a contract between that third party and the plaintiff. … but it is evident … that Jenkins LJ … was not intending to confine the tort of actionable interference with contractual right to the procuring of such non-performance of primary obligations as would necessarily give rise to secondary obligations to make monetary compensation by way of damages. All prevention of due performance of a primary obligation under a contract was intended to be included even though no secondary obligation to make monetary compensation thereupon came into existence, because the second obligation was excluded by some … clause.'

[107] His Lordship thought that 'any doubt about this matter' had been resolved by Lord Denning's judgment in *Torquay Hotel*. He then set out that passage of the judgment which I have just quoted.

[108] In *Woolley v Dunford* (1971) 3 SASR 243 Wells J set out (at 266-268) several propositions of law which his Honour thought emerged from the cases. Proposition 3 was:

> 'The alleged interference may consist either in procuring or causing a *breach* of the contract, or in preventing or hindering the *performing* of the contract, even though the defective performance does not amount to an actual breach of the contract.'

[109] *Torquay Hotel* was cited as the authority. In *Davies v Nyland* (1975) 10 SASR 76 at 98 Bray CJ accepted the propositions as correctly stating the law.

[110] The authors of Clerk and Lindsell on Torts (para 25-16) speak of an 'invasion of … contractual rights'. This expression is I think consistent with the expressions found in the cases I have discussed and is a useful way of describing the nature of the conduct made actionable by the tort.

[111] The ambit of Lord Denning's judgment has been the subject of debate in England. There has been disagreement about whether the interference necessary to establish the tort must amount to a breach of contract. The debate is traced in Clerk and Lindsell (25-31 to 25-34). It is not necessary to discuss it because the plaintiff does not need to go beyond the well established limits of the tort.. According to Clerk and Lindsell at 25-34:

> 'The better view is, therefore, that a person who, by acts lawful in themselves, hinders performance of a contract, deliberately rendering rights under it less valuable, is not liable unless he thereby causes a party to it to fail in the performance of a contractual obligation.'

This means that the defendant's interference with performance must constitute a breach of the contract by the third party. That requirement is met in this case. The second defendant's execution of the letting agreement precluded the first defendant from performing its contract with the plaintiff. It made it impossible for the first defendant to have the letting agreement rights conferred on the plaintiff by the bodies corporate. The second defendant's act in making the agreement with the bodies corporate interfered with the plaintiff's contractual rights against the first defendant and was a participation in the first defendant's breach of the MRA agreement.

[112] The plaintiff must still show that the second defendant induced the interference, or caused the first defendant to continue its breach of contract *viz a viz* the plaintiff and/or caused a further breach of that contract. That is, the second defendant must be proved to have induced or procured the interference with the contractual relationship between plaintiff and first defendant.

[113] I think the only sensible inference to draw from the evidence is that the second defendant was incorporated for the very purpose of taking the letting rights promised to the plaintiff. It did in fact take those rights in circumstances where its directors knew of the promises made to the plaintiff, and of the plaintiff's insistence that the promises be honoured. There was evidence, which seemed acceptable, that

it was necessary both commercially and contractually to appoint a letting agent before the expiration of 12 months during which the first defendant would control the bodies corporate. This constraint did not compel the execution of letting agreements with the second defendant (which, as I say, I infer) was formed for the very purpose of taking them in the face of the plaintiff's process to establish that it was entitled to them. This is an unusual case of inducement but the second defendant's genesis was in Messrs Potts' and Morris' purpose that it should take the benefit of the letting agreement. As directors of the first defendant they acquiesced in the result. The reason for its incorporation is sufficient to show that its very existence was the inducement of the first defendant to cause the bodies corporate to make the letting agreement with the second defendant, thereby interfering with the plaintiff's contractual rights.

[114] The other element of the tort which the plaintiff must prove is that the second defendant's interference was intentional, or deliberate. Jordan CJ in *Independent Oil Industries Ltd v The Shell Co of Australia Ltd* (1937) 37 SR (NSW) 394 said (414-415):

> 'To establish this tort it is not sufficient to prove that a third party has in fact done something which had the effect of inducing a party to a contract to break it. It must be proved that the breach was knowingly and intentionally procured … It is necessary to establish the third party knew of the contract, knew that the doing of a particular act by one of the parties to it would be a breach of it, and with that knowledge procured the party to do the act.'

