District Court

New South Wales

Case Name:	Pinaki Holdings Pty Limited v HSDCTLVMB Pty Limited & Anor; Pinaki Holdings Pty Limited v David John Byrne & Anor
Medium Neutral Citation:	[2019] NSWDC 855
Hearing Date(s):	25-29 November 2019, 2-6 December 2019
Date of Orders:	6 December 2019
Decision Date:	6 December 2019
Jurisdiction:	Civil
Before:	Neilson DCJ
Decision:	See [137], [138]
Catchwords:	LANDLORD AND TENANT. Tenant vacates property and ceases to pay rent 13 months before end of term of lease. Rent for whole 13 months recoverable. GUARANTEE. LIABILITY OF GUARANTORS. Former directors of tenant had given unlimited guarantee for tenant's liabilities. Whether liability of guarantors affected by a change of position brought about by tenant's dealings with a third party. INTEREST. Whether stipulated interest rate of 12% per annum in lease was a penalty. CONTRACT. SALE OF BUSINESS AND CERTAIN ASSETS OF BUSINESS. Tenant agrees to sell business and certain assets of business to a third party ('TP'). What assets sold. Whether parties to contract of sale could vary its terms.

EQUITY. EQUITABLE ASSIGNMENT. Whether an equitable assignment of tenant's lease to TP. TP enters into possession of demised premises. Whether TP equitable assignee or weekly tenant.

COMPANY LAW. Whether TP or its director liable to landlord. Whether weekly tenancy between landlord and company, or landlord and director personally.

TRESPASS TO LAND. Removal of certain fittings from demised property by TP.

DAMAGES. MITIGATION. Whether landlord failed to mitigate its losses.

DAMAGES. QUANTUM. Whether "make good", painting and carpet provisions in lease breached. Replacement costs.

CONTRACT. IMPLICATION OF TERMS.

Legislation Cited:

Conveyancing Act 1919
Corporations Act 2001
Sale of Goods Act 1923

Cases Cited:

Ankar Pty Ltd v National Westminster Finance (Australia) Ltd (1987) 162 CLR 549
Australian Mutual Provident Society v 400 Saint Kilda Road Pty Ltd [1990] VR 646
BP Refinery (Westernport) Pty Ltd v The Shire of Hastings (1977) 180 CLR 266
Esanda Finance Corporation Ltd v Plessnig (1989) 166 CLR 131
Finlan v Eyton Morris Winfield [2007] EWHC 914 (Ch)
Karacominakis v Big Country Developments Pty Ltd [2000] NSWCA 313
Lemon v Lardeur [1946] KB 613
Lewy v Moss Nominees Pty Ltd [1996] NSWCA 325
Midcoast Petroleum Pty Ltd v Keldros Pty Ltd [2019] NSWSC 970
Paciocco v Australian New Zealand Banking Group Ltd [2016] HCA 28
Singh v Smithenbecker (1923) 23 SR (NSW) 207
Tabcorp Holdings Ltd v Bowen Investments Pty Ltd

	[2009] HCA 8; (2009) 236 CLR 272 The Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17 Walsh v Lonsdale (1882) 21 Ch D 9 Warren v Keen [1953] 2 All ER Waterways Authority of New South Wales v Coal and Allied Operations Pty Ltd [2005] NSWSC 1285 Young v Lamb (No 2) [2001] NSWSC 1014
Category:	Principal judgment
Parties:	2016/00360721 Pinaki Holdings Pty Ltd – Plaintiff HSDCTLVMB Pty Ltd – First Defendant Jose Vieira – Second Defendant 2018/00050775 Pinaki Holdings Pty Ltd – Plaintiff David John Byrne – First Defendant Matthew William Byrne – Second Defendant
Representation:	Counsel: 2016/00360721 C.R. Ireland – Plaintiff R. Freeman – 1st & 2nd Defendants 2018/00050775 C.R. Ireland – Plaintiff S. Lees – 1st & 2nd Defendants Solicitors: 2016/00360721 Teneo Legal - Plaintiff R E Barros & Company – 1st & 2nd Defendants 2018/00050775 Teneo Legal - Plaintiff Blake Lawyers – 1st & 2nd Defendants
File Number(s):	2016/003607212018/00050775

Publication Restriction: Nil.

JUDGEMENT

05/12/2019

The parties

1 HIS HONOUR: There are before me two sets of proceedings. The plaintiff in each case is Pinaki Holdings Pty Ltd. The first set of proceedings is plaint number 2016/00360721. The defendants in those proceedings are a company known as HSDCTLVMB Pty Ltd, which is the first defendant and the second defendant is Mr Jose Vieira. The second set of proceedings is matter number 2018/00050775. The first defendant in those proceedings is Mr David John Byrne. The second defendant is his brother, Matthew William Byrne. I shall refer in this judgment to HSDCTLVMB Pty Ltd as the company. I shall refer to Mr Jose Vieira, as Mr Vieira. I shall refer to the Byrne brothers as the guarantors.

2 The proceedings arise out of a demise of commercial premises at Gladesville by the plaintiff to a company known as Rova Media Pty Ltd, and its vacation of the premises infra terminum, and a failure by Rova Media Pty Ltd to pay rent until the lease was due to expire 13 months later. I shall refer to Rova Media Pty Ltd as Rova. The guarantors are former directors of Rova, who guaranteed a lease, granted by the plaintiff, to Rova. The company bought the business of Rova and was in possession of the premises for a period of at least four weeks, after the cessation of the occupancy of the premises by Rova. Mr Vieira is a director of the company. The company has as its registered office, 22 Lucinda Avenue Wahroonga, a northern suburb of Sydney. Its sole director is Mr Vieira, whose residential address is that given for the company. The sole shareholder of the company is another company rejoicing in the Latin name Nunc Coepi Pty Ltd, the Latin meaning, “now I begin”. The address for that company is also the residential address of Mr Vieira at Wahroonga. The inference to be drawn is that Mr Vieira is the principal of the company. Mr Vieira is alleged by the plaintiff to be personally liable for what might otherwise be the liability of the company.

The plaintiff

3 The plaintiff company has two directors. They are Mr Pinaki Basu, and his sister, Ms Manisha Basu. They are also the shareholders of the plaintiff. The plaintiff owns the commercial premises at Gladesville, which were the subject of the lease to Rova. The plaintiff also owns three residential properties. The evidence given on behalf of the plaintiff has mainly been given by Mr Pinaki Basu. The inference to be drawn is that the plaintiff is a legal entity protecting Mr Basu's investment properties.

