SUPREME COURT OF QUEENSLAND

CITATION:	*MSD Securities Pty Ltd & Ors v MFB Properties (NQ) Pty Ltd & Ors* [2016] QSC 261
PARTIES:	**MSD SECURITIES PTY LTD AS TRUSTEE FOR THE BRUNSWICK STREET TRUST** **ACN 160 362 345** (first plaintiff) **PK'S RESORT PTY LTD** **ACN 168 348 730** (second plaintiff) **MARK LEONARD SEABROOK** (third plaintiff) **DAVID BRUCESMITH** (fourth plaintiff) **v** **MFB PROPERTIES (NQ) PTY LTD** **ACN 101 980 303** (first defendant) **THE JUNGLE VILLAGE PTY LTD** **ACN 098 067 077** (second defendant) **ASHLEE JANE PIPER** (third defendant) **MARK FREDERICK DAVID BIANCOTTI** (fourth defendant)
FILE NO:	BS No 2575 of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 November 2016
DELIVERED AT:	Brisbane
HEARING DATES:	17 and 18 October 2016; Plaintiffs' Written Submissions received 25 October 2016.
JUDGE:	Flanagan J
ORDER:	**1. The plaintiffs' claim for a declaration that the balance consideration to be paid by the plaintiffs to the defendants pursuant to the transaction deed dated 13 March 2014 is $1,616,655.05 is dismissed.** **2. I will hear the parties as to further orders, directions and costs.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTIONS FOR BREACH – PARTICULAR PARTIES – VENDOR AND PURCHASER – where first and second plaintiffs agreed to purchase parcels of land and a resort business from first, second and third defendants – where the terms of the sale and purchase were set out in a transaction deed and various sale and purchase contracts – where two lots of land to be transferred pursuant to the transaction deed and the relevant sale and purchase contracts were subject to leases – where the leases were amended prior to settlement – where plaintiffs not party to the leases prior to settlement – whether amendments to the leases amounted to a breach of the relevant sale and purchase contracts – whether the damages flowing from any breaches of contract are the difference in the rental figures under the leases prior to amendment and the rental figures after amendment

EQUITY – EQUITABLE REMEDIES – SPECIFIC PERFORMANCE – DECREE OR JUDGMENT – where all parties seek an order that the transaction deed and associated sale and purchase contracts be specifically performed – whether the plaintiffs are entitled to set-off the amount claimed as damages for the alleged breach of contract against the balance consideration owing under the transaction deed

Clark v Macourt (2013) 253 CLR 1; [2003] HCA 56, applied
Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64; [1991] HCA 54, cited
Davis v Perry O'Brien Engineering Pty Ltd [2016] QSC 202, considered
Drane v Aqualung Holdings [2016] QSC 139, considered
Forsyth v Gibbs (2009) 1 Qd R 403; [2008] QCA 103, cited
HP Mercantile Pty Ltd v Dierickx (2013) 306 ALR 53, cited
UI International Pty Ltd v Interworks Architects Pty Ltd (2008) 2 Qd R 158; [2007] QCA 402, considered

COUNSEL: DV Ferraro for the plaintiffs
MA Jonsson QC with V Brennan for the defendants

SOLICITORS: Dowd & Co for the plaintiffs
Preston Law for the defendants

Introduction

[1] All parties to this action seek the specific performance of a transaction deed dated 13 March 2014 and certain contracts. The relevant contracts are two land sale contracts and a business contract. The contracts are for the sale and purchase of land and a resort business in Cape Tribulation, Queensland.

[2] The present dispute concerns the amount that the first and second plaintiffs must tender to effect settlement. The plaintiffs allege $1,617,067.73[1] is required, whereas the defendants allege $1,978,497.28[2] is required. Apart from an order for specific performance, the actual relief sought by the plaintiffs is a declaration that the balance consideration to be paid by the plaintiffs to the defendants pursuant to the transaction deed is $1,616,655.05.[3]

[3] The difference in the settlement amount is primarily the quantum of damages sought by the first plaintiff for an alleged breach of contract of one of the land sale contracts. This is an amount of $216,828.60.[4] The plaintiffs seek to have these damages set-off against the balance purchase price.

[4] In order to achieve a settlement the parties seek to have three issues determined.[5] These three issues may be briefly summarised as follows:

1. Did the first defendant breach certain conditions in one of the land sale contracts?

2. If yes, is the quantum of the damages arising from the breach the amount that the first plaintiff seeks to set-off against the balance purchase price payable at settlement?

3. Does the first plaintiff have a legal or equitable right to set-off any amount of damages against the balance purchase price otherwise payable at settlement?

[5] In order to grant the declaration sought each of these three issues would need to be determined in the plaintiffs' favour.

[6] For reasons set out below, I am of the view that the plaintiffs have not established that the declaratory relief sought should be granted. The parties are otherwise agreed that an order for specific performance of the transaction deed and the relevant contracts should be made.

The Transaction Deed and relevant Contracts

[7] On 13 March 2014, the plaintiffs entered into a transaction deed. Pursuant to the transaction deed, among other things, the first and second plaintiffs agreed to purchase various land parcels and a resort business in Cape Tribulation from the first, second and third defendants for the sum of $4 million.[6] The resort is situated on approximately eight acres of land consisting of four lots. A convenience and grocery store is located

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1 Exhibit 4.
2 Exhibit 1.
3 Amended Statement of Claim, Prayer for Relief, [1].
4 Amended Statement of Claim, [34].
5 Exhibit 16.
6 Amended Statement of Claim, [3]; Amended Defence, [1].

on lots 1 and 2. The manager's residence is located on lot 3. The balance of the resort, consisting of a reception, hotel restaurant and bar, swimming pool, communal toilets and showers and camping grounds, is located on lot 4.[7]

[8] The land and business to be purchased by the first and second plaintiff is as follows:

(a) Lots 1 and 2 on SP 219085 (the Supermarket Land, sometimes referred to as the Cape Land);

(b) Lot 3 on SP 219085 upon which was situated the manager's residence (the Round House Land);

(c) Lot 4 on SP 219085 (the Resort Land); and

(d) the resort business.

[9] Pursuant to the transaction deed, the first and second plaintiff entered into various contracts for the purchase of the Supermarket Land, the Round House Land, the Resort Land and the business as follows:

(a) the Supermarket Land and the Resort Land contract dated 13 March 2014:

(i) this sale was by the first defendant, MFB Properties to the first plaintiff, MSD Securities;

(ii) the purchase price was $3,300,000.00.

(b) the Round House Land contract dated 17 March 2014:

(i) this was a sale by the third defendant, Ashlee Piper to MSD Securities;

(ii) the purchase price was $300,000.00.

(c) the resort business contract dated 13 March 2014:

(i) this was a sale by the second defendant, Jungle Village to the second plaintiff, PK's Resort;

(ii) the purchase price was $400,000.00.

[10] Pursuant to the transaction deed, MFB Properties, Jungle Village and Piper agreed to accept payment of the total purchase price by way of:

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[7] T1-24, lines 9-20; Exhibit 3.

(a) a conveyance of various other property from the fourth plaintiff, David Brucesmith and the third plaintiff, Mark Seabrook to the fourth defendant, Mark Biancotti for an amount of $2,000,000.00 of the total purchase price;

(b) a cash payment of $2,000,000.00 for the balance purchase price from MSD Securities and PK's Resort to MFB Properties, Jungle Village and Piper in accordance with agreed apportionments and any adjustments.

[11] In the result the following additional contracts were entered into:

(a) the Gold Coast house contract:

(i) this was a sale from the fourth plaintiff, David Brucesmith to Mark Biancotti of a house situated at 15 Glastonbury Drive, Mudgeeraba in Queensland;

(ii) the purchase price was $250,000.00;

(b) The Gold Coast apartment contract:

(i) this was a sale by Mr Brucesmith to Mr Biancotti of an apartment situated at 1104/1105, 3458 Main Beach Parade, Surfers Paradise in Queensland;

(ii) the purchase price was $250,000.00;

(c) The vessel contract:

(i) this was a sale by Mr Seabrook to Mr Biancotti of a 72 foot Hershine motor cruiser;

(ii) the purchase price was $1,500,000.00.

[12] Pursuant to clause 11 of the transaction deed all sale contracts were subject to a contemporaneous settlement with each other. Settlement was initially to occur on 1 May 2014.[8] It did not.

[13] On 29 May 2014 the parties agreed to vary the transaction deed and related contracts, including the settlement date as set out in an email of the same date.[9]

"Dear John

I note there has been a volley of emails regarding the proposed terms of an early of what has been termed 'Partial Settlement'.

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8 TB 27 at 29 letter P.
9 TB 219.