[115] In *Short v The City Bank of Sydney* (1912) 15 CLR 148 Isaacs J said at 160:

> 'But to constitute that cause of action, the defendant must have induced or procured the doing of what he knew would be a breach of contract. A bona fide belief reasonably entertained that it was not a breach of contract would be fatal to the claim. If the defendant did not know of the existence of the contract, he could not induce its breach; … if he believed on reasonable grounds that the contract had been rescinded … when in fact it had not, he could not be said to knowingly procure its breach.'

[116] The directors of both defendants are one and the same so the knowledge which came to them in their capacity as the controlling minds of the first defendant is knowledge which is to be imputed to the second defendant, for they are also its controlling mind. What Messrs Potts and Morris knew from their dealings with the plaintiff and the events leading up to the purported repudiation of 9 February 2006 is knowledge the second defendant possessed when it executed the letting agreements in May 2006. See *Endresz v Whitehouse* (1998) 3 VR 461 and *Morlea Professional Services Pty Ltd v Richard Walter* (in liq) (1999) 96 FCR 217.

[117] The particular point is whether the second defendant ie Messrs Potts and Morris knew that the MRA agreement between the first defendant and the plaintiffs was still in force in May 2006. I have found it was. The question is whether the directors honestly believed on reasonable grounds that the agreement had been validly rescinded. If they knew that the first defendant's termination of the agreement was ineffectual the second defendant's execution of the letting

agreements would destroy the plaintiff's subsisting contractual rights. Although knowledge and intention are distinct the second defendant's actions in making the agreements with that knowledge would compel the inference that the destruction, or interference, was intended.

[118] There is no doubt that Mr Morris knew the termination was invalid. He made that admission in plain terms

[119] The first defendant's solicitor's letter of 8 February 2006 sought, verbosely, an assurance that the plaintiff would not, and an admission that it could not, pursuant to the letting agreement, conduct a short term accommodation business from the Aurora complex. The letter argued (wrongly) that the plaintiff's solicitors had not provided an assurance to that effect. It stated that if the plaintiff were genuine in its protestation that the first defendant had no basis for continuing to assert that the plaintiff intended to operate such a business, the plaintiff should execute the draft deed which had been sent earlier. Ignoring the letter's misstatement of the effect of the deed the letter proceeded:

> '… if your client is prepared to do that, our client will proceed. Otherwise … our client will move to terminate the agreement on the basis of an anticipatory breach by your client of its obligations under the … MRA agreements.'

[120] The letter of 9 February 2006 which purported to terminate the agreements did so because of the plaintiff's 'refusal to confirm that he does not intend to operate a short term accommodation business from the Tower …'. This, in its context, means that the plaintiff had not given that confirmation by executing the Deed of Variation. This was the manner which the first defendant nominated as satisfactory confirmation. Mr Morris gave this evidence:

> 'And you knew that with a contract like this, the plaintiff couldn't force you to agree to the variation to it, didn't you? – yes
> You had to, if you wanted to vary the contract, you would. If you didn't want to vary the contract, you wouldn't; correct? – yes
> And well before termination, that was your understanding of how the contract would operate? – yes
> And you knew that even if it was very commercially inconvenient for you, the way the contract operated, you couldn't insist on any change to the contract, you could only ask for it? – yes
> And you knew that there was no way you could be bullied into agreeing to change the terms of the contract if you didn't want to change the terms of the contract? – That's correct.
> You knew you couldn't be accused of any breach of this contract if you simply exercised your right … to not agree to a change to the terms of the contract? Correct? – yes
> And you knew that the same would be true if you tried to force the plaintiff to agree to a change in the terms of the contract? – That's correct.
> You couldn't … insist on it? – No, correct.
> You couldn't complain if they refused to agree to change the terms? – That's correct.' (T 97 .15 – .55).

[121] Mr Morris also gave evidence that the first defendant had sought an opinion from senior counsel who advised that it should seek an undertaking from the plaintiff that it would not engage in short term letting, and consider what action to take subsequent to the plaintiff's response. Mr Morris was then asked these questions and gave these answers:

> 'Now earlier you gave the court … your appreciation of … your company's right to insist on a variation of the management rights acquisition agreement. Do you remember that? – Yes
> You told the court in substance … that you clearly understood that your company had no right to insist on any variation to the management rights acquisition agreement? – Yes that's right.
> That's precisely what your company did, though, in the situation wasn't it? – Yes.
> It did that which you knew you had no right to do. It sought to require the plaintiff to enter into a Deed of Variation of the management rights acquisition agreement, didn't it? – Yes.' (T 128 .8 – .28).