The property

4 The plaintiff bought the commercial premises at Gladesville, now in question, in 2005. The premises in question is Lot 18 in Strata Plan 61065. Those premises are described by Mr David Bird, a certified practicing valuer, in his valuation report, which is exhibit 15, and is dated 17 May 2019. The relevant part of his description is this:

> "The subject property is strata title industrial unit, of a two level nature, suitable for warehouse/office usage, within a 1999 completed development of similar office and warehouse units, within the industrial area of Gladesville.
>
> The subject property is set to the rear of an 18 unit complex to the southern side of Buffalo Road, between Cressy Road and Monash Road, at Gladesville in Sydney's mid north western suburbs.
>
> The surrounding development comprises an older and well established industrial area with a strong mix of 'high tech' or office/showroom usages, along with a considerable presence of automotive related occupancies. Close by is the State Transit Ryde Bus Depot, as well as a major industrial/commercial redevelopment project underway on Victoria Road. Surrounding the industrial estate are established residential areas of a predominantly low density nature, along with medium density developments, closer to the Parramatta River or along the main roadway thoroughfares and close to the town centres. Holy Cross College is close by, as are several parks/reserves and playing fields.
>
> Bus routes pass directly by, whilst the major arterial link of Victoria Road is within 800 metres. West Ryde rail station is within 4 kilometres."

Mr Bird goes on to point out that the current zoning for the area by the Ryde local council is 1N2 Light Industrial. Under the heading "Improvements", Mr Bird says this:

> "A strata title industrial unit, situated to the rear of the block of similar 18 office/warehouse units, completed in around 1990. The subject is the largest unit of the complex, the majority of around 240 300 square metres of strata area, comprising ground floor warehouse space, covered by full first floor office area, and there is a basement car park. A café usage operates out of

> one of the front units. The units are arranged along either side of a central driveway leading to a rear L shape, the subject being situated closing off the rear of the complex along the western side boundary."

Later in the report, Mr Bird points out the area of the lot: ground floor, 231 square metres; first floor, 230 square metres; ground floor car space, 16 square metres; basement car spaces, 122 square metres; total strata area, 599 square metres. That is according to the Strata Plan.

Rova Media

5 When the plaintiff bought the property in 2005, there was an existing tenant described by Mr Basu in his oral evidence as MG UPS Pty Ltd, which was an "IT" company. The property was first let to Rova on 1 August 2009, for a term of four years, with an option to renew for a further period of four years. Rova was incorporated on 19 June 2002, under the name No 1 Taxi Media Pty Ltd. It changed its name to Rova Media Pty Ltd on 16 December 2005. Prior to moving to the premises now in question, it was situated nearby in 1/56 Buffalo Road, Gladesville. The street address for the premises now in question is unit 18, 46-48 Buffalo Road, Gladesville. Mr David John Byrne was, according to records kept by ASIC, a director of Rova between 18 September 2006 and 12 March 2014. He ceased to be a shareholder on 18 February 2015. Mr Matthew William Byrne was a director of Rova between 18 September 2006, until 16 March 2016. He ceased to be a shareholder in effect on 14 July 2015.

6 According to Mr Vieira's evidence, Rova carried on a taxi media business, which involved the placing of advertisements at the rear of and on the roof of taxi cabs. The original lease to Rova can be found at CB 242. A further copy of it can be found at CB 612. As I have indicated, it ran from 1 August 2009 to 31 July 2013, with an option to renew for four years. That option appears to have been exercised, because the second lease commenced on 1 August 2013 for a period of four years ending on 31 July 2017, with no option to renew.

The lease to Rova

7 The second lease, the lease now in question, can be found at CB 151. A number of its provisions need to be considered. The annexure A to the affidavit specifies that the guarantors were David John Byrne and Matthew William Byrne. Their liability was unlimited. The lease as drafted included William

Edward Cole as a guarantor, but his name has been deleted. It would appear from other evidence that prior to 1 August 2013, Mr Cole had died.

8 Item 13 of annexure A specified that the rent for the first year of the lease was $110,860 plus GST, to be paid by monthly instalments of $9,238.33 plus GST. Item 13 goes on to point out that at the end of each year, the rent was to be adjusted in accordance with the review process contained in other parts of the lease.

9 Item 14 in annexure A specifies outgoings, 100% of which were to be paid by Rova. It specifies these things as the outgoings:

> "Outgoings -
>
> (a) local council rates and charges;
>
> (b) water sewerage, water usage and drainage charges
>
> (c) land tax;
>
> (d) insurance;
>
> (e) management fees;
>
> (f) air conditioning maintenance; and
>
> (g) all levies and contributions of whatsoever nature determined and/or levied by the owner's corporation or any strata managing agent lessee, with the exception of any contributions to a sinking fund or special levy in respect of the strata scheme, of which the property forms part (if applicable)."

The item goes on to refer to the outgoings being for the part of the property which is covered by the lease. That appears to be unnecessary verbiage in the circumstances of the current lease.

10 Item 15 in annexure A specifies an interest rate of 12% per annum.

11 The standard conditions of the lease are contained in annexure B. Between annexure A and annexure B are a set of conditions headed, "Alterations and additions to annexure B". I shall refer to these, if necessary, as the “special conditions”.

12 There are a number of special conditions which need to be noticed. They are these:

> "8. Repair and maintenance:
>
> (a) Notwithstanding anything here contained, the tenant shall be responsible for all repair and maintenance of the demised premises,

and any part thereof, excluding matters of a structural nature.

(b) The tenant's obligation to repair and maintain as above shall include the obligation to replace at the tenant's expense.

(c) Any replacements shall, upon the tenant's vacating the demised premises, become the property of the landlord.

9. Lessee to bear charges:

(a) In addition to the rent and outgains payable by the lessee under the lease, the lessee shall bear and pay:

(i) the costs of maintenance and upkeep of the premises by the lessor, excepting items of a structural nature, and having regard to the condition thereof at the commencement of the tenancy; and

(ii) the costs of operation and maintenance of all services provided, and all utilities consumed by or supplied to the lessee.

(b) In respect of the demised premises:

(i) the lessee shall pay any GST payable in respect of the above charges, GST being additional thereto; and

(ii) monies payable by the lessee under this clause shall be paid by the lessee to the lessor forthwith upon written demand being made upon the lessee.

10. Outgoings:

(a) At the commencement of the lease term, and upon each anniversary thereafter, the lessor will provide to the lessee an estimation of the outgoings payable by the lessee under the provisions of this lease.

(b) The lessor may elect to provide such estimation at different times to that specified above, but not less than annual intervals.

(c) Failure by the lessor to provide such an estimation shall not constitute or be deemed to constitute either a waiver of the right to provide the estimate, or a waiver of the obligation of the lessee to pay the outgoings as elsewhere provided.

(d) The estimation of the outgoings provided by the lessor shall be paid in monthly payments by the lessee to the lessor, each such payments[sic] being one twelfth of the total estimated amount.

(e) At the end of the estimation period, the lessor shall provide to the lessee a further calculation of the actual relevant outgoings for the period of the estimation, supported by copies of tax invoices and

receipts (where appropriate), for such outgoings.