I understand the agreed position is as follows:

1. Settlement of all contract [sic] between our respective clients will take place 2 June 2014 (Settlement Date);

2. On the Settlement Date, Mark and David will transfer the Gold Coast House, the Gold Coast Unit and the Vessel to Biancotti pursuant to the terms of the Gold Coast Contract, the Gold Coast Unit Contract and the Vessel Contract;

3. The parties acknowledge that upon the transfers referred to in Item 2, consideration of $2,000,000.00 will have been paid being a part payment under the Transaction Deed and that a balance amount of $2,000,000.00 remains to be paid under the Transaction Deed;

4. On the Settlement Date, MSD and PK's will take possession of the Business, Cape Land and Round House and will assume operation of the Business and be responsible for all outgoings and entitled to all income of the Business, Cape Land and Round House from the Settlement Date;

5. MSD, PK's, Mark and David confirm they have received finance approval for the acquisition of the Supermarket Property, Vacant Shop Property and Round House and that MSD and PK's will pay to MFB, Jungle Village and Ashlee the sum of $625,000.00 in exchange for the unencumbered title to those properties and the Business within 30 days of the Settlement Date;

6. The parties acknowledge that upon the transfers referred to in Item 2 and 5, consideration of $2,650,000.00 will have been paid under the Transaction Deed and that a balance amount of $1,350,000.00 remains to be paid under the Transaction Deed and that MFB will remain the registered owner of the Resort Property;

7. MFB discloses that it has a registered mortgage over the Resort Land and that it is making monthly repayments against this property;

8. MSD and PK's agrees to make the monthly repayments referred to in Item 7 above on behalf of MFB and the parties agree that part of the payment made is interest and part is principal;

9. MSD must pay MFB the sum of $1,375,00.00 less any principal payments made under the terms of Item 8 above, within 12 months of the Settlement Date in exchange for the unencumbered title to the Resort Property;

10. Despite and [sic] provision to the contrary above, MFB and Biancotti agree to "vendor finance" the maximum sum of $400,000.00 should MSD or PK's request when the final payment under Item 9 is required;

11. Each party is responsible for all costs of each property and are entitled to all income of each property (including the Vessel) from the Settlement Date.

…" (**the 29 May agreement**).

[14] At the settlement on 2 June 2014:

(a) Mr Brucesmith transferred the Gold Coast house and the Gold Coast apartment to Mr Biancotti;

(b) Mr Seabrook transferred the vessel to Mr Biancotti; and

(c) MFB Properties, Jungle Village and Piper gave possession of the Supermarket Land, the Round House Land and the resort business to MSD Securities and PK's Resort.[10]

MSD Securities and PK's Resort were, however, unable to and did not pay to MFB Properties, Jungle Village and Piper the sum of $625,000 by 2 July 2014 in exchange for a transfer of the unencumbered title to the resort business, the Supermarket Land and the Round House Land, as was required by clause 5 of the 29 May agreement.[11]

[15] The parties made a further agreement with respect to performance of the transaction deed and the related contracts which is recorded in an email dated 31 July 2014[12] as follows:

"Morning John,

My client continues to work with financiers to arrange settlement but in reality it will not happen today.

I note that the agreement reached was for interest on the $625000 amount would be charged at 12%pa from 1 August if that portion was not settled by today.

I understand the agreement reached is as follows:

1. The contracts and arrangements contained in the Transaction Deed are on foot with settlement having been effected on 2 June 2014 based on the [sic] those contracts and the terms of my email dated 29 May 2014;

2. The parties have agreed to further amend in the terms of Point 1 above as follows;

3. MSD, PK's, Mark and David would try to make payment of the sum of $625,00 by 31 July 2014 to comply with Item 5 of my email of 29 May 2014;

4. Should payment contemplated in Point 3 above not be made by 31 July 2014, interest would accrue to Biancotti at the rate of 12%pa on the amount of $625000 from 2 June 2014 until payment is made;

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[10] Amended Statement of Claim, [10]; Amended Defence, [1].
[11] Amended Statement of Claim, [12]; Amended Defence, [1].
[12] TB 231-232.

5. For clarification purposes, my client is entitled to all rents and income generated from the Business, Cape Land and the Round House from 2 June 2014 and is responsible for all outgoings and expenses associated with the Business, Cape Land and Round House from that date;

6. My client must make the payments contemplated by Items 7, 8 and 9 of my email of 29 May 2014 as required by their due date;

7. Rent and other income has been received by your client which rent and income is to be either repaid to my client of [sic] offset against any payment made or to be made by my client for the purposes of Point 6 above;

8. Adjustments effective 2 June 2014 need to be made in relation to telephone expenses and costs as between my client and your client, with either party producing invoices and receipts to quantify claims being made; and

9. Adjustments for prepaid accommodation packages are to be made as is an adjustment for fuel on the Vessel.

…" (**the 31 July agreement**).

[16] By virtue of the 29 May agreement, as subsequently varied by the 31 July agreement, the parties agreed that the amount of $2,000,000 was to be taken to have been paid under the transaction deed[13] and an amount of $2,000,000 was to be deemed outstanding.[14] Whilst the plaintiffs were granted possession, MFB Properties remained the registered owner of lots 1, 2, 3 and 4.

[17] MSD Securities and PK's Resort were again unable to complete settlement on 31 July 2014. This was because MSD Securities and PK's Resort could not obtain finance to complete the transaction deed and the contracts.[15] In spite of the plaintiffs' failure to complete, Mr Biancotti agreed to keep the contracts on foot.[16] Similarly, the plaintiffs, who had the benefit of finance clauses also did not exercise their right to terminate.[17] The plaintiffs did not obtain finance until a temporary offer of finance from the Commonwealth Bank on 22 December 2015.[18] There was a plan to settle on 3 March 2016 which did not eventuate.[19]

Did the first defendant breach certain conditions in one of the land sale contracts?

[18] The relevant land sale contract is the Supermarket Land and Resort Land contract. The clauses alleged to have been breached by MFB Properties are clauses 8.3 and 10.7(1)(a).

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13 TB 221, 31 May agreement clause 3.
14 TB 221, 31 May agreement clause 3.
15 T1-27, lines 16-21; T1-59, line 44 to T1-60, line 2.
16 T1-60, lines 4-11.
17 T1-43, lines 29-35.
18 T1-31, lines 40-45; T1-59, line 46.
19 T1-48, lines 15-21.

[19] Clause 8.3 provides:[20]

> "**Seller's use of property**
>
> The seller must use the Property reasonably until settlement. The Seller must not do anything regarding the Property or Commercial Tenancies that may significantly alter them or result in later expense for the Buyer."

[20] Clause 10.7(1)(a) provides:[21]

> "**Dealings with the Commercial Tenancies**
>
> (1) Unless it would breach a provision of, or waive or prejudice the Seller's rights under, a Commercial Tenancy, the Seller must not, after the Contract Date:
>
> (a) deal with the Property or any of the Commercial Tenancies without the Buyer's consent (which must not be unreasonably withheld);"

[21] The relevant "dealing" for the purposes of clause 10.7(1)(a) of the Supermarket Land and Resort Land contract is the alleged alteration to the lease arrangements by the MFB Properties in respect of lots 1 and 2 of the Supermarket Land.[22]

[22] At the time of entering into the contract on 13 March 2014, lot 1 was rented to GDUB Holdings Pty Ltd (GDUB) on a month-to-month tenancy at an annual rent of $60,000 plus GST with the tenant responsible for paying electricity supplied at cost. Mr Graham Williams is a director of GDUB.