[122] This evidence establishes beyond doubt that Mr Morris knew the plaintiff had no right to insist that the plaintiff should execute the Deed of Variation and that its refusal to do so would not, and could not, constitute a breach of the MRA agreement. Yet he had the first defendant's solicitor intimate that it would terminate the contract unless the plaintiff executed the deed. It will be remembered that the Deed of Variation did not merely convey an undertaking not to conduct short term letting. It altered the MRA agreement in a substantial way by restricting the scope of the letting business, and imposed onerous obligations.

[123] Mr Morris gave even more significant evidence. The first defendant's whole case is based upon the supposition that the letting agreements did not permit short term letting and that the plaintiff had asserted that it would conduct such lettings thereby anticipatorily breaching the agreements. The first defendant solemnly propounded this as its case. It was that concern, and that alone, which lead it to take the drastic step of rescission.

[124] Mr Morris said (T 112 .5- .15) that he had never read the letting agreement prior to 9 February 2006, and had never read the definition of letting business in that agreement. He accepted (T 113 .10- .12) that he did not know what, if any, opinion he held in late 2005 about what letting business the letting agreement permitted ie short or long term letting. He gave this evidence (T 124 .1- .20):

> 'You had no personal opinion about what the letting agreements authorised either did you? – That's correct.
> Because you hadn't read them? – That's right.
> The last sentence of paragraph 71 (of your affidavit) does not represent any idea of yours does it? – No I stand by those words. My industry experience is that the letting business are long term letting business.
> That's got nothing to do with what the letting agreements authorised, has it? – Well, our view is the letting agreement was for long term letting of units in the building.

> I'll ask you one more time. That's got nothing to do with what the letting agreements authorised, has it Mr Morris? – Well, at the time the letting agreements were entered into I hadn't read them so I wasn't totally sure what the letting agreements did authorise.'

[125] Critically Mr Morris gave this evidence:

> 'You didn't believe you had any right to insist even on an undertaking that the plaintiff would never let any lots otherwise than for long term residence? – In the circumstances yes, we did believe we had a right to ask that.
> Well where did you get that right? – Well, simply because the units were sold as long residences, some of them would as I said owner occupied, and the people were not expecting to have the plethora of comings and goings of people staying in a short term operation.
> Is this a commercial right you have? – Yes.
> You knew you didn't have the legal right to insist on it, you certainly knew that? – I'm not a lawyer so I don't know if we had the legal right but we certainly had the commercial – we believe we had the commercial right, yes.
> You told the court before you knew that you had no legal right to insist that the plaintiff agree to a variation of its contract with you?- Yes.
> It's correct, you don't resile from that? – No.
> Say you knew that you didn't have the legal right to insist on this, didn't you? – Yes.
> And you insisted on it knowing that you didn't have the right to do it, didn't you? – Yes.
> And you did that because you were concerned about the possible adverse commercial consequences for your company? – That's correct.
> And you didn't much care about the possibility of being sued by the plaintiff, did you? – No, we didn't.' (T132 .1- .20)

[126] I should for completeness cite some further evidence:

> 'Commercially speaking you didn't care if that was a wrongful repudiation of the contract, did you? – Um No.
> Because the worst that could? – We … didn't know … that would constitute a repudiation of the contract.
> But you did not care because the worst that could happen would be that you'd be sued. You might be sued by the plaintiff? – Ah yes.
> And if the plaintiff got specific performance … then you're no worse off than you would have been if you'd gone to settlement would you? – Yes that's correct.
> … so you were worried regardless of the legal rights or wrongs of it … that if you went ahead without insisting on a variation of the contract you might lose a lot of money? – That's right.
> You in fact didn't care at all did you what the legal rights or wrongs of it were? – Um no that's correct.' (T 129 . 25 - .130.9).