(f) The lessor and the lessee shall then adjust the monies payable by the lessee on account of the outgoings against the actual outgoings for the same period.

(g) Any excess paid by the lessee shall be credited to the next outgoing period; and any shortfall shall be paid to the lessor within 14 days.

12. Lessor's consent and consent of third parties to works:

(a) The lessee shall not make any alterations, additions or improvements to the premises without the prior consent of the lessor, except for the installation

of unattached, mobile objects which may be installed without drilling, cutting, or otherwise defacing or damaging the premises, which consent shall not be unreasonably withheld.

(b) For the purpose of obtaining the lessee's consent to any such proposed works, the lessee shall provide full details thereof to the lessor, together with a copy of any relevant plans.

(c) Where any such works require the consent or approval of any third party or parties, including (but not limited to) the local Council, Sydney Water, or the Owner's Corporation, where the demised premises comprises a lot or part of a lot in a Strata Plan, or Community Plan, the lessee shall not carry out any such works unless and until the consent of such third party or parties has been obtained.

(d) The lessee shall supply a copy of such third party consent to the lessor prior to carrying out any such work.

(e) In carrying out the works described above, the lessee shall comply with the requirements of the Building Code of Australia, any applicable standards and any requirements and conditions imposed by any third party or parties.

(f) The lessee shall be solely responsible for the repair and restitution needed to restore the affected premises to the original condition.

14. Lessor's works:

(a) Conditional upon compliance with clause (b) below, the lessor will cause:

(i) four skylights to be installed into the demised premises to add natural light to the rear office area.

(ii) install a small kitchenette on the outside of the conference room, in the position marked D on the attached plan, such kitchenette to include a wall mounted Zip hot water heater, and a sink with cold running water;

('the lessor's works')

(b) The carrying out of the lessor's works is conditional upon the lessor obtaining the consent of the Owner's Corporation, the Local Council, and any other requisite authorities to the works.

(c) The Lessor shall apply for, and pursue, the consent referred to in the preceding subclause with all due expedition.

(d) The lessor's works shall be carried out at the expense of the lessor.

(e) In carrying out the lessor's works, the lessor shall minimise the disturbance caused to the lessee."

13 Clause 14 was part of the first lease granted by the plaintiff to Rova. It would appear to have been reproduced, albeit that the "kitchenette", at least, had been inserted into the demised premises immediately after the commencement of the first lease was therefore unnecessary to insert it in the second lease. I should also point out that the special conditions sometimes spell lessor and lessee with capital letters, and sometimes they do not. I have standardised that for the purposes of this judgment.

14 Annexure B contains a number of clauses which need to be noted. They are these:

> "5.1.5 [The lessee must pay to the lessor, or as the lessor directs] interest on these monies at the rates stated in item 15 in the schedule, when payment is more than 14 days overdue, calculated from the due date to the date of payment;
>
> 7.3.3 [The lessee must also] decorate the inside of the property in the last three months of the lease period (however it ends) 'decorate' here means restoring the surfaces of the property in a style, and to a standard of finish originally used, eg by repainting;
>
> 12.3 When this lease ends, unless the lessee becomes a lessee of the property under a new lease, the lessee must
>
> 12.3.1 return the property to the lessor in the state and condition that this lease requires the lessee to keep it in; and
>
> 12.3.2 have removed any goods and anything the lessee fixed to the property and have made good any damage caused by the removal.
>
> Anything not removed becomes the property of the lessor, who can keep it, and remove and dispose of it, and charge to the lessee the cost of removal, making good and disposal.
>
> 12.6 If there is a breach of an essential term, the lessor can recover damages for losses over the entire period of this lease, but must do every reasonable thing to mitigate those losses and try to lease the property to another lessee on reasonable terms.
>
> 12.7 The lessor can recover damages even if -
>
> 12.7.1 the lessor accepts the lessee's repudiation of this lease; or
>
> 12.7.2 the lessor ends this lease by entering and taking possession of any part of the property, or by demanding possession of the property; or
>
> 12.7.3 the lessee abandons possession of the property;
>
> 12.7.4 a surrender of this lease occurs.

15 13 GUARANTEE

What are the obligations of a guarantor?

> 13.1 This clause applies if a guarantor of the lessee is named in item 10A in the schedule, and has signed or executed this lease or, if this lease is a renewal of an earlier lease, the earlier lease.
>
> 13.2 The guarantor guarantees to the lessor the performance by the lessee of all of the lessee's obligations (including any obligation to pay rent, outgoings or damages) under this lease, under any extension of it, or under any renewal of it, or under any tenancy, and including obligations that are later changed or created.
>
> 13.3 If the lessee does not pay any money due under this lease, under any extension of it or under any renewal of it, or under any tenancy, the guarantor

must pay the money to the lessor on demand, even if the lessor has not tried to recover payment from the lessee.

13.4 If the lessee does not perform any of the lessee's obligations under this lease, under any extension of it, or under any renewal of it, or under any tenancy the guarantor must compensate the lessor even if the lessor has not tried to recover compensation from the lessee.

13.5 If the lessee is insolvent, and this lease or any extension or renewal of it is disclaimed, the guarantor is liable to the lessor for any damage suffered by the lessor because of the disclaimer. The lessor can recover damages for losses over the entire period of this lease or any extension or renewal, but must do every reasonable thing to mitigate those losses and try to lease the property to another lessee on reasonable terms.

13.6 Even if the lessor gives the lessee extra time to comply with an obligation under this lease, any extension of it, or under renewal of it, or under any tenancy, or does not insist on strict compliance with the terms of this lease, or any extension of it, or renewal of it, or of any tenancy, the guarantor's obligations are not affected.

13.7 If an amount is stated in item 10B in the schedule, the guarantor's liability under this clause is limited to that amount.

13.8 The terms of this guarantee apply even if this lease is not registered, even if any obligation of the lessee is only an equitable one, and even if this lease is extended by legislation."

16 I observe at this time, that as a matter of construction, I would construe the words, "under any tenancy", as meaning under any tenancy of the lessee, not as any tenancy of any person. The guarantors were guaranteeing the liability of the lessee, not of anybody who might occupy the premises at any time. The words, "under any tenancy", are actually applicable where the lease expires, and there has been no express extension of it, or any renewal of it, but the lessee stays in possession as a weekly, monthly, or annual tenant at common law. To construe the words, "under any tenancy" as including any tenancy held by the company would, in my view, be absolutely perverse.

17 There is a restriction on the use to which the premises may be put in the strata by laws. A search of the common property of the strata plan is exhibit G. That provides that the by-laws to be created upon registration of the strata plan are the Industrial Scheme model by laws, as far as the first 13 clauses are concerned. Cl 16 is this:

"USE:

A proprietor or occupier of a lot shall not, upon the parcel, carry on any of the following uses:

(i) panel beating workshop

(ii) motor vehicle repair workshop

(iii) motor vehicle or outboard motor mechanic

(iv) auto electrical workshop

(v) repairs to any motors, including outboard and lawn mower motors."

