SUPREME COURT OF QUEENSLAND

CITATION:	*Whelan Air Conditioning P/L v Arcape P/L & Ors* [2012] QSC 382
PARTIES:	**WHELAN AIR CONDITIONING PTY LTD ACN 005 769 782** (plaintiff) v **ARCAPE PTY LTD ACN 010 871 280** (defendant) and **WHELAN AIR CONDITIONING PTY LTD ACN 005 769 782** (first defendant to counterclaim) and **GEOFFREY RAYMOND-WILLIAMS** (second defendant to counterclaim) and **JILL OLIVIA RAYMOND-WILLIAMS** (third defendant to counterclaim)
FILE NO/S:	BS10754/10
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	3 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	19 October 2012
JUDGE:	Jackson J
ORDER:	

1. **Whelan Hospitality Pty Ltd ACN 146 357 066 be included as second defendant to the proceeding.**

2. **The plaintiff has leave to amend the claim and statement of claim in accordance with the draft proposed by exhibit SAA-1 to the affidavit of Sheree Angove filed by leave on 19 October 2012 except for:**
   - **paragraphs 2B and 2C of the claim**
   - **paragraphs 12(d), 26A, 26B, 26C, 27B(iv), of the statement of claim**
   - **paragraphs 2B and 2C of the prayer for relief of**

the statement of claim.

3. The plaintiff pay the defendants' costs of the application to be assessed.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – where plaintiff claims relief on termination of lease of licensed hotel - where plaintiff applies for leave to amend claim and statement of claim to add claim for loss of benefit of gaming machine operating authorities– where liquor licence transferred and new gaming machine licence issued after termination of lease - whether proposed amendments futile and have no prospect of success – whether leave should be granted

Gaming Machine Act 1991 (Qld), s 13A, s 78, s 87, s 95, s 96, s 109B, s 109C, s 109E, s 109F, s 109G, s 109H
Liquor Act 1992 (Qld), s 113, s 129, s 131, s 132

Brown v Riverstone Meat Co Pty Ltd (1985) 60 ALR 595, refered
Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594, cited
Dresna Pty ltd v Misu Nominees Pty Ltd [2004] FCAFC 179, cited
Marks v GIO Australia Holdings Ltd (1998) 196 CLR 494, cited
Pritchard v Racecage Pty Ltd (1997) 142 ALR 527, cited
R v Toohey; ex parte Meneling Station Pty Ltd (1982) 158 CLR 327, cited
Sellars v Adelaide Petroleum NL (1992-1994) 179 CLR 332, cited
WP Kidd Pty Ltd v Panwell Pty Ltd [2004] QCCTG 4, refered

COUNSEL: J Peden for the plaintiff
T Matthews for the defendants

SOLICITORS: MacDonnells Law for the plaintiff
Egans Solicitors for the defendants

[1] **Jackson J**: The plaintiff applies for orders joining an additional defendant, Whelan Hospitality Pty Ltd ACN 146 357 066 ("Whelan Hospitality") and granting leave to file an amended claim and a further amended statement of claim (FASOC). The joinder and some of the amendments to the claim and statement of claim are not opposed. The dispute between the plaintiff and the defendant and Whelan Hospitality is confined to the addition of pars 2B and 2C of the claim, and pars 12(d), 26(A), 26(B), 26(C), 27(B)(iv), and pars 2B and 2C of the prayer for relief, of the FASOC.

[2] The parts objected to are all concerned with the additional claims that the plaintiff seeks to make against the defendant and Whelan Hospitality over their dealings with the liquor licence, gaming machine licence, and the operating authorities for the gaming machines the subject of the gaming machine licence, which were previously held by the plaintiff in respect of the hotel premises which it describes in the FASOC as "the leased premises".

[3] From February 2003 until 30 September 2010, or thereabouts, the plaintiff conducted the business of a hotelier at the leased premises. The leased premises included an area for gambling activities pursuant to a gaming machine licence granted under the provisions of the *Gaming Machine Act* 1991 (Qld) ("GM Act")[1].

[4] Although there is a dispute on the pleadings as to the commencement date of the lease, it is not in dispute that the plaintiff was lessee of the leased premises from the defendant ("Arcape"). The lease was in writing or partly in writing. The plaintiff obtained a liquor licence and a gaming machine licence by February 2003 and, on its case, commenced occupation of the lease premises on or about 10 February 2003.