[127] The import of the evidence could not be clearer. The first defendant put its commercial interests ahead of its contractual obligations. It did not care if it harmed the plaintiff's contractual interests or caused it loss. The passage I have just quoted in context is a plain admission that the first defendant had no basis for believing that the plaintiff's refusal to provide the undertaking would constitute an anticipatory breach of the letting agreements. Mr Morris did not know whether or not those agreements allowed short term letting. He did not care. He was determined to terminate all contractual relations with the plaintiff unless it met his new terms embodied in the Deed of Variation. He knew he had no contractual right to bring the MRA agreement to an end. He acted to preserve the first defendant's profit, and to avoid losing 'a lot of money'.

[128] In *Swiss Bank Corporation v Lloyds Bank Ltd* (1979) Ch 548 at 580 Browne-Wilkinson J said:

> '… it is not enough to show that there is room for honest doubt whether the defendants' or the plaintiff's rights have priority: if when such doubt exists a defendant chooses to adopt a course which to his knowledge will undoubtedly interfere with the plaintiff's contract on one view of the law, in my judgment he must at least show that he was advised and honestly believed that he was illegally entitled to take that course.'

[129] There is here no such evidence. The legal advice given to the first defendant (and therefore to the second defendant) was in evidence. The first defendant sought advice from eminent senior counsel. The advice was that a refusal by the plaintiff to undertake not to conduct a serviced apartment business, or hotel, from the Aurora complex would arguably amount to a refusal to comply with the MRA agreement sufficiently important to be an anticipatory breach justifying termination by the first defendant.

[130] The effect of the advice was summarised in a letter by the first defendant's solicitors on 13 December 2005. The solicitors drew 'the following conclusions' from counsel's advice:

> '… it is "reasonably arguable" that the proposed letting agreement would preclude the operation of a serviced apartments business or an hotel operation, …
>
> … if we demand undertakings … that it will not operate a serviced apartments/hotel business … and that demand is refused, it would be "arguable" that this would be an indication of a refusal to comply with the agreement … entitling it to terminate …
>
> … (counsel) does not assert that any termination based on (a) refusal to give the undertakings would be or would be likely to be unlawful. On the contrary he says that this proposition is "arguable" …'

[131] It is to be noted that the advice does not deal at all with the question of whether the first defendant had any grounds, arguable or otherwise, for terminating because the plaintiff would not undertake not to conduct short term lettings. Secondly there was

no advice that in the event of such refusal a termination by the first defendant would be justified contractually. To say such a course was arguably correct was to say no more than it might be correct: the position was not clear.

[132] To apply Browne-Wilkinson J's *dictum* there was clearly doubt about the lawfulness of the first defendant's termination. The second defendant chose to adopt a course which interfered with the plaintiff's contract, on one view of the law. Neither Mr Potts nor Mr Morris testified that he had been advised, and honestly believed, it was legally entitled to take that course. They do not seem to have asked advice on this specific point at all.

[133] Apart from this it is clear from Mr Morris' evidence that he knew he was not justified in terminating the MRA agreement. Mr Morris did say late in his evidence that he believed the termination was lawful but I reject that evidence. It is inconsistent with his earlier plain admissions.

[134] I have no doubt that Mr Morris' attitudes and opinions were shared by Mr Potts. The latter's evidence was not so startling, probably because he gave evidence *de bene esse*, and before the defendants had waived privilege over its legal advice. It is that advice which provided substantial material for the cross-examination of Mr Morris. The contents of that advice suggests that Mr Potts' evidence was less than candid. I do not intend to explore it in these reasons.

[135] I have said enough to indicate that the plaintiff has proved that the second defendant did not honestly believe and had no reasonable grounds for believing that the MRA agreements was terminated in February 2006. Its execution of the letting agreements in May was an intentional interference with the plaintiff's rights.

[136] Although the trial was limited to questions of liability and what relief the plaintiff is entitled to, if not the subject of agreement, will be determined by the court after further hearing. I should make orders so that the defendants' rights of appeal are protected. I will make a declaration as to the first defendant's repudiation of the MRA agreement and give judgment for damages to be assessed against the second defendant. That order is not meant to preclude the plaintiff's right to argue for an injunction or a specific performance. If it obtains such orders any damages to which it is entitled will diminish. The assessment can take into account the grant of injunctive relief.

[137] I declare that the first defendant's purported recission of the Management Rights Acquisition Agreements between it and the plaintiff dated 25 July 2002 by its letter of 9 February 2006 was a repudiation of those agreements.

[138] I give judgment for the plaintiff against the second defendant for damages to be assessed.