18 A copy of the by-laws can also be found as an annexure to the affidavit of Ms Kellie Tattersall, sworn on 21 June 2019, which is exhibit E1, and can be found at Court Book at 919. The inference to be drawn is that copy of the by-laws was that extant when Ms Tattersall was acting as the real estate agent for the plaintiff immediately after Rova quit possession of the premises on or about 30 June 2016. In other words, from both exhibit G and from the annexure to Ms Tattersall's affidavit, the restriction in use appears to have been effective during the whole of the period relevant to the current proceedings.

Sale of Rova Media's business

19 The next issue to be considered is the purchase of the assets of Rova by the company. In his affidavit of 15 April 2019, which is exhibit 14C, Mr Vieira said this:

"1. I am the second defendant and sole director of [the company].

2. The company is the General Partner of the Appscloud Limited Partnership (Appscloud LP). The Appscloud LP is a corporate

partnership between the company and Omnia In Bonum Pty Ltd.

3. Between 1 May 2016 and 30 July 2016, Appscloud LP acquired and merged two competing media businesses in Australia, Ultimate Media Group Pty Ltd and Rova Media Pty Ltd, which then rebranded and traded under the name 'Nonstop Media'.

4. Appscloud, through a DOCA, with the administrator of Ultimate Media Group Pty Ltd, purchased and operated Ultimate Media Pty Ltd, which had premises at 24/6 Herbert Street St Leonards. The following involved (St Leonards Premises). The St Leonards Premises had numerous computers, servers and racks, which increased as the number of [businesses] acquired increased. The St Leonards Premises had copper lines connected to the installed fibre optic cable in the basement of the complex.

7. In 2016, I was looking for media businesses for the Company to acquire. In and around April or May 2016, I became aware that the business of a company owned by Rova Media Pty Ltd (Rova Media), was for sale.

8. I engaged in negotiations on behalf of the company (on behalf of Appscloud LP) to purchase the business of Rova Media with David Ha and Maureen Cole (on behalf of Rova Media). These negotiations commenced in and around May 2016. During the course of negotiations, I visited the premises from which Rova Media traded at Unit 18…

> 9. During the course of negotiations with Rova Media, due diligence was undertaken by the Company following (due diligence process). To the best of my recollection, the due diligence process occurred during May 2016 and terminated around or just prior to 9 June 2016 when the final agreement was signed. Through the due diligence process, I received a number of documents from which I gained information on the business. I refer to some of these documents below.
>
> 10. During the due diligence process, I became aware that Rova Media leased the Premises and I was provided with a copy of a lease for a term of four years for the premises, commencing on 1 August 2009 and terminating on 13 July 2013. Annexed to hereto and marked 'B' is a copy of a letter from Hughes and Taylor to the manager, Rova Media, dated 28 September 2009, attaching a copy of the lease for the premises for the period 1 August 2009, and terminating on 31 July 2013.
>
> 12. The negotiations between the company and Rova Media culminated in a written agreement being prepared by Brown Wright Stein Lawyers."

20 It should be noted as far as par 8 of that affidavit is concerned, which I have quoted above, that Maureen Cole was a director of Rova from 20 March 2016, and sole director after the retirement of the guarantors. It appears that she was the widow of William Edward Cole, who ceased to be a director on 29 November 2011. Maureen Cole was not a guarantor of the lease now in question, because she was not a director at the time of the execution of the second lease.

The sale agreement

21 The agreement for the sale of business between Rova and the company is a lengthy document, comprising 21 pages, with a four page schedule. Two and a half copies were provided in the Court Book. The first copy can be found at CB 76. A further copy can be found at CB 494. A part copy can be found at CB 649, being a redacted copy because of fears by Mr Vieira that some of its provisions were “commercial in confidence”. The multiplication of relevant documents in the Court Book is something to be decried, and I shall have more to say about that later. There are a number of things to be observed about the agreement, which is dated 9 June 2016. When defining the "purchaser" on the first page of the agreement, this occurs "HSDCTLVMB Pty Ltd … as general partner for the Appscloud Limited Partnership of...(the purchaser)". That ties in with the evidence of Mr Vieira, which I have already quoted.

22 A number of provisions of the agreement need to be considered. Clause 1.1 provides definitions. The word, "Assets" is defined thus "Assets means all interest, right and title of the Vendor to all assets of the Business, including:

> "(a) the Plant and equipment;
>
> (b) to (k) [omitted]
>
> (l) any assets or benefits agreed to be sold or vested in the Purchaser under this Agreement,
>
> but excludes the Excluded Assets."

Clause 1.1 also contains a definition of "Plant and Equipment". It is this:

> "Plant and Equipment means all the plant, equipment (including office and computer equipment), machinery, tools, furniture, fixtures and fittings and the spare parts and accessories for those items owned or used by the Vendor in connection with the Business."

The words, "Excluded Assets" are defined thus:

> "Excluded Assets means the following assets used in or forming part of the business:
>
> (a) cash, including funds held with any bank or financial institution to the credit of the Vendor, and cash on hand as at Completion; and
>
> (b) the assets specified by the purchaser as excluded assets prior to Completion in accordance with clause 7."

The terms "Completion" and "Completion Date" are also defined in cl 1.1:

> "Completion means the completion of the sale and purchase of the Business and the Assets in accordance with cl 19.
>
> Completion Date means the later of:
>
> (a) 28 June 2016; and
>
> (b) such other date as the Vendor and the Purchaser may agree."

Clause 1.1 also defines the "Purchase Price" as meaning $250,000, excluding GST. Clause 4(a) provides for the payment of a deposit of $155,000 as at the time of the making of the contract, that is on 9 June 2016.

23 The Following clauses must also be noted:

> **7. Asset Register**
>
> (a) Within 7 days of the execution of this Agreement, the Vendor will provide to Purchaser a complete list of all the assets of the Business, including but not limited to, the assets listed on the “2016 depreciation schedule”.
>
> (b) Following its compliance with clause 7(a) and by no later than 2 days before the time referred to in clause 7(c), the Vendor will permit the Purchaser

to view the assets of the Business for the purpose of specifying the Excluded Assets.

(c) By no later than 7 days prior to the Completion Date, the Purchaser will provide the Vendor with a list of the assets of the Business that the Purchaser specifies and Excluded Assets for the purpose of this Agreement.

8. Transfer of property and risk

Title to and the risk of the Business and the Assets:

(a) until Completion, remains solely with the Vendor; and

(b) on and from Completion, passes from the Vendor to the Purchaser effective on and from Completion.

9. Liabilities

(a) The Vendor is liable for any Liabilities incurred in respect of the Business before Completion, and the Purchaser is liable for any Liabilities incurred in respect of the Business on or after Completion.