[23] On 26 March 2015 Mr Biancotti, as sole director of MFB Properties, entered into written leases for both lots 1 and 2 with GDUB.[23] The leases were each for five years. The lease in respect of lot 1 was for $60,000 rental per annum excluding GST payable to the landlord by equal monthly instalments of $5,000 exclusive of GST in advance. The tenant was to pay for electricity supplied to the premises at cost.[24] The rent for lot 2 was $50,000 per annum excluding GST payable to the landlord by equal monthly instalments of $4,166.66 exclusive of GST in advance. The lease contained the same provision for electricity.[25]

[24] The plaintiffs plead that both were entered into without the knowledge or consent of MSD Securities.[26] Mr Seabrook is the sole director of MSD Securities. MSD Securities and Mr Seabrook allege that they became aware of these leases on 5 January 2015 by way of correspondence from the solicitors acting for the defendants.[27] There is no issue that the plaintiffs consented to the leases entered into on 26 March 2015. This

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[20] TB 23.
[21] TB 24.
[22] Amended Statement of Claim, [20].
[23] TB 96; TB 125.
[24] TB 98, Item 13.
[25] TB 126.
[26] Amended Statement of Claim, [20].
[27] Amended Statement of Claim, [21].

consent was given by the plaintiffs on 3 February 2016.[28] The leases were registered on 24 February 2016.[29]

[25] The issue of consent for the purposes of clause 10.7(1)(a) of the Supermarket Land and Resort Land contract however arises in respect of amendments to these leases agreed by MFB Properties and GDUB on 22 February 2016.[30] These amendments were agreed prior to the registration of the leases on 24 February 2016. The amendments themselves were registered on 29 February 2016[31] in anticipation of the plaintiffs and defendants settling on 3 March 2016. The parties did not settle on 3 March 2016 because they failed to reach agreement on the adjustments and apportionments to be made to the balance purchase price.[32]

[26] It is necessary to set out the amendments effected to the leases for lots 1 and lot 2. As to lot 1:[33]

> "The Lessor and the Lessee acknowledge and agree as follows:
>
> (1) The Lessor has entered into a contract with MSD Securities Pty Ltd with respect to the sale and purchase of the land described in Item 2 of Form 7 ("the MSD Contract").
>
> (2) From the 1st of September 2014, until completion of the MSD Contract, or the termination of the MSD Contract, whichever first occurs, the Lease shall be rent free.
>
> (3) The Lessee will pay electricity supplied to the leased premises by the Lessor at 25 cents pkh plus GST.
>
> (4) The Lessor must supply electricity to the Lessee without interruption, save for circumstances falling within a genuine *force majeure* event, and when servicing of the electricity generating system by qualified tradesmen is taking place.
>
> (5) The Lessor acknowledges that the fit-out of the leased premises, including all shelving, the cool-room, the freezer-room, the POS system, the counters, the stainless steel sinks, and all air-conditioning units installed in the leased premises, are the property of the Lessee and section 14 of the lease shall apply to the fit-out."

[27] As to lot 2:[34]

> "The Lessor and the Lessee acknowledge and agree as follows:
>
> (1) The Lessor has entered into a contract with MSD Securities Pty Ltd with respect to the sale and purchase of the land described in Item 2 of Form 7 ('the MSD Contract').

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28 Amended Statement of Claim, [22]; TB 402.
29 TB 449; TB 451.
30 TB 153-154 (lot 1); TB 155-156 (lot 2).
31 TB 449; TB 451.
32 Amended Statement of Claim, [17]; Amended Defence, [1].
33 TB 154.
34 TB 157.

(2) From the 1st of September 2014, until completion of the MSD Contract, or the termination of the MSD Contract, whichever first occurs, the Lease shall be rent free.

(3) Upon the completion of the MSD Contract, the rent shall decrease to $24,000 per annum excluding GST payable to the Lessor by equal monthly instalments of $2,000 excluding GST in advance.

(4) The Lessee will pay electricity supplied to the leased premises by the Lessor at 25 cents pkh plus GST.

(5) The Lessor must supply electricity to the Lessee without interruption, save for circumstances falling within a genuine *force majeure*, and when servicing of the electricity generating system by qualified tradesmen is taking place.

(6) The Lessee may terminate the lease by giving three (3) months written notice to the Lessor.

(7) The Lessor acknowledges that the fit-out of the leased premises, including all shelving, the cool-room, the freezer-room, the POS system, the counters, the stainless steel sinks, and all air-conditioning units installed in the leased premises, are the property of the Lessee and section 14 of the lease shall apply to the fit-out."

[28] A central issue for determination is whether these amendments were agreed and registered without the knowledge or consent of MSD Securities. The plaintiffs allege that the amendments to the lots 1 and 2 leases were only discovered by MSD Securities on or about 11 March 2016 whilst reviewing the results of a title search.[35] The defendants do not dispute that MFB Properties facilitated registration of the instruments of amendment.[36] However, the defendants submit, by reference to an extensive history of discussions and communications between the parties and Mr Williams with respect to the leasing of lots 1 and 2, that the plaintiffs effectively consented to the amendments.[37] The plaintiffs submit that an examination of this history does not support the defendants' submission.

[29] Before I examine the relevant history I note that by order of Martin J made on 24 March 2016, MFB Properties was directed to take such steps as are necessary to amend the lot 1 and lot 2 leases so as to reinstate them as they existed immediately prior to the amendments.[38] Neither GDUB nor Mr Williams were a party to the application brought by the plaintiffs before Martin J. The leases have not been amended to reinstate them as they existed immediately prior to the amendments.[39] In compliance with his Honour's order, MFB Properties requested GDUB to execute instruments of amendment by deleting the conditions that were added to the leases. By letter dated 21 April 2016 the solicitors for GDUB stated that their client would not sign the relevant Form 13 amendments unless ordered to do so.[40]

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35 Amended Statement of Claim, [27].
36 Submissions on Behalf of the Defendants, [38].
37 Submissions on Behalf of the Defendants, [39] and [41].
38 Amended Statement of Claim, [36].
39 Amended Statement of Claim, [37].
40 Exhibit 15.

[30] The relevant history consists of contemporaneous documents and three witnesses' recollection of conversations and events.

[31] The plaintiffs called one witness, the third plaintiff, Mr Seabrook. The defendants called two witnesses, namely the fourth defendant, Mr Biancotti and Mr Williams. Mr Biancotti, as well as being sole director of both the first and second defendants, is the de facto partner of the third defendant.[41]

[32] Mr Williams, through his company GDUB, initially leased lot 2 of the Supermarket Land from MFB Properties in or about 2008.[42] Lot 1 was, at that time, leased by a pharmacist who was subsequently killed in a car accident.[43] Mr Williams vacated lot 2 and commenced to lease lot 1 in or about 2010.[44] Lot 2 remained vacant until about 1 November 2014 when Mr Williams, through GDUB, commenced to use both lots 1 and 2 for the purposes of his grocery business.[45] The idea of Mr Williams leasing lots 1 and 2 was discussed on the date that the transaction deed and related contracts were executed. This occurred at the Gold Coast on 13 March 2014. Mr Biancotti wished Mr Williams to meet Mr Seabrook and Mr Brucesmith who were present for the purposes of the execution of the documents. Mr Williams actually witnessed Mr Biancotti's signature on the transaction deed.[46] All three witnesses gave their account of this meeting. Mr Seabrook recalls that Mr Williams was willing to enter into a lease of lot 2 "if the rent was fair".[47] Mr Seabrook indicated to Mr Williams that he was happy to deal with him to make it work but that he was looking for a combined rental income from lots 1 and 2 of $10,500 per month.[48] Mr Seabrook also proposed that each party have a right to terminate the lease for lot 2 on three months' notice.[49] He recalls that Mr Williams did not accept those terms.[50] Mr Seabrook did however mention a rent-free period for lot 2.[51] Mr Seabrook was keen for Mr Williams to enter into a lease of lot 2 as soon as possible because Mr Seabrook required the lease for his financier.[52] He recalls that the rental proposed by Mr Williams for lot 2 was $24,000 per annum plus GST.[53] No agreement in relation to the lease of lot 2 was concluded at the Gold Coast meeting.[54]

[33] In cross-examination Mr Seabrook accepted that he wanted Mr Williams to enter into fresh leases to assist the plaintiffs in obtaining finance.[55] Mr Seabrook also accepted that Mr Williams, in contrast, was cautious about the possibility of expanding into lot

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41 T1-82, lines 10-12.
42 T1-82, lines 35-40.
43 T1-82, lines 40-45.
44 T2-18, lines 37-40.
45 TB 255.
46 TB 1 at 10; T1-83, lines 30-46.
47 T1-25, lines 45-46.
48 T1-26, lines 4-10.
49 T1-26, lines 15-17.
50 T1-26, lines 20-22.
51 T1-26, line 24.
52 T1-26, lines 33-35.
53 T1-26, line 40.
54 T1-27, lines 3-6.
55 T1-39, lines 35-43.