[5] The lease ended on or about 30 September 2010. On that date, on the plaintiff's case, the plaintiff terminated the lease on the ground that Arcape had repudiated it. The existing claim in the proceeding is based on a dispute over whether that termination was valid and as a result of it the plaintiff is entitled to relief on a claim for detinue for the gaming machine software and plant and equipment which were at the hotel (or damages for breach of contract) or whether under an option contained in the lease Arcape became entitled to and did acquire the plant and equipment and, further, whether Arcape is entitled to set off sums alleged to have been owing by the plaintiff against any liability for the price of the plant and equipment.

[6] However, even if the plaintiff's termination was not valid, the term of the lease expired by the end of 30 September 2010. One way or another, it had come to an end by that day.

Disputed amendments

[7] The proposed pars 2B and 2C of the claim are:

> "2B. In the alternative to paragraphs 2 and 2A, damages in the sum of $2,450,895 against the first and or second defendant for the loss of opportunity to sell the Plaintiff's property in or about October 2010
>
> 2C. In the alternative to 2B, damages against the second defendant in the sum of $1,829,520 being the value of the Gaming Authorities."

[8] The paragraphs of the proposed FASOC which are objected to are:

> "12. In conducting in the hotel business at the lease premises, the owned the following chattels and had certain rights as follows ("the Plaintiff's Property"):

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1 Paragraph 3 of the FASOC

(a) …
(d) the benefit of operating authorities under the *Gaming Machine Act* 1991 in respect of 40[2] gaming machines at the hotel premises ("Gaming Authorities").

…

26A. At no time did the plaintiff ever provide any permission or consent for its Gaming Authorities at the hotel premises to be transferred to the second defendant.

26B. Had the defendant not had transferred to it the Gaming Authorities, the Plaintiff would have had the opportunity of seeking to transfer the Gaming Authorities or alternatively compensation for their surrender.

26C. In the premises, the second defendant has wrongfully dealt with the Plaintiff's Property comprising the Gaming Authorities and deprived the plaintiff the opportunity to seek compensation for or transfer the Gaming Authorities for value.

…

27B. In the premises the first and/or alternatively the second defendant is liable for damages:

(i) …
(iv) in the sum of $1,829,520 (being 35 gaming machines at the then current surrender value of $72,000 per machine plus GST) for the loss of opportunity to transfer or claim compensation for the Gaming Authorities in 2010."

[9] The ground of opposition to those proposed amendments is that they are futile and have no prospect of success.

[10] There is an anterior problem with proposed par 26C, in my opinion. The allegation that Whelan Hospitality "wrongfully dealt with" the gaming authorities and deprived the plaintiff of the opportunity to seek compensation for or transfer the gaming authorities for value does not disclose a reasonable cause of action. Facts are not pleaded which show the basis of any cause of action for damages against Whelan Hospitality. Paragraph 13A of the FASOC alleges, *inter alia*, that since about October 2010 Whelan Hospitality has had transferred to it the gaming authorities previously held by the plaintiff. However, the allegation that the plaintiff did not provide permission or consent for its gaming authorities at the hotel premises "to be transferred to" the Whelan Hospitality, without more, does not disclose a reasonable cause of action in my view.

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[2] It is possible that 40 may be an error. There were 35 operating authorities according to some of the evidence.

[11] Strictly speaking, it would be unnecessary to go further, in order to dispose of the dispute that the plaintiff should not be permitted to amend the statement of claim into the form proposed by the FASOC in respect of any cause of action relating to the gaming authorities. However the respondents urge that I also consider another point, because it may be that the plaintiff can formulate a reasonable cause of action that Whelan Hospitality obtained a transfer of the liquor licence for the premises and was granted a gaming machine licence, as well, by engaging in misleading or deceptive conduct vis-à-vis the Office of Liquor and Gaming Regulation. I say nothing as to whether a viable cause of action can be formulated in that respect, as it would be inappropriate to do so based on speculation. The plaintiff quite properly seeks to investigate the circumstance in which the liquor licence was transferred and the gaming machine licence was issued to Whelan Hospitality more completely before asserting a claim of that kind.