(b) The Vendor will indemnify the Purchaser against all Claims and proceedings, including legal costs which may be incurred by the Purchaser, arising from all Liabilities in connection with the Business before Completion.

(c) The Purchaser will indemnify the Vendor against all Claims and proceedings, including legal costs which may be incurred by the Vendor, arising from all Liabilities in connection with the Business on or after Completion.

(d) This **clause 9** does not merge on Completion.

10. Leases

In the event that the leases for any of the Premises are not Excluded Assets:

(a) the Vendor agrees to use its best endeavours and to act promptly and reasonably in seeking to obtain the lessor's consent to the assignment of the lease;

(b) the Purchaser agrees to assist the Vendor in obtaining the lessor's consent and to act promptly and reasonably in providing references and evidence regarding the Purchaser's financial status and those matters which the lessor may require under the lease covenant relating to assignment;

(c) if required by the lessor as a condition of consent to the assignment, the Purchaser will procure the execution of guarantees for the performance of lease covenants by the Purchaser, for the residue of the lease term and for any further lease whilst the Purchaser remains the lessee, by not more than two of the Purchaser's directors of principal shareholders; and

(d) the costs of the assignment of leases shall be borne by the Purchaser.

19. Completion

(a) Completion of this Agreement will take place on the Completion Date at Suite 6, Level 1, 74-76 Burwood Road, Burwood NSW 2134 or at another time and place agreed in writing by the parties.

(b) On Completion the Vendor will vest in the Purchaser title to and possession and control of the Business and each Asset included in the sale under this Agreement.

(c) The Purchaser may by notice (Waiver Notice) given to the Vendor on or before the Completion Date, and at the request of the Vendor, waive the requirement of the Vendor to comply with one or more of the requirements referred to in clause 20, in which case Completion will still occur and the Vendor is not required to comply with the requirements specified in the notice on or before Completion, but instead must comply with:

(1) those requirements as soon as reasonably possible after Completion; and

(2) any conditions to the waiver of the Purchaser set out in the Waiver Notice.

20. Obligations of Vendor on Completion

On or before Completion, the Vendor must give the Purchaser unencumbered title to and ownership of the Business and the Assets and Place the Purchaser in effective possession and control of the Business and the Assets, and to this end the Vendor must (without limitation):

(a) deliver to the Purchaser each of the following, in a form previously approved by the Purchaser and duly executed by all relevant parties (other than the Purchaser) and, if required by Law, stamped at the expense of the Purchaser:

(1) without limiting **clause 15,** an effective Assignment of each of the Contracts and Licences that are not Excluded Asses to the Purchaser, together with the written consent to the Assignment of all necessary persons unless that consent is provided under the terms of the relevant Assignment document;

(2) the certificate of registration or other title document (if any) and an effective transfer to the Purchaser of each item of the Intellectual Property Rights, Trade Marks and Domain Names;

(b) deliver to the Purchaser the Plant and Equipment and Stock, together with any relevant title documents, by delivery at the respective places where they are located;

(c) deliver to the Purchaser the Records (including the originals of all Contracts) by delivery to the Sydney Premises;

(d) deliver to the Purchaser all other documents relating to the Business or the Assets or necessary for the Business to be carried on, including such other notices, documents, instruments and assignments as are reasonably requested by the Purchaser prior to Completion which are required to be executed or registered under any statute or otherwise to enable the Purchaser to take possession of the Assets or for the Future conduct of the Business;

(e) deliver to the Purchaser all documents necessary to record the changes of ownership of any of the Assets at each place the relevant Asset is registered or recorded, duly executed by the Vendor as transferor in favour of the Purchaser;

(f) deliver to the Purchaser possession of, and all security devices and keys for, the Premises; and

(g) deliver to the Purchaser all other documents and things required by this Agreement to be done by or delivered by the Vendor to the Purchaser on the Completion Date, or which are reasonably required by the Purchaser to vest full ownership, title, possession and benefit of the Assets in the Purchaser and to enable the Purchaser to conduct the Business in the same manner as the Vendor conducted it before the Completion Date.

21. Obligations of Purchaser on Completion

At Completion the Purchaser Must:

(a) pay the balance of the Purchase Price to the Vendor or as the Vendor directs in writing;

(b) accept from the Vendor an Assignment of each of the Contracts and Licences that are not Excluded Assets, subject to **clause 15**;

(c) take possession of the Plant and Equipment and the Records that are not Excluded Assets;

(d) accept all the documents and other items specified in **clause 20** which the Vendor gives the Purchaser under that clause; and

(e) do all other acts and execute all other documents that this Agreement requires the Purchaser to do or execute at Completion.

Completion of the sale

24 The completion of the sale did not proceed in accordance with the terms of the written contract, and to show that one must trace a path through a number of emails, which in accordance with normal but unacceptable practice, are strewn higgledy piggledy throughout in the Court Book. On Monday 13 June 2016, Mr Bruce McKay of McKay's Legal Practice at Burwood, who was acting for Rova, sent this email to Mr Vieira:

> "When do you propose completion of this sale?
>
> I note there are a few documents or lists to be dealt with before then.
>
> With respect to the assets, my understanding from David is that there are no assets other than those on the 2016 depreciation schedule, so no other list needs to be prepared. That's right, isn't it, David? [one infers that this email was copied to David]
>
> We will need from you the list of Excluded Assets, particularly in relation to real property leases and vehicles, so we can start the process of transferring these things to you. We will also need to know the employees to whom you intend to offer positions.
>
> Documentation for assignment of contracts, et cetera, is in your court.
>
> As I recall, there was a suggestion that completion would be on the 21st. If that is the case, then the lists above should be provided today, unless we can agree to shorten the time periods otherwise set out in the contract.
>
> To a large extent, we are in your hands from here on, so please let us know if there is anything you specifically require at this stage."

On the same day at 7.14pm, Mr Vieira replied thus:

> "Thanks and would like to move to shorten the period of notice to 24 hours, as seven days is impractical, and anything unfinished can be concluded post settlement on your side.
>
> If we all agree to this, I will try to give all details tomorrow, or shortly thereafter, after discussing details with David in respect of excluded assets and employees etc.
>
> Confidentiality of the sale is important to maintain until all the issues are settled, and would appreciate if it is not disclosed until it suits my situation with the administrator of Ultimate.
>
> I will get back in touch tomorrow with other requirements."

At 7.31pm on the same day Mr McKay replied:

> "Yes, we can [be] flexible on timing so long as we have sufficient time to do anything we need to. From our end, disclosure can be delayed for a day or two, but the other shareholder (Gary with 5%) will have to be informed quite soon and, naturally, staff will have to be informed if you are planning on making offers to any. Naturally, if there is anything much to be done from our side, Ron will be the best person to do things, as he has already been in touch with landlords etc, in anticipation of a potential sale some time back."