2.[56] Mr Williams' reluctance was based on the fact that the viability of his grocery business was very much dependent upon the successful running of the resort.[57]

[34] Mr Biancotti had been approached by Mr Williams a year or so before the Gold Coast meeting in relation to the leasing of lot 2. Mr Williams told Mr Biancotti that he could only afford "a couple of thousand" a month.[58] Mr Biancotti did not have a good recollection of the conversations between Mr Seabrook, Mr Brucesmith and Mr Williams at the Gold Coast meeting. He was not privy to all of the conversations as he was watching television.[59]

[35] Mr Williams' evidence in respect of the Gold Coast meeting is that both Mr Seabrook and Mr Brucesmith wanted him to pay an amount of approximately $126,000 including electricity per year for both lots 1 and 2.[60] Mr Williams was hesitant to include electricity as part of the rent because he had always been charged on a per kilowatt hour rate of 25 cents for the previous five or six years.[61] He recalls that Mr Seabrook and Mr Brucesmith wished him to sign leases at an inflated rent so as to assist with their financing, with a side agreement reflecting what the actual deal would be in respect of rent.[62] Mr Williams' recollection of the side agreement was that he would pay rent at $2,000 per calendar month plus GST for lot 2. He was however reluctant to enter into even this arrangement because his grocery business was dependent on the successful operation of the resort.[63] He recalls that Mr Seabrook suggested an escape clause, namely that Mr Williams could give three months' notice to vacate lot 2.[64]

[36] Whilst nothing was agreed at the Gold Coast meeting, Mr Biancotti, on 28 March 2014, sent a follow-up email to Mr Brucesmith in relation to the proposed lease of lot 2:[65]

> "As for graham he's [sic] is still waiting to hear from you guys … he's keen to proceed based on a fair and reasonable rent to be agreed upon …"

Mr Williams had a clear recollection of the Gold Coast meeting. I found Mr Williams to be a forthright and credible witness. Whilst I have primarily relied on the contemporaneous documents, where Mr Seabrook's recollection differs from Mr Williams, I prefer Mr Williams' evidence. For reasons given below, I am unable to accept Mr Seabrook's evidence in relation to important aspects of this case. Parts of his evidence were not only self-serving and disingenuous but also inconsistent with contemporaneous documents. Specific examples of this are outlined below.

[37] Although Mr Williams accepted that no formal agreement was made at the Gold Coast meeting,[66] from the very beginning of negotiations between Mr Seabrook, Mr

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56 T1-39, lines 45-46.
57 T1-40, lines 1-6.
58 T1-84, lines 30-34.
59 T1-84, line 20.
60 T2-19, lines 27-35.
61 T2-19, lines 36-37.
62 T2-20, lines 10-19.
63 T2-20, lines 20-25.
64 T2-20, lines 30-32.
65 Exhibit 14.
66 T2-28, lines 1-3.

Brucesmith and Mr Williams, a lease of lot 2 that reflected an inflated rent so as to assist the plaintiffs with finance, together with a side agreement that reflected the true situation was contemplated

[38] On 25 March 2014 at 8.13 am Mr Seabrook sent an email to Mr Biancotti which relevantly states:[67]

> "As you know we did not catch up with Graham and don't have his email to confirm his intension [sic] with the commercial building.
>
> We need a copy of the old lease so we can prepare a new one and we need a letter of acceptance from him to the terms discussed.
>
> This is urgent for valuation and preparation of finance.
>
> On completion of the lease we will do a deed of release where either party can release the lease with 90 days written notice as agreed."

[39] The fact that a side agreement was discussed at the Gold Coast meeting is further evidenced by Mr Seabrook's email to Mr Williams dated 13 July 2014 at 8.31 pm:

> "Hi Graham,
>
> I am waiting for you to confirm your intensions [sic] on the rental of both lots please confirm what you want to do.
>
> All rents are to be provided to us as does the fuel.
>
> We wish you to confirm price and time for the deal on both so we can confirm and complete a deed varying the lease you have been provided to protect you and us."

[40] The proposed side deed is also referred to in Mr Williams' email to Mr Seabrook dated 14 July 2014 at 10.08 am:[68]

> "I have spoken with my Accountant and I am prepared to sign the Lease provided to help with your Finance etc. I have been advised to also get a Dead [sic] (Legal Document) from your Solicitor cancelling this Lease in its entirety.
>
> In consultation with my Accountant I am prepared to agree to a Rent of $84,000pa for both shops. I hope you appreciate I have run the Business since 2008 in very challenging times. I know what is affordable for the business and this rent I have been offering is based on the New Management at PKs performing as we have discussed. As it is more than [sic] I would offer at Current Trading but I am prepared to have faith in the New Management and pay a higher rent upfront and not based on Current Turnover. As offered by you a number of Months ago if the New Management fails to perform and Revenue is not improving at the Store to justify the New Rent I can Terminate the Lease and/or maybe renegotate, [sic] again this needs to be in the form of a Legal Document. Along with

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[67] TB 159.
[68] TB 226.

> your offer of a 3 month Rent Free Period when I take possession of the entire Premises."

[41] In the same email Mr Williams referred to the lessee owning the fit-out and cool/freezer rooms on the basis that he had purchased these from Mr Biancotti a number of years ago or had installed certain equipment at his own cost. As to electricity, Mr Williams stated that he was happy to pay for power at the "Commercial Rate" as per the "Meter Reading". He stated that he had been paying a flat 25 cents per kilowatt hour, as the metre was not set up for peak and off-peak rates.

[42] Mr Seabrook replied to this email by email dated 19 July 2014 at 1.09 pm.[69] He was not prepared to offer three months rent free and advised the rate for electricity at 30 cents per kilowatt hour. Relevantly Mr Seabrook stated: "If you have a concern about the deed of variation to the lease please have your lawyer draw it up it is a simple document."

[43] By email dated 26 July 2014 sent at 2.06 pm, Mr Williams informed Mr Seabrook that he would not agree to each party having a right to terminate upon three months' notice:[70]

> "I will not agree to a 3 month clause for both Parties to Terminate the Lease. We did not agree to this on the Gold Coast. What we agreed to was my rent plus $2000pcm, 3 mth clause for tenant to terminate the lease to alleviate my concerns if New Management fails to turned [sic] the resort around as im [sic] agreeing to a new rent before performance of New Mgmt has been proven. Whats the point me agreeing to the Landlord being able to Terminate my Lease on me at anytime? What would I be working for just to be thrown out?"

[44] Mr Williams also referred to the fact that he had been in limbo for the past several months with the property not settling. He stated that until he had a guaranteed future and lease he would not be expanding into lot 2. He was however happy to agree to electricity at 30 cents per kilowatt hour.

[45] On 11 August 2014 Mr Williams, through his solicitors, informed the solicitors for MSD Securities that he only wished to proceed with the lease of lot 1. The terms suggested were the same rental as he was paying to Mr Biancotti, namely $60,000 per annum plus GST. Electricity was to be paid at the current rate of 25 cents per kilowatt.[71]

[46] On 27 August 2014 at 7.04 pm Mr Seabrook wrote to Mr Williams in the following terms:[72]

> "Well get [sic] Mark [Biancotti] to provide electricity.

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69 TB 227.
70 TB 229-230.
71 TB 234-235.
72 TB 236.

> Any way we are happy for you to pay him for rent we will claim at settlement.
>
> Just get him to do what he promised so you can move in and even enter into a lease with him as agreed with the deed and we will transfer that at settlement.
>
> We are happy for a rent free period till settlement on both areas but not electricity.
>
> Make time and let us know this can be resolved quickly."

This is an important email because it shows that Mr Seabrook was content to permit, and indeed directed, Mr Williams to sort out the lease arrangements (including the side agreement) for lots 1 and 2 with Mr Biancotti.

[47] This was confirmed by Mr Seabrook in a further email sent to Mr Williams on 28 August 2014 at 8.43 am[73] which relevantly states:

> "We have always said we would look after you but you continue not to pay the rent to us and we have possession and rights to the income we will not negotiate this issue. It is your mate who has failed to do the repairs for you to move into the other shop and assist in this issue which has caused the delay in finance as this is the question from the bank why? We are frustrated at what has happened and doing our best to finalise everything but Mark in not doing what he promised is making it difficult to show we have a lease for all the building. We will continue to resolve this but you need to decide if you are serious to get him to do a lease he can use the one we did and a deed of variation to what was agreed and move in. The issues in settlement should not concern you."

[48] According to Mr Williams, in September 2014, when he was making a visit to his business, Mr Seabrook offered him "rent free" until settlement if he moved into the "back premises", lot 2.[74] Accordingly, Mr Williams agreed to move into lot 2 and commenced to arrange works to combine lots 1 and 2.[75] Mr Williams stated that Mr Seabrook, on approximately a dozen occasions, instructed him to enter into leases with Mr Biancotti, as he was still the landlord, with a side deed.[76] Mr Seabrook in cross-examination accepted that he had urged Mr Williams to enter into a lease with Mr Biancotti in relation to lot 2 as agreed, with such lease being transferred to Mr Seabrook's company at settlement.[77] Mr Seabrook also accepted that he had told Mr Williams that he was happy for a rent free period until settlement on both areas.[78]

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73 Exhibit 12.
74 T2-22, lines 15-17.
75 T2-22, lines 25-37.
76 T2-22, line 45 to T2-23, line 6.
77 T1-54, lines 27-30.
78 T1-54, lines 32-35.

[49] In any event, at the expense of Mr Williams and Mr Biancotti, repairs were done to lot 2 so as to enable Mr Williams to move into lot 2. Mr Seabrook never objected to Mr Williams expanding into lot 2.[79]

[50] In an email sent on 5 September 2014 at 9.02 am Mr Seabrook informed Mr Williams:[80]

> "Spoke to my lawyer and he said we could do the lease and an agreement that would satisfy the banks but it was easier if Mark did it with you and then transferred when we settle."