[12] Nevertheless, Arcape and Whelan Hospitality urge me to decide that the proposed amendment should be refused not just because a reasonable cause of action has not been formulated in the manner just discussed, but also because it contends that there are uncontroversial facts that the plaintiff surrendered the liquor licence on 1 October 2010, and that the associated gaming machine licence was cancelled so that the operating authorities became authorities of the State in circumstances where the plaintiff had no entitlement to any compensation. Arcape and Whelan Hospitality submit that it follows that the plaintiff can never succeed on any case which is based on a pleading that the liquor licence and the associated gaming machine licence and operating authorities, had any value to it whatsoever upon the expiry of the lease.

Provenance of the operating authorities

[13] It is convenient to set out both the legal and factual background to the disputed question. I start with a description of the legislative scheme relating to gaming machine licences and operating authorities taken from a decision of the Queensland Commercial and Consumer Tribunal[3]:

> "A gaming machine licence is required to operate a gaming machine. An application for a gaming machine licence may only be made by the holder of the liquor licence. A gaming machine licence cannot be transferred.
>
> On 8 May 2001 the Queensland Government announced that there would a cap on the number of gaming machines in hotels and that a scheme would be developed to reallocate gaming machines within the State wide cap. There are in the order of 18,843 gaming machines in hotels in Queensland.
>
> The reallocation scheme commenced on 1 July 2003. The scheme involved the creation of an operating authority for each gaming machine for which a licence existed. A new asset was thereby created as was a new market, albeit limited, in which that asset may be sold/purchased.

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3 *WP Kidd Pty Ltd v Panwell Pty Ltd* [2004] QCCTG 4 at [10]-[15].

> Consistent with the provisions of the *Gaming Act 1991* which require the holder of a gaming licence to be the holder of the liquor licence, the scheme allocated operating authorities to licensees of licensed premises.
>
> The Act provides that a licensee must not install and operate at the licensed premises more than the number of gaming machines that is equal to the number of operating authorities for the licensed premises.
>
> The scheme provides for operating authorities to be sold/purchased at tender sales in the future under certain restrictions within each of three defined geographic regions within the State. Operating authorities cannot be the subject of direct sale and purchase between parties. The tender sales will be overseen by the Queensland Government."

[14] On 3 February 2003 gaming and machine licence number 47979 ("the plaintiff's G&M licence") was issued to the plaintiff. The plaintiff's G&M licence identified the operating authority registration details for approved gaming machines for the licence. The total number of operating authorities held in the coastal region was 35.

[15] In 2003, by an amendment to the lease executed by the parties, cl 5.25 was added as follows:

> "The Tenant will maintain the gaming machine licence and Authorities applicable to the Premises issued pursuant to the *Gaming Machine Act 1991* at the Tenant's expense. Neither the Tenant nor the Landlord will without the consent of the other party, dispose nor attempt to dispose of the said gaming machine licence and Authorities during the term of the Lease other than for the purpose of assignment of the Lease pursuant to cl 9."

[16] Clause 21.5 of the lease had provided:

> "The Tenant will at the expiration or sooner determination of this Lease do all acts and things necessary to enable the Landlord or any person authorised by the Landlord to obtain the renewal of any licence or permit or any new licence or permit the transfer of any licence or permit then existing and in force to any person or corporation nominated by the Landlord to enable the Business to continue uninterrupted at the Premises."

[17] The 2003 amendment added the following words at the end of cl 21.5:

> "The word licence includes the gaming machine licence and Authorities applicable to the premises issued pursuant to the *Gaming Machine Act 1991*".

Second defendant's G&M licence

[18] There is no dispute that from approximately 30 September 2010 the plaintiff ceased to carry on business at the leased premises. There is no allegation that it had any right to do so after that date. Whether or not the lease or some executory contractual obligations under the lease were terminated on that date would not affect the conclusion that the plaintiff was not in possession and it was not entitled to be in possession after the expiry of the term of the lease.

[19] On 1 October 2010, Mr Philip Williams, on behalf of the plaintiff, sent an email to the Office of Liquor and Gaming Regulation advising that the plaintiff no longer occupied the hotel premises and would not be accountable for any actions of the current occupier.

[20] On 19 December 2011, a liquor licence for a commercial hotel was issued to Whelan Hospitality for the leased premises.

[21] On the same date, gaming machine licence number 134370 was issued to Whelan Hospitality ("the second defendants' G&M licence").