25 On Friday 17 June at 1.42am, Mr McKay sent this to Mr Vieira:

> "With completion looming, would you be able to let us have details of Excluded Assets, employees who are to be retained, etc, and drafts of the forms of documents to be used or assignment of contracts, etc, please? Or are you anticipating that the final payment will be made and then all paperwork sorted out later?"

At 2.16pm that day, Mr Vieira replied:

> "I don't think I can attend to all the matters prior to completion, given the demands that I am under for the next few days.
>
> I would propose that I can settle today, for the balance of the purchase price, on the basis that the parties agree to attend to all other matters required for completion, to be completed as soon as practicable from Monday [20 June] forward.
>
> If I can get an email response, the I can settle today before 4pm."

26 At 2.42pm on the same day, Mr McKay replied "That seems fine to me. It was always an ambitious timetable...do you still have my trust account details?". At 3.35pm, Mr McKay sent to Mr Vieira details of his trust account. At 4pm on the same day, Mr Vieira sent this to Mr McKay "All done. Please confirm receipt. Will get in touch on Monday. Many thanks". The inference to be drawn thus far is that the purchaser, acting through Mr Vieira, paid the balance of the

purchase price on Friday 17 June 2016 and the parties agreed to postpone other formalities to a date as yet unspecified.

27 The next relevant email is this: it was sent on 28 June 2016 at 5.15pm by Mr Vieira to Mr McKay:

> "After evaluating the circumstances of the business, I can advise of the following in respect of outstanding matters that need to be finalised.
>
> Property Leases
>
> All leases will be deemed excluded assets. We would propose to pay existing lease costs on a week to week basis, but expect that we could vacate the premises within 28 days. Please advise if this is agreeable, or if we need to act sooner.
>
> Motor Vehicles
>
> Excluded assets/finance contract are as follows:
>
> [Here follow the registration numbers of five vehicles]
>
> We will pay out the other vehicles tomorrow, being [registration numbers of two vehicles].
>
> Other Lease/Credit Agreements
>
> We will pay out the finance contracts for the phone system and computer system. We believe that these are the only remaining credit liabilities covering any of the Assets. Please advise if this is not the case.
>
> Bank Account
>
> Could you please indicate what funds have been received since settlement. Could you please arrange to deposit these funds into the following account, and any future amounts received.
>
> [Details of Appscloud Account]
>
> We will be making offers to the existing relevant employees that we have identified, tomorrow. As previously advised, we will not be offering contracts to RB and CJ and there will be a few others that we will not require.
>
> I will get back to you on other matters tomorrow."

There was no communication, as far as I am aware, on 29 June 2016.

28 On 30 June 2016 at 9.36am, Mr Vieira sent this email to Mr McKay:

> "We have had an opportunity to review the requirements for taxi agreements and have identified that we will need to reduce the number of taxis by approximately 1,000, and they will be excluded contracts/licenses under the Sale Agreement.
>
> Having said this, we do not know as yet exactly which taxis are to be excluded, and therefore would advise of our intention to reduce the number of taxis and related agreements so as to achieve an overall reduction of 1,000 taxis. Having said that, we will be able to identify and finalise the exact agreements by COB tomorrow.

> Employees
>
> We will be making offers to the following employees under the terms of the sale agreement. [There follow the names of 11 employees].
>
> Please note that all other employees are not required, and we need to advise them of the outcome at the earliest time and arrange for handover of assets etc.
>
> I would appreciate also that the deliverables under the contract being finalised at the earliest time and a response to my earlier emails.
>
> Lastly, I need to let RB know that I won't be offering him a position, and need him to leave the premises so that we can operate the business.
>
> I look forward to speaking today."

29 On this day, 30 June 2016, Rova appointed an administrator. At CB 178, CB 505 and CB 699 is a formal notice of appointment of administrator under the *Corporations Act 2001*. That notice is addressed to the company, for the attention of Mr Vieira. The formal notice is this:

> "TAKE NOTICE that on the 30th day of June 2016, Steven Nichols was appointed Administrator of the company, by a resolution of the company's Board of Directors. Records indicate that you hold a Charge over whole, or substantial whole, of the company's assets.
>
> In terms of s 450A(3), you are hereby put on notice.
>
> Dated this 30th day of June 2016."

The notice has been signed by Steven Nichols as administrator. Mr Nichols belonged to the firm of Nichols Brian, who have premises in 350 Kent Street Sydney, as well as in 70 Market Street, Wollongong. Mr Vieira in his oral evidence told me that he was advised of the appointment of the administrator orally on 30 June 2016. Since it is not mentioned in his email of 30 June 2016, sent at 9.36am, I infer that he was advised sometime after that time of the appointment of the administrator. At CB 179, 186, 506 and 700, one can find a formal notice of the external administration and the appointment of an external administrator, signed by Mr Nichols and dated 30 June 2016. 30 June was a Thursday.

30 On Saturday 2 July 2016 at 12.49pm, Mr Vieira sent an email to Mr Basu. He opened the email by attaching a copy of the notice of 30 June 2016, from which I have already quoted. The email continues:

> "During the purchase process, I took a charge that they are referring to. I now have completed the purchase and own the business and assets of Rova Media Pty Ltd.

> Ryan Bradbury on [phone number] is the Manager taking care of the administration. He can be reached at [email number].
>
> As per their advice to me, they [Administrator] will disown the premises and have seven days to finalise and therefore advise me to make contact with the landlord to discuss an orderly exit from the premises, as I do not want to take over the premises.
>
> I would appreciate if you can take your advice and get back to me at the earliest time, about under what conditions WE can stay on a temporary basis or otherwise [my emphasis].
>
> Many thanks."

Mr Vieira signed the email, pointing out that he was a director of the company whose name was specified. On Tuesday 5 July 2016 at 12.10pm. Mr Vieira sent another email to Mr Basu:

> "I am following up the earlier email and call from last week.
>
> I would appreciate hearing from you at the earliest time so that
>
> unnecessary costs can be avoided for all parties.
>
> Many thanks."

31 At 3.23pm on that day, Mr Basu replied "Thank you for your call this afternoon. I will get back to you on this matter ASAP. Kind regards". At 5.21pm on 5 July 2016, Mr Basu sent this email to Mr Vieira:

> "This is following your request for temporary occupancy of the premises at 18/46 48 Buffalo road, Gladesville. Pinaki Holding Pty Ltd is happy for you to continue occupying the property on a week to week basis to continue your business. I have attached the invoice for the first week of occupancy starting 1 July 2016. The monthly rent paid by the previous tenant, Rova Media Pty Ltd, has been adjusted to the weekly period. The rent is now due for payment. An invoice will be issued to you for every week of your occupancy. If your circumstances changes, and you wish to move out, then kindly provide us with sufficient notice for Handover. Kindly advise if we can show the property to potential clients, accompanied by Real Estate agents.
>
> Kind regards."