[51] In the same email Mr Seabrook confirmed that he was happy to have started the electricity cost at 25 cents per kilowatt hour.

[52] On 9 September 2014 at 7.25 pm Mr Seabrook wrote to Mr Biancotti in the following terms:[81]

> We have had finance looking at this deal but have asked us why the tenant has not moved in the premises and will need another valuation and they have said that if Graham has a lease with you on the same terms as we have advised to be transferred to us on settlement (we have discussed this with Graham) they can push that through reasonably quickly which will settle that side of the issue and the other side we are having banks wanting us to have 6 months figures as they do not believe the previous figures because of the changes and the mistakes provide to the valuer.
>
> So if you get Graham in there we will revalue both and get that finished as quick as we can. We have two banks who have shown good interest and have also said they would look at the business after the first is completed."

By this email Mr Seabrook contemplated that Mr Williams and Mr Biancotti would enter into a lease for both lots 1 and 2 on terms that would satisfy the plaintiffs' financiers. Any such lease arrangement entered into between Mr Biancotti and Mr Williams was always contemplated by all parties, including Mr Seabrook, to be subject to the "side agreement".

[53] On 14 September 2014 by an email sent at 12.16 pm, Mr Seabrook suggested to his own solicitors the following:[82]

> "We have a letter of offer as you are aware and this is good but in discussions the financier may wish a new valuation and is going to ask the question about the rental of the whole building. I have suggested to Frank to discuss with Mark in signing the lease with Graham from the 1st July and providing a rent free for the extra space till we settle so there is a lease in place when it is valued as the last valuation was on that basis.
>
> I had a meeting with Graham and he is happy to do this.

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79 T1-60, lines 42-43.
80 TB 238-239.
81 TB 240.
82 TB 242.

> Can we do this and if so can it be actioned quickly so we can accept the letter of offer and proceed to approval for settlement."

[54] As at October 2014 there was some chance of a settlement. Mr Williams, in an email sent by his solicitors, outlined the basis upon which he would agree to lease lot 1 and 2 from MSD Securities.[83] For lot 2 the rental would be $24,000 per annum plus GST with the lessee having a right to terminate upon giving one month's notice. Mr Williams would also seek some special conditions which were to be further discussed. The rental for lot 1 would be $60,000 per annum plus GST, with electricity payable at 25 cents per kilowatt hour. The email also referred to the fact that on 1 November 2014 Mr Williams commenced using lot 2. This offer was made in anticipation of a settlement occurring in October 2014.[84]

[55] Having had no response from the solicitors for MSD Securities in respect to the proposed terms, Mr Williams emailed Mr Seabrook on 9 February 2015 requesting Mr Seabrook to ask his solicitors to confirm the terms for the lease agreement with Mr Williams' solicitors so the matter could be finalised.[85] Mr Williams followed this up with an email sent on 10 February 2015 at 1.48 pm requesting confirmation of the terms.[86] Mr Seabrook replied on the same day at 3.35 pm in the following terms:[87]

> "The only term we said was different was three (3) month notice not one. The rest was agreeable."

[56] Mr Seabrook then caused his solicitors to draft up leases for lots 1 and 2, which generally reflected the terms suggested by the solicitors for Mr Williams. In these draft leases[88] the rental for lot 1 was $60,000 per annum, with electricity supplied to the premises at cost, which was then 30 cents per kilowatt hour.[89] For lot 2 the rental was $24,000 per annum, which was not payable until MSD Securities had completed settlement on the purchase of lot 2. Electricity was the same as for lot 1. Importantly the draft contained a unilateral right for the lessee to terminate the lease for lot 2 upon the giving of three months' written notice.[90]

[57] Mr Seabrook in evidence suggested that he forwarded these draft leases by email to Mr Williams.[91] No such email has been disclosed and he has not provided a copy of any such email to his solicitors. Mr Seabrook stated that his computer had crashed and he did not know whether his own solicitors had a copy of an email to Mr Williams enclosing the leases. I do not accept Mr Seabrook's evidence. Mr Williams was emphatic that he did not receive a copy of these draft leases.[92] In spite of Mr Seabrook having given instructions to his solicitors to draft a lease for lot 2 that incorporated a unilateral right on the part of the lessee to terminate upon the giving of three months'

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83 TB 251; TB 255-256.
84 TB 244-251.
85 TB 260.
86 TB 259.
87 TB 259.
88 TB 261-320.
89 TB 265.
90 TB 294.
91 T1-58, line 44 to T1-59, line 1.
92 T2-31, lines 26-29.

notice, Mr Seabrook insisted that this was never agreed.[93] In light of Mr Seabrook's email sent 10 February 2015 at 3.35 pm[94] and the terms of the proposed draft lease for lot 2 prepared by Mr Seabrook's solicitor, I do not accept Mr Seabrook's evidence on this topic. His evidence in this respect was unconvincing and self-serving:

> "HIS HONOUR: Can I take you to page 294, thanks?--- Yes, your Honour.
>
> This is the draft that your solicitors did for the lease for lot 2, so we're talking about lot 2, and you'll see it's item 13 special conditions, and under the heading Early Termination, you'll see that the right to terminate the lease upon three months' notice rests solely with the tenant?--- Yes, I see that, your Honour.
>
> Did you give instructions to your solicitors to draft the lease in those terms?--- No, it was three months either side, and I did give Mr Williams an email, which is in the file there somewhere, that I did say to him it's three months either side, and he came back saying he doesn't accept the lease based on that.
>
> But coming from your own solicitors – this draft is from your own solicitors, is it not?--- Yes.
>
> It would seem that the condition is or the special condition is three months' termination on the tenant's discretion?--- Yes, your Honour. I didn't notice that."

[58] The reference made by Mr Seabrook to an email suggesting a mutual right to terminate would appear to be a reference to Mr Williams' email of 26 July 2014 sent at 2.06 pm in which Mr Williams stated that he would not agree to both parties having the right to terminate upon three months' notice.[95] The draft leases were not created until on or about 16 March 2015, some eight months after this email was sent. Negotiations in relation to the clause concerning the right to terminate had proceeded to the point where, in his email dated 10 February 2015 sent at 3.35 pm[96] Mr Seabrook had accepted the special condition suggested by Mr Williams, except that it should be three months' notice rather than one month notice. It is, in my view, misleading for Mr Seabrook to refer to an earlier email for the purposes of suggesting that the three month termination clause had not been agreed.

[59] What is significant about the draft leases is that the named lessor was MSD Securities rather than MFB Properties. The draft leases therefore contemplated settlement being achieved. The draft lease for lot 2 not only contemplated the rent of $24,000 per annum being paid upon completion of settlement, it expressly noted in the special conditions that the tenant would not be required to pay the rent until the landlord had completed settlement.[97]

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93 T1-53, lines 27-29; T1-71, lines 31-36; T1-73, lines 1-16.
94 TB 259.
95 TB 229-230.
96 TB 259.
97 TB 294.

[60] On 20 March 2015 Mr Williams emailed Mr Seabrook enquiring about the leases:[98]

> "Spoke to my Solicitor yesterday and I am told not still no word from your Solicitor.
>
> it's been several months now that we have been waiting for your Solicitor to confirm details for the new lease. It was my understanding this was needed for your Finance .. What is the problem Mark?"

This email corroborates Mr Williams' evidence that he had not received the draft leases for lot 1 and lot 2 from Mr Seabrook. Mr Seabrook responded to Mr Williams' email on the same day:[99]

> "I have seen the two leases and they were complete over two weeks ago.
>
> I think this has been held up as we are discussing selling the building to Mark as part settlement. This is due to the fact of difficulties getting finance due to everyone knowing everyone and talking in Cairns.
>
> We are working on it and it will not affect you and the deal is as discussed I will send you the leases I have received so you can see they were done. Please look at the dates. We are doing what we can do."

[61] Because of the difficulties the plaintiffs were experiencing in obtaining finance in order to settle, two alternative proposals were floated. The first was that Mr Biancotti would retain lots 1 and 2.[100] The second was that the parties would sell lots 1, 2, 3 and 4 and the resort business together with Mr Williams' business to a third party.[101] This reached the stage of a draft deed.[102] In any event, neither proposal eventuated and the plaintiffs continued to seek finance in order to settle. By the above email however, Mr Seabrook confirmed with Mr Williams that "the deal is as discussed".