[22] According to an email sent on 21 June 2012 from a senior liquor licencing officer of the Office of Liquor and Gaming Regulation the sequence leading up to the transfer of the liquor licence was that, following receipt of Mr Williams email of 1 October 2010 mentioned above, an application to discharge the licensee was approved on 8 October 2010 and Arcape as freehold owner was granted an interim authority. The liquor licence was subsequently transferred to Whelan Hospitality.

[23] Under s 132 of the *Liquor Act* 1992 (Qld) ("the Liquor Act"), the discharge of a licensee who is not the sole owner of the licensed premises and has ceased to conduct business on the premises may be ordered by the chief executive. And ss 129 to 131A of that Act empower the chief executive to authorise certain persons to conduct business on the licensed premises on an interim basis.

[24] Further, by an email sent on 5 July 2012 from the senior liquor licencing officer of the Office of Liquor and Gaming Regulation, it was stated that on 19 December 2011 an application for a new gaming machine licence "was issued to" Whelan Hospitality and as a consequence 40 (not 35) operating authorities were transferred to Whelan Hospitality.

[25] By s 113(1) of the Liquor Act , if the lease has been lawfully terminated or the licensee has ceased to conduct business in the licensed premises (and has not agreed to the application), the owner of the licensed premises may apply to the Chief Executive to transfer the licence to a person who could be granted the licence. By s 113(2), the Chief Executive's authority to transfer the licence is subject to s 78 of the GM Act. By s 113(3), on transfer of the licence, the transferee becomes the licensee and is subject to the obligations imposed under the Act and licence, including outstanding obligations of the transferor or the previous holder.

[26] By s 78 of the GM Act, if a person makes a liquor licence transfer application relating to a commercial hotel licence, the Liquor Licensing Authority may transfer the licence only if the Chief Executive issues a certificate under subsection (2). By s 78(2)(b) the Chief Executive may issue the certificate, if the premises for which the application was made are licensed premises under the GM Act, only if the Commission is prepared to grant a gaming machine licence to the applicant.

[27] Under s 78(3) of the GM Act, if a person makes a liquor licence transfer application relating to a commercial hotel licence and applies at the same time for a gaming machine licence for the premises, and the liquor licensing authority is prepared to transfer the licence and the Commission is prepared to grant the gaming machine licence, the Chief Executive and the Liquor Licensing Authority are to make arrangements so that the transfer of the liquor licence and the issue of the gaming machine licence happen at the same time.

[28] Under s 78(5) of the GM Act, if arrangements are made for a new gaming machine licence to be issued at the same time as the transfer of a liquor licence, and an associated gaming licence for the liquor licence is cancelled under s 96(1) because of the transfer of the liquor licence, all operating authorities or entitlements, if any, for the licensed premises under the cancelled associated gaming machine licence are transferred by operation of that subsection to the holder of the new licence.

[29] The reference to "the cancelled associated gaming machine licence" directs attention to s 78(4) which is engaged where arrangements are made for a gaming machine licence and an associated gaming machine licence for the liquor licence is cancelled under s 96(1) because of the transfer of the liquor licence.

[30] Section 96(1) of the GM Act provides that if a liquor licence is cancelled, transferred or surrendered any associated gaming licence is cancelled.

[31] Summarising the effect of these provisions, if Arcape was entitled under s 113 of the Liquor Act to apply for a transfer of the liquor licence to Whelan Hospitality, s 78 of the GM Act prohibited the transfer unless the Chief Executive issued a certificate that the commission was prepared to grant a gaming machine licence to Whelan Hospitality. However, if the certificate issued and Whelan Hospitality applied for both a commercial hotel licence and a gaming machine licence and the transfer of the liquor licence and the issue of a new gaming machine licence happened at the same time, the issue of a new gaming machine licence to Whelan Hospitality had the effect that the operating authorities for the licensed premises were transferred by operation of law to Whelan Hospitality.

[32] There does not seem to be any basis in the facts set out above or the operation of the relevant provisions which creates a cause of action for the plaintiff in relation to that outcome, as such.