On Thursday 7 July 2016 at 9.38am, Mr Vieira sent this email to Mr Basu:

> "Many thanks for your offer, and we accept the offer to stay on a week to week basis. We expect to stay for around four weeks, but it might extend if things don't go to plan. We are happy to have potential tenants come through with a few hours' notice.
>
> I will arrange for payment of the invoice this week.
>
> Many thanks."

32 It is clear that Mr Vieira, on behalf of the purchaser, and Mr Bruce McKay, solicitor, on behalf of the vendor, agreed to vary the formal arrangements of the

agreement for the sale of the business. The purchaser agreed to pay the balance of the purchase price on 17 June 2016, rather than 21 June 2016 as fixed by par (a) of the definition of Completion Date in the agreement for sale. However, the specification of what were to be excluded assets was left to a later date as were various obligations under clauses 20 and 21 of the sale agreement.

An equitable assignment of the lease?

33 From what I have recited thus far, I can deal with three substantive issues in these proceedings. The first is whether there was an equitable assignment of the lease by Rova to the company. In the 2016 proceedings, the plaintiff originally pleaded this:

> "13. By agreeing to the Assignment, Rova breached the term pleaded in subpara 6(f) above, and repudiated the lease.
>
> 14. On 2 July 2016, the first defendant informed the plaintiff by email of the assignment.
>
> Particulars
>
> Email from the second defendant to the Plaintiff dated 2 July 2016
>
> 15. On 6 July 2016, the administrator informed the plaintiff of the assignment.
>
> Particulars
>
> Letter from the Administrator to the Plaintiff dated 6 July 2016
>
> 16. The plaintiff did not accept the repudiation by Rova, referred to in par 13, above, and, as a result, is taken to have affirmed the Lease.
>
> 17. By reason of the facts pleaded in pars 9 to 16 above, there was a novation (either expressed or implied) by which the parties agreed to transfer the lease to the first defendant.
>
> 18. The first defendant, as transferee of the Lease, owes obligations to the Plaintiff for the period of the Lease, and in terms pleaded in subpara 6(a) to (f) above."

34 The guarantors, in their final amended defence in the 2018 proceedings pleaded the following, however, it must be noted that in handwritten matter at the top of the first page of the final amended defence is an asterisk and the following statement "All references in this pleading to 'novation' should be read as 'novation, assignment (legal or equitable) or, agreement to assign". The relevant part of the pleading is this:

> Novation of the lease

“15. On or about 9 June 2016, Rova contracted with HSDCTLVMB Pty Ltd (HSDCTLVMB) to sell its business to HSDCTLVMB (Sale Agreement).

Particulars

“Agreement for Sale of Business” 9 June 2016

16. The Sale Agreement relevantly contained the following definitions:

(a) 'Assets' includes Rova's rights and benefits under the Contracts.

(b) 'Contracts' means all contracts and commitments entered into by the Vendor in connection with the Business or the Assets that are wholly or partly unperformed as at Completion Date.

(c) 'Completion Date' means the later of 21 June 2016 and such other date as Rova and HSDCTLVMB may agree.

(d) 'Landlord' means the Plaintiff.

Particulars

Sale Agreement, cl 1.1.

17. The Lease was a 'Contract' for the purposes of the Sale Agreement.

18. It was an express term of the Sale Agreement that:

(a) Rova agreed to vest in HSDCTLVMB each contractual arrangement relating to the business which subsisted as at the date of the Sale Agreement.

(b) Rova would use all reasonable endeavours to ensure that each contract was assigned or novated to HSDCTLVMB.

(c) If Rova was unable to get an Assignment, Rova assigned to HSDCTLVMB and HSDCTLVMB accepted an assignment for the benefit (and assumed the burden) of each contract with effect from completion.

(d) At completion, HSDCTLVMB would accept from Rova an assignment of each of the contracts (assignment).

Particulars

Sale Agreement clauses 14(a), 21

19. The Sale Agreement was completed on or about 17 June 2016.

20. On 2 July 2016, HSDCTLVMB informed the Plaintiff by email of the Assignment.

21. On 6 July 2016, the administrator informed the Plaintiff of the assignment.

22. The Plaintiff accepted (either expressly or impliedly), the transfer of the Lease from Rova to HSDCTLVMB.

23. By reason of the facts pleaded in paras 16 to 22, there was a novation (either express or implied) by which the parties agreed that HSDCTLVMB would be substituted for Rova, and would receive the benefits and burdens arising under the Lease.

24. As a result of the novation, HSDCTLVMB, as transferee of the lease, owed obligations to the plaintiff as lessee for the period of the Lease.

> 25. As a result of the novation, Rova is not liable to the plaintiff for any obligations arising under the lease after 17 June 2016.
>
> 26. Further, or in the alternative to par 6 (d)-(f) above, to the extent that any guarantee given by the second defendant or the obligation of Rova under the Lease continued as at June 2016 (which is denied) the guarantee obligations were discharged from the date of the novation of the lease to HSDCTLVMB."

The plaintiff abandoned the argument made on its behalf and par 16 of its pleading was amended into this form "The plaintiff accepted the repudiation by Rova, referred to in para 13". Clause 17 of its pleading was also deleted.

35 It ought be clear that completion of the sale agreement did not occur on 21 June 2016, as I have already pointed out. The list of excluded assets was not provided to the vendor, Rova, or to its solicitor, Mr McKay, until 30 June 2016, and the property lease had been excluded on 28 June 2016. The vendor, through its solicitor, has agreed to this. During addresses, there was no submission made that there had been an actual novation of the lease between the plaintiff and Rova, so that the lease became one between the plaintiff and the company. The only submission was that there was an equitable assignment of the lease. I have been referred to the 33rd edition of Snell's Equity. 3 O14(a) of that work states this:

> "No particular form is required for a valid equitable assignment, whether voluntary or for value. Equity has always looked to the intent rather than the form, and all that is needed is a sufficient outward expression of an intention to make an immediate disposition of the assignor's right.
>
> 'It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain'.".

That quotation was taken from *Finlan v Eyton Morris Winfield* [2007] EWHC 914 (Ch). I have also been referred to the 5th edition of Meagher, Gummow and Lehane's 'Equity, Doctrines and Remedies', (2015) LexisNexis. At [6- O5O] the learned authors say this:

> "A purported assignment, for value, of legal property, which fails at law, or a contract, for value, to assign legal property, effects an equitable assignment when the consideration is paid or executed. This is a case where equity regards as done that which ought to be done. The Privy Council has described the principles as, 'fairly fundamental'. Lord O'Hagan called them, 'rudimental'. The effects of a valid equitable assignment of a legal interest in property after payment or execution of the consideration is to constitute the assignor as trustee of the property, for the benefit of the assignee. It is not relevant in that case to ask whether the contract (or the purported immediate assignment, treated as a contract) is one of a kind of which specific performance would be

> ordered. Whether it is or not equity, once the assignee has done what is required of the assignee, regards that as done which ought to have been done by the assignor."