[62] On 26 March 2015 MFB Properties entered into leases in respect of lots 1 and 2 with GDUB. The rental for lot 2 was $50,000 per annum excluding GST. The commencement date for the lease was 1 January 2015. Each lease for lot 1 and lot 2 contains a personal guarantee by Mr Williams.[103] Mr Biancotti has never collected rent from Mr Williams in relation to lot 2.[104] According to Mr Biancotti the leases were entered into at Mr Williams' request in order to "confirm his commitment":[105]

> "that was – and he – you know, there was communication between him and Mr Seabrook leading up to it."

Mr Biancotti knew that Mr Williams was not interested in paying rent for lot 2 beyond $24,000 per annum.[106] Whilst Mr Biancotti did not send to Mr Seabrook copies of the

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98 TB 322.
99 TB 321.
100 TB 323.
101 TB 324.
102 TB 326-334.
103 TB 123-124; TB 150-151.
104 T1-88, lines 42-43.
105 T1-89, lines 14-17.
106 T1-90, lines 8-16.

leases executed on 26 March 2015, he did send a similar template for such leases to Mr Seabrook in early 2014.[107] Mr Biancotti's evidence in this respect would appear to be corroborated by Mr Williams' email to Mr Seabrook dated 14 July 2014 sent at 10.08 am where Mr Williams states:[108]

> "I have spoken with my Accountant and I am prepared to sign the Lease provided to help with your Finance etc. I have been advised to also get a Dead (Legal Document) from your Solicitor cancelling this Lease in its entirety."

[63] Mr Biancotti rejected any suggestion that he entered into these leases on 26 March 2015 to assist him in obtaining finance from Bendigo Bank.[109] Mr Biancotti stated that it was only because of Mr Seabrook's offer that Mr Williams occupied lot 2.[110] Mr Williams' evidence was to similar effect:[111]

> "The only reason I took up occupancy of lot 2 was Mark Seabrooks' assurances that I could vacate lot 2 at any time by giving the notice, that the rent on lot 2 was $2000 per calendar month and the only reason – one of the main reasons why I expanded into lot 2 was because Mark Seabrook said I could have that rent-free until settlement."

[64] The evidence of both Mr Biancotti and Mr Williams was that in entering into the leases on 26 March 2015 they were acting on Mr Seabrook's request. This was in circumstances where Mr Biancotti never had any intention to collect rent for lot 2 from Mr Williams, nor did Mr Williams ever contemplate paying $50,000 per annum rental for lot 2.[112] Mr Biancotti, in entering into the leases, was acting under Mr Seabrook's instructions.[113] Similarly Mr Williams, in entering into the 26 March 2015 leases, believed he was acting on the instructions of Mr Seabrook.[114]

[65] On 24 December 2015 the solicitor for MSD Securities wrote to the solicitors for MFB Properties in relation to preliminary requirements for MSD Securities' financier. In that email[115] reference was made to the "convenience store" remaining on a month-to-month lease. In response, the solicitors for MFB Properties provided the two leases entered into on 26 March 2015.[116] Full copies of these leases were provided on 7 January 2016.[117]

[66] Mr Seabrook's evidence is that prior to the signing of these leases on 26 March 2015 he did not give his consent to either Mr Williams or Mr Biancotti to enter into these

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[107] T1-91, lines 1-15.
[108] TB 226.
[109] T1-92.
[110] T1-93, lines 10-15.
[111] T2-24, lines 14-18; T2-35, lines 20-27; T2-40, lines 24-37.
[112] T2-25, lines 5-8.
[113] T1-100, lines 33-45.
[114] T2-22, line 45 to T2-23, line 6; T2-24, lines 20-21; T2-30, lines 13-15; T2-31, lines 8-12; T2-31, lines 40-45; T2-32, lines 3-6; T2-32, lines 31-34 and T2-37, lines 40-43.
[115] TB 337.
[116] TB 339.
[117] TB 341.

leases.[118] When he noticed that the lease for lot 2 was for an annual rental of $50,000 he was "very surprised".[119] He was very happy about this rental because it was more than he had been expecting.[120] I found Mr Seabrook's evidence in this respect particularly disingenuous. It ignores the extensive history of negotiations between Mr Williams, Mr Biancotti and himself. His evidence ignores the fact that he made numerous requests to Mr Williams to enter into a lease for lot 2 with Mr Biancotti. It also ignores that Mr Seabrook had sought to have these leases show an inflated rental so as to assist him in obtaining finance. The lease for lot 2 was always subject to the mutual understanding of the "side agreement" as contemplated by the parties. Mr Seabrook knew that Mr Williams had moved into lot 2. According to Mr Williams, after entering into the lease for lot 2 on 26 March 2015 he informed both Mr Seabrook and Mr Brucesmith, when they kept cutting his power off during the course of 2015, that he had current leases with Mr Biancotti. He further informed them that they were in breach of his leases. According to Mr Williams, these telephone conversations took place in September 2015.[121] I accept this evidence.

[67] Unsurprisingly the plaintiffs have consented to a transfer of lots 1 and 2 subject to the 26 March 2015 leases as disclosed.[122]

[68] Mr Biancotti and Mr Williams gave evidence in relation to the amendments to the leases entered into on 22 February 2016 and registered on 29 February 2016. Mr Biancotti recalls in the context of the contemplated March 2016 settlement, that Mr Williams was very wary of the situation. He asked Mr Biancotti as to his understanding of the agreement with Mr Seabrook relating to variations. The amendments were drafted by Mr Williams' solicitor.[123] The amendments to lot 1 in clause 2 provides that the lease shall be rent free from 1 September 2014 until settlement.[124] Mr Biancotti states that that stipulation has not been carried into effect.[125] Mr Biancotti has been collecting rent from Mr Williams in relation to lot 1. It is no part of the defendants' case that the rental for lot 1 should not be accounted to MSD Securities upon settlement.[126] Mr Williams' explanation for this apparent anomaly is that it was probably a misunderstanding or misinterpretation by his solicitor.[127]

[69] Mr Seabrook's evidence in relation to the amendments to lot 2 is that he had no knowledge of these amendments prior to the failed settlement on 3 March 2016 and did not consent to these amendments.[128] I do not accept this evidence. Mr Seabrook was aware that there were many discussions with Mr Williams in relation to the side agreement, including his instruction to Mr Williams to complete the lease arrangements

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[118] T1-30, lines 15-30.
[119] T1-32, lines 9-10.
[120] T1-32, lines 13-15; T1-63, lines 13-15.
[121] T2-32, lines 22-30.
[122] TB 402.
[123] T1-89, lines 25-32.
[124] TB 154.
[125] T1-89, line 41.
[126] See Exhibit 1.
[127] T2-40, line 41 to T2-41, line 21.
[128] T1-33, lines 36-43.

with Mr Biancotti. Mr Seabrook's evidence in relation to the "side agreement" is as follows:[129]

> "There was many discussions to have agreement, but I've always said – said to him that we need do a deed of variation to that could be always – show exactly what we agreed when it comes to settlement."

[70] Whilst Mr Seabrook accepted that he wanted Mr Williams and Mr Biancotti to enter into lease arrangements, he stated that this was subject to him being happy with the terms.[130] Mr Seabrook's primary objection to the amendments to lot 2 is that they did not exactly mirror what had been discussed with Mr Williams:[131]

> "No, but you'd agreed to the incidents recorded in those amendments. You'd previously agreed to - - -?--- There are many things that are agreed and not agreed - - -"

Irrespective of whether Mr Seabrook and Mr Williams had agreed that electricity would be paid at either 25 or 30 cents per kilowatt hour, the contemporaneous documents establish that the true rental payable by Mr Williams for lot 2 was $24,000 which was not payable until settlement. This agreement is corroborated by the fact that no rent was paid by Mr Williams to Mr Biancotti for lot 2, neither $50,000 per annum from 1 June 2015 nor $24,000 per annum. On the whole of the evidence, Mr Seabrook must have known that the rental payable on lot 2 was $24,000 per annum, rent free until settlement. As discussed above, he also knew that the lease of lot 2 would be subject to a unilateral termination by the lessee upon three months' notice.

[71] Mr Biancotti and Mr Williams, having been requested by Mr Seabrook to conclude the lease arrangements for lots 1 and 2 sought to accurately reflect the terms of the "side agreement" in the amendments. This was done by reference to the email correspondence between Mr Seabrook and Mr Williams.[132]

[72] The parties' submissions in respect of the issue of consent centred on clause 10.7(1)(a) of the Supermarket Land and Resort Land contract which I have quoted above. The clause prohibited MFB Properties dealing with the "Property" or any of the "Commercial Tenancies" without MSD Securities' consent. "Property" is defined to mean the lots, improvements and the included chattels.[133] "Commercial Tenancies" is defined to mean the tenancies referred to in the Commercial Tenancy Schedule. The schedule only refers to the month-to-month tenancy. The words "deal with" and the word "consent" are not defined in the contract. The ordinary meaning of the words "deal with" is to take action with respect to.[134] The word "consent" means to "assent, acquiesce, permission."[135]

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[129] T1-41, lines 11-16.
[130] T1-55, lines 43-47.
[131] T1-63, lines 29-30.
[132] T2-25, lines 23-36; T1-98, lines 1-7; T1-100, lines 33-45.
[133] TB 19.
[134] *Macquarie Concise Dictionary*, 5th ed (2009), 319.
[135] *Macquarie Concise Dictionary*, 5th ed (2009), 266.