[33] For the purpose of analysis, let it be assumed that Arcape and Whelan Hospitality in some way may have misled the Office of Liquor and Gaming Regulation so as to caused the relevant authorities to approve the applications for transfer of the liquor licence and to issue a new gaming machine licence to Whelan Hospitality. Let it also be assumed that the conduct was in trade or commerce.[4] The question would be whether any loss would have been suffered by the plaintiff. It is not necessarily a bar to a claim for damages under s 82 of the *Trade Practices Act* 1974 (Cth) for contravention of s 52 that the party who suffered loss was not the representee who was induced to act by the conduct.[5]

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[4] Cf *Brown v Riverstone Meat Co Pty Ltd* (1985) 60 ALR 595 at 607; *Dresna Pty ltd v Misu Nominees Pty Ltd* [2004] FCAFC 179 at [34]; *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594.

[5] For example, *Pritchard v Racecage Pty Ltd* (1997) 142 ALR 527 at 542; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at [101].

[34] The answer to that question would have to depend on what would or might have happened instead and whether there was some opportunity lost which in law would constitute loss of a valuable opportunity.[6] None has been identified in the statement of claim, so far, except for an assertion that the operating authorities constituted the property of the plaintiff in the sense of "rights" which were "the benefit of the operating authorities" under the GM Act. However, operating authorities are neither transferrable by the licensee,[7] nor can they be made subject to an encumbrance by mortgage or charge.[8] They are not a readily recognised species of property.[9]

[35] Still, operating authorities do have realisable value in some circumstances. For example, where a liquor licence holder and gaming machine licensee agrees to sell their business to a purchaser and to apply for and assist the purchaser to obtain a transfer of the liquor licence and a new gaming machine licence as previously stated, the purchaser may be prepared to pay for the value of the operating authorities without which it cannot operate machines under the gaming machine licence. However, the method by which the operating authorities are transferred to the purchaser is under s 78(5) of the GM Act as previously described.

[36] Alternatively, the holder of a gaming machine licence may surrender the licence under s 95 of the GM Act which will have the effect that the operating authorities must be sold at an authorised sale, and the licensee will become entitled to the balance under s 109E of the GM Act. I note that the transfer of an operating authority under s 78(5) of the GM Act is made subject to this process, where there has been a surrender, because s 78(7) defines operating authority in s 78(5) to not include an operating authority that must be sold at an authorised sale.

[37] Similarly, a licensee may make a decrease proposal under s 87 of the GM Act which may result in realisation at an authorised sale.

[38] Whelan Hospitality also submitted that any claim by the plaintiff about the operating authorities would be affected by s 109F and s 109G of the GM Act.

[39] Section 109F of the GM Act is engaged, *inter alia*, if the licensee's gaming machine licence is cancelled under s 96 because the licensee's liquor licence is cancelled or surrendered. However, the process described above would not have resulted in the gaming machine licence being cancelled because the licensee's liquor licence was cancelled or surrendered. The gaming machine licence would appear to have been cancelled because the licensee's liquor licence was transferred. In those circumstances, s 109F would have no application. It becomes unnecessary to consider s 109G.

[40] There is also no suggestion in the facts that I can see that the plaintiff's G&M licence would have been surrendered under s 95 of the GM Act. An effective surrender under s 95 would have had the result that operating authorities for the licensed premises under the licence were to be sold in an authorised sale. I note that an action of that kind by the plaintiff potentially would have amounted to a breach

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6 *Sellars v Adelaide Petroleum NL* (1992-1994) 179 CLR 332 at 355.

7 Sections 13A, 109B and 109C(1)(a) of the GM Act.

8 Section 109H of the GM Act.

9 *R v Toohey; ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342-343.

of cl 21.5 of the lease, but it is not necessary to pursue that scenario further on the facts as they presently appear.

Disposition

[41] Notwithstanding the foregoing analysis, it is not appropriate for the court to make some form of quia timet declaration to the effect that the plaintiff can have no reasonable cause of action as against either Arcape or Whelan Hospitality in respect of the operating authorities. It is sufficient for present purposes that the application to join Whelan Hospitality be allowed and that the plaintiff be allowed to amend the claim except that it not be permitted to amend to add:

- paragraphs 2B and 2C of the claim
- paragraphs 12(d), 26A, 26B, 26C, 27B(iv), of the proposed further amended statement of claim
- paragraphs 2B and 2C of the prayer for relief of the proposed further amended statement of claim.

[42] In substance, Arcape and Whelan Hospitality have succeeded in their opposition to parts of the proposed amendments to the claim and amended statement of claim. In the circumstances it is appropriate that the plaintiff pay their costs of the application to be assessed.