[73] The relevant dealing is MFB Properties agreeing to the amendments to the leases for lot 1 and 2 on 22 February 2016 and their subsequent registration. The plaintiffs submit that this was done without MSD Securities' consent because the leases that were entered into on 26 March 2015 were agreed to by the plaintiffs on 3 February 2016. Therefore, according to the plaintiffs:[136]

> "Whatever transpired between the parties in 2014 and early 2015 was taken up and superseded by the written leases entered into in March 2015."

[74] The plaintiffs further submit that the history of the negotiations which I have outlined above preceded the plaintiffs' authorisation and consent to the lot 1 and 2 leases. This course of negotiations, according to the plaintiffs, cannot constitute consent on the part of MSD Securities to the amendments because they "predate entry into the concluded written leases to which the plaintiffs agreed".[137] This submission however ignores the numerous express requests made by Mr Seabrook to both Mr Biancotti and Mr Williams to finalise the leasing arrangements between themselves. Mr Seabrook accepted that he had "urged" Mr Williams to enter into a lease with Mr Biancotti in relation to lot 2 as agreed. This lease would be transferred to MSD Securities at settlement.[138] Mr Seabrook also accepted that a deed of variation to the lease of lot 2 was intended to be done.[139] The plaintiffs do not explain in submissions how MSD Securities' consent to the 26 March 2015 leases altered these agreed arrangements. In cross-examination Mr Seabrook was specifically asked whether he ever told Mr Williams that he did not want him to proceed to establish a lease with Mr Biancotti direct. Mr Seabrook's response to this question was unsatisfactory. He stated that he was happy for Mr Williams to enter into a lease with Mr Biancotti "as long as we are happy with the terms, that suited us."[140] This qualification suggested by Mr Seabrook is not corroborated by reference to the contemporaneous documents, nor is it consistent with Mr Seabrook's conversations with Mr Biancotti and Mr Williams. To the contrary, the evidence supports a finding that Mr Seabrook authorised Mr Williams and Mr Biancotti to enter into lease arrangements generally in the terms disclosed in the contemporaneous documents.

[75] All parties contemplated that any lease for lot 2 at a rent higher than $24,000 per annum and without a unilateral right for the lessee to terminate upon giving three months' notice, would be the subject of a deed of variation or "side agreement". The plaintiffs submit however that any consent or agreement to the terms of the amended lot 1 and lot 2 leases preceded the express written consent given by MSD Securities on 3 February 2016[141] to the leases entered into on 26 March 2015 and registered on 26 February 2016.[142] This submission is inconsistent with the fact that Mr Seabrook had largely agreed with Mr Williams the general terms of these amendments. The mere fact that settlement was delayed from the time of such agreement does not affect the authorisation given by Mr Seabrook to Mr Biancotti and Mr Williams. There is no evidence that Mr Seabrook's authorisation was altered or withdrawn because of the delay in settling. Nor does it matter that Mr Seabrook and Mr Williams had never

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136 Plaintiffs' Submissions, [8].
137 Plaintiffs' Submissions, [37].
138 T1-54, lines 28-30.
139 T1-42, lines 25-27.
140 T1-55, lines 43-46.
141 TB 402.
142 Plaintiffs' Submissions, [41].

"formally" agreed to the terms of the letter of 13 January 2015.[143] This is because Mr Seabrook ultimately left it to Mr Biancotti and Mr Williams to enter into the lease arrangements for lots 1 and 2. As I have already observed, the amendments agreed to for the lot 2 lease by Mr Biancotti and Mr Williams on 22 February 2016 generally reflected those terms previously agreed as between Mr Seabrook and Mr Williams.[144]

[76] Accepting that the agreement to amend the leases entered into on 22 February 2016 and the subsequent registration of those instruments of amendment constitute a dealing by MFB Properties with the "Property" I am not satisfied that this dealing was undertaken without the consent of MSD Securities. The dealing, including registration, was implicit in Mr Seabrook's continuing authorisation for Mr Biancotti and Mr Williams to enter into lease arrangements for lots 1 and 2.

Issue 2 – If yes, is the quantum of the damages arising from the breach that sought by the first plaintiff?

[77] As I am not satisfied that MFB Properties has breached clauses 8.3 and 10.7(1)(a) of the Supermarket Land and Resort Land contract it is unnecessary for me to consider the quantum of damages. Had I found such a breach I would not otherwise have been satisfied that the measure of damages is that submitted by the plaintiffs. The alleged breaches are said to give rise to loss and damage in the sum of $216,828.60 (as at 17 October 2016).[145] A substantial part of this claim is for lost rent in respect of lot 2. The total amount of lost rent for lot 2 is $146,914.20. $111,184.32 of this amount is claimed for the period 18 October 2016 to 31 December 2019 on the basis that MSD Securities would have been entitled to an annual rent (together with a fixed rent revenue increase) of approximately $55,000 per annum for lot 2. The defendants submit however that the measure of damages should not be the aggregate shortfall of rental and electricity charges MSD Securities claims it would have been entitled to charge the lessee over the currency of the two unamended leases.[146]

[78] The amount to be awarded by way of damages for breach of contract should, as near as possible, put the party in the position that it would have been in had the contract actually been performed.[147] The defendants submit that where the object of the contract in question is, as here, the acquisition of a marketable asset, vindication of the party's expectation interest can adequately be achieved by an award of damages which is reflective of the diminished value of the asset concerned as an article of commerce. The defendants refer to the decision of Keane JA (as his Honour then was) in *UI International Pty Ltd v Interworks Architects Pty Ltd*:[148]

> "In the present case, when one applies the fundamental principle as to the measure of damages for breach of contract by asking what amount of money

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143 TB 255.
144 Submissions on Behalf of the Defendants, [74]-[75].
145 Plaintiffs' Submissions, [51].
146 Submissions on Behalf of the Defendants, [80].
147 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 80 and 98 per Mason CJ and Dawson J, 134 per Deane J; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 286 at [13]; *European Bank Ltd v Evans* (2010) 240 CLR 432, 437-438 at [11]; *Clark v Macourt* (2013) 253 CLR 1, 5 per Hayne J, 11 per Crennan and Bell JJ, 19 per Gageler J, 30 per Keane J.
148 (2008) 2 Qd R 158, 191 at [89].

> is necessary to put the plaintiff in the position it would have been had the product been marketable as promised, the answer is: that amount of money which reflects the difference between actual realisable value in the market and the realisable value the product should have had. The measure of damages which gives effect to the fundamental principle is the difference in market value." (Citations omitted).

[79] Here, had the contract been performed without the amendments to the leases for lots 1 and 2, these lots would have been transferred subject to the original leases entered into on 26 March 2015. The defendants submit that the measure of damages should therefore be the difference in the diminution in the value of the land transferred. As the plaintiffs have failed to lead any evidence as to diminution in value, they have failed to establish loss and damage. The defendants further submit that the Court should not assume that the relevant diminution in value is equivalent to the difference in projected rental income streams.[149]

[80] The plaintiffs raise two matters in answer to these submissions. First it is submitted that the defendants did not plead that the measure of loss and damage is to be assessed in the manner in which they now contend.[150] I do not accept this submission. In response to the plaintiffs' plea of damages for breach of contract[151] the defendants plead that MSD Securities has not suffered loss or damage caused or occasioned by or as a result of any breach of contract on the part of MFB Properties, or alternatively, damages of the kind and in an amount quantified in the manner alleged.[152] This plea is in my view, sufficient to put the plaintiffs on notice that the measure of damages contended by the defendants was not the difference in the projected rental income streams.

[81] As to the second matter, the plaintiffs sought to distinguish the decision of Keane JA in *UI International Pty Ltd v Interworks Architects Pty Ltd.* In that case at [88] Keane JA stated:

> "When the asset imperfectly produced or improved by the defendant for the plaintiff is sold by the plaintiff as the parties by their agreement intended, the diminution in market value is, prima facie, the measure of loss which will put the claimant in the position it should have been had the contract been performed."

The plaintiffs submit that it is evident from the above passage that his Honour was discussing a commercial context entirely different to the present case. In that case the appellant sought damages for breach of contract by the respondent for defective design and alleged that those damages ought to be assessed as the cost of demolition and reconstruction of the defective buildings. By contrast, according to the plaintiffs, the present case is not a case whereby the defendants have constructed, produced or improved an asset for the plaintiffs to be sold by the plaintiffs "*as the parties by their*

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149 Submissions on Behalf of the Defendants, [81].
150 Plaintiffs' Submissions, [44].
151 Amended Statement of Claim, [34].
152 Amended Defence, [16(d)].

agreement intended".[153] The fact that the present case concerns a different commercial context does not assist the plaintiffs.

[82] In *Clark v Macourt*[154] the High Court was concerned with the appropriate measure of damages for breach of a warranty in relation to the sale of certain business assets. Hayne J stated: [155]

> "Nor was there, or could there have been, any dispute that when a contract has been breached, the position in which the plaintiff is to be put, by an award of damages, is the position in which the plaintiff would have been *if the contract had been performed*.
>
> The only dispute between the parties was about how these principles were to be applied in this case. Any difficulty encountered in applying these principles stems ultimately from the failure, when speaking of "compensation" for "loss", to identify what "loss" is being compensated. Identification of the relevant loss does not depend (as much of the respondent's argument assumed) on whether the contract can be classified as a contract for the sale of goods." (Citations omitted).

[83] Irrespective of any particular commercial context, the applicable principles remains the same. As further observed by Hayne J: [156]

> "Subject to some limitations, none of which were said to be engaged in this case, damages for breach of contract must be measured by reference to the third kind of loss: the loss of the value of what the *promisee would have received* if the promise had been performed." (Citations omitted).

[84] In the same case Keane J referred to *Bellgrove v Eldridge*:[157]

> "In *Bellgrove v Eldridge* Dixon CJ, Webb and Taylor JJ explained that the practical operation of the ruling principle may vary depending on the commercial context; but that the principle is always applied with a view to assuring to the purchaser the monetary value of faithful performance by the vendor of the bargain. The decision in *Bellgrove v Eldridge* confirms that the circumstances that a case does not involve the transfer of marketable commodities does not displace the application of the ruling principle."[158] (Citations omitted).

[85] By the Supermarket Land and Resort Land contract MSD Securities seek to have transferred to it, upon payment of the balance consideration, land constituting lots 1, 2 and 4. The relevant dealing, on the plaintiffs' case, means that the land will be now transferred subject to the amended rather than the original 26 March 2015 leases. Were a breach of contract to be established, damages should be assessed by reference to the diminution in value of the land that is being transferred. I am not satisfied, for the

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[153] Plaintiffs' Submissions, [48].
[154] (2013) 253 CLR 1.
[155] (2013) 253 CLR 1, 5-6.
[156] (2013) 253 CLR 1, 6.
[157] (1954) 90 CLR 613, 617-618.
[158] (2013) 253 CLR 1, 30-31 at [107].

purposes of granting the declaratory relief sought, that the proper measure of damages is the difference in the projected rental income streams.

Issue 3 – Does the first plaintiff have a legal or equitable right to set-off for any amount of damages against the balance purchase price otherwise payable at settlement?

[86] MSD Securities seeks to set-off the amount of $216,828.60 against the amount it is liable to pay to MFB Properties to complete the transaction deed and related sale contracts.[159]

[87] As to any legal right to deduct this amount from the balance purchase price, the Supermarket Land and Resort Land contract in clause 2.5 identifies the adjustments to be made to the balance purchase price.[160] These include adjustments for outgoings, rates, land tax, rent and special levies. The contract does not expressly permit any adjustments to the balance purchase price for damages for breach of contract.

[88] As to any adjustments for rent, the 29 May agreement in clause 4 provides that from 2 June 2014 MSD Securities and PK's Resort would be entitled "to all income of the business, Cape Land and Round House from the settlement date."[161] Clause 7 of the 31 July agreement refers to the defendants' obligation to repay or allow a set-off for "rent and any other income received by the defendants since 2 June 2014".[162] Whilst these amendments contemplate adjustments being made for rent, or at least rent received, no express provision is made for the set-off of damages for breach of contract. The parties, by their contract, have not expressly excluded the right to assert a set-off. I accept the defendants' submission that the parties have implicitly, by their commitment to a specific and prescriptive contractual regime as to how the balance purchase price may be adjusted, excluded any legal set-off for damages for breach of contract.[163] The question is therefore whether the plaintiffs are entitled to an equitable set-off.

[89] In *HP Mercantile Pty Ltd v Dierickx*[164] Emmett JA stated:

> "For there to be an equitable set-off, the set-off must essentially be bound up with and go to the root of, challenge, call in question, or impeach the title of the claimant. Equitable set-off is available where the party seeking it can show a recognised equitable ground for being, to the relevant extent, protected from its adversary's demand. The mere existence of a cross-claim is not sufficient. There must be some ground for equitable intervention beyond the mere existence of a cross-claim, such that it can be said that the equity of the defendant impeaches the claimant's title to the legal demand being enforced." (Citations omitted).

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159 Amended Statement of Claim, [35(b)].
160 TB 11 at 20.
161 TB 219.
162 TB 232.
163 Submissions on Behalf of Defendants, [88]-[90] referring to *Smith v Acquire Asia Philippines Inc* [2016] NSWSC 1084 at [92] and [93].
164 (2013) 306 ALR 53, 82 at [136].

[90] Equity will therefore allow a set-off in relation to competing claims where one claim impeaches the validity of the other claim. In *Forsyth v Gibbs*[165] Keane JA stated:

> "Consistently with the technique of equity, which does not seek to define what an elephant is but knows one when it sees one, the principles governing the availability of equitable set-off of cross-claims are couched in open textured terms, such as "sufficient connection" and "unfairness". In some cases, it will be necessary to engage in an evaluation of a range of facts which might establish "sufficient connection" or "unfairness" of the relevant kind. But the principles to be applied are not so vague or subjective that it is never possible to determine, for the purposes of an application for summary judgment, that the facts alleged by a defendant simply fall short of what is required." (Citations omitted).

[91] In both passages quoted above what is necessary for an equitable set-off is the existence of a cross-claim. The difficulty I have with an equitable set-off in the present case is that, in circumstances where all parties are desirous of the relevant agreements being specifically performed, the balance purchase price does not constitute a cross-claim. The plaintiffs by reference to two authorities submit however that an award of damages for breach of a contractual obligation of warranty may be set-off against the purchase price payable under the contract. The first authority is *Drane v Aqualyng Holdings & Anor.*[166] In that case Henry J was concerned with a share sale agreement. The plaintiff sought summary judgment for a final payment amount of $1,097,760. The defendant sought to set-off against that amount a tax subject claim. This was in circumstances where clause 10.6 of the relevant share sale agreement provided that a payment to the defendants for a warranty or indemnity claim (which is what the defendants were seeking) was to be treated as a reduction in the purchase price.[167] Unlike the present case, in *Drane* the balance purchase price constituted the subject matter of the claim. Similarly, in the second case referred to by the plaintiffs, *Davis v Perry O'Brien Engineering Pty Ltd*[168] the equitable set-off sought was in response to a monetary claim.[169] In the present case there is no claim by the defendants against which the plaintiffs may assert any equitable set-off.

[92] The plaintiffs submit however that by paragraph 34 of its amended defence, the defendants admit that the contract can and ought to be specifically performed and carried into execution but on conditions, including that the plaintiffs be obliged to tender at settlement the sum of $1,978,497.28. Whilst the defendants have not made a formal counterclaim *per se*, the plaintiffs submit that the effect of what is pleaded at paragraph 34 amounts to a claim for an amount owing by the plaintiffs to the defendants pursuant to the relevant agreements. This submission should be rejected. Under the Supermarket Land and Resort Land contract the plaintiffs and the defendants have interdependent obligations. By clause 2.4(1) the plaintiffs were required to pay the balance purchase price by bank cheque. The defendants were obliged to deliver at settlement the stipulated documents necessary to facilitate transfer of title of the Supermarket Land and the Resort Land to MSD Securities. The mere fact that the

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[165] (2009) 1 Qd R 403, 406 at [9] per Keane JA.
[166] [2016] QSC 139.
[167] [2016] QSC 139 at [55] per Henry J.
[168] [2016] QSC 202.
[169] [2016] QSC 202 at [5(b)] and [6(b)] per Applegarth J.

parties cannot agree on the appropriate adjustments to the balance purchase price does not mean that the defendants are counterclaiming for any monetary amount.

Disposition

1. The plaintiffs' claim for a declaration that the balance consideration to be paid by the plaintiffs to the defendants pursuant to the transaction deed dated 13 March 2014 is $1,616,655.05 is dismissed.

2. I will hear the parties as to further orders, directions and costs.