36 Those authorities were cited to me by Mr C. Ireland, who appeared for the plaintiff. Mr C.D. Freeman, who appeared for the company, and Mr Vieira cited to me a later portion of the latter work, which at p 238 says this:

> "The purchaser's equitable interest is certainly unusual...the equitable interest or trust, can arise only if the contract is one of a kind which specific performance might be ordered...It has been said that the interest of the assignee is an interest commensurate with the relief which equity will give by way of specific performance...The interest of the assignee is defeasible, because the contract may be avoided or rescinded."

37 Here there is no obvious intention expressed either by the vendor or the purchaser to assign the lease of the property granted by the plaintiff to Rova. Indeed, prior to final settlement on 30 June 2016, there was a stipulation by the purchaser, the company, that it wished to treat the lease as an "Excluded Asset". The company as the purchaser had done nothing to comply with its obligations under cl 10 of the agreement for sale of business entered into on 9 June 2016. There was no intention expressed by the company to acquire the lease from Rova. There was nothing which could in any way be specifically enforced if that remedy was sought in equity. The primary position, however, is that there was no express or implied agreement for the transfer of the lease from Rova to the company. There was nothing that could be specifically enforced, and there was no words, of any fashion, to express an intention that the lease be transferred. Neither the alleged assignee nor the alleged assignor had done anything required of either of them when one considers the provisions of cl 10 of the contract for the sale of the business.

38 The evidence does not establish any intention of either party to effect an assignment of the lease from Rova to either the company or Mr Vieira personally. The submission of Mr S.A. Lees, who appeared for the guarantors, on this point, are based on the proposition that the lease was never validly designated as an excluded asset, because Mr Vieira did not give notice to Rova, "far enough in advance of actual completion": see his written submission MFI 6 at [9]. In other words, he was submitting that Mr Vieira did not give notice of the lease being an excluded asset within seven days of 9 June 2016, that is, by 17 June 2016, which is the date, fortuitously, when the purchaser paid the

balance of the purchase price to the vendor. That ignores the ability of the parties to agree to vary any earlier agreement, and would allow a non-party to the agreement to insist upon its written terms, as if it were a party to the agreement. That offends our doctrine that a contract is one between certain parties, and only those parties can enforce it: the doctrine of privity of contract. An equitable assignment can only arise if it be the agreement between the parties to the alleged assignment, objectively determined. I am not so persuaded on the balance of probabilities in this case. The basal principle relied upon by the guarantors is that in *Walsh v Lonsdale* (1882) 21 Ch D 9. See also *Australian Mutual Provident Society v 400 Saint Kilda Road Pty Ltd* [1990] VR 646 at 657.

A discharge of guarantors' obligations?

39 The next issue of a substantive nature is whether such an assignment would discharge the guarantor's obligations. Mr Lee's written submissions (MFI 6) contain this:

> "13. The effect of an assignment is that the lessee becomes a surety to the lessor for the assignee: *Wolveridge v Steward* (1833) 149 ER 557 at 564.
>
> 14. It is a well-established principle of law that when conduct on the part of a creditor has the effect of altering the surety's rights, it will discharge the surety from the guarantee, unless the alteration is unsubstantial and not prejudicial to the surety (ie, reduction of rent or rate of interest). The Court is not committed to inquire in the effect of the alteration; *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd (1987)* 162 CLR 549 at [559 560], applying *Holmes v Brunskill* (1877) 3 QBD 495.
>
> 15. HSDC becoming a new lessee (on novation) or assignee (on
>
> assignment) changes the identity of the obligor from Rova, to whom the Byrnes gave the guarantee, and but for the principle in Ankar, would make them responsible for a third party whose credit worthiness and reliability is unknown to them. The alteration is clearly prejudicial and not unsubstantial.
>
> 16. Here the agreement to assign, and Pinaki's agreement found in the emails at CB 189, causes prejudice to the guarantors. Formal assignment could have been completed quickly and without any notice to the Byrnes, and they would have no capacity to prevent it.
>
> 17. In answer to HSDC's submission that the agreement to assign or equitable assignment is not capable of being specifically performed; the promise which equity would enforce would be HSDC's promise to take assignment of the lease. If Rova had not been placed in administration, HSDC would have been estopped from denying it had promised to take assignment of the lease when it did not designate the lease as an excluded asset in conformity with the business sale agreement."

I should point out that it was not pressed, as already mentioned, that there was a novation of the lease from Rova to the company, but it was only pressed that there was an equitable assignment.

40 With respect, the submissions by Mr Lee on this point involve a misunderstanding of the principle in *Ankar*. At 162 CLR 560, Mason ACJ, Wilson, Brennan and Dawson JJ said this:

> "The foundation of the rule is that the creditor, by varying the principal contract or extending time, has altered the surety's rights without consulting it, though the surety has an interest in the principle contract, and that the creditor cannot be permitted to do so; see *Rees v Berrington* (1795) 30 ER 765."

At 561, their Honours said this:

> "If the surety is to be discharged for breach of a promissory term in the suretyship contract, the justification for the discharge must be that the creditor has failed to comply with a provision that, as a matter of interpretation, requires strict performance as a condition precedent to the sureties obligation, or at least requires substantial performance of the promise, such that the surety would not have entered into the contract if it had not been assured that there would not be a breach such as the breach which in fact occurred. If, on its true interpretation, the term is not intended so to operate, it is not easy to understand why the surety should be discharged by its
>
> breach. Of course, in construing the contract, the Court is entitled to look to the general setting in which the contract has come into existence; see, eg the discussion in *Reardon Smith Line Ltd v Hansen Tangen* [1976] 3 All ER 570 at pp 574 575."

In the current case, the creditor, the person to whom the obligation is owed, is the plaintiff, not Rova. The plaintiff did nothing which might affect the obligations of the guarantors to the plaintiff. The plaintiff did nothing that could be seen to discharge the liability which the guarantors had to it. As I said, the submission is misconceived, because it assumes that the liability which the guarantors had was not to the plaintiff, but to Rova. That argument of the guarantors also fails.

Is Mr Vieira personally liable?

41 The third substantive point which I can deal with at this time is whether Mr Vieira, the second defendant in the 2016 proceedings, has any personal liability. The only case against Mr Vieira is based on the use of the first person, singular pronoun in his email of 2 July 2016, at 12.49pm, which I have already quoted. However, that use of the first person, singular pronoun ignores the use of the first person, plural pronoun later in the email, which I emphasised earlier

when I quoted the email. Mr Vieira was neither the monarch nor the editor of a newspaper. He was not entitled to use the plural personal pronoun. He was speaking for himself and another. That other could only be the company, or Appscloud LP, a partnership between two companies. At the end of the email itself, Mr Vieira identified himself as a director of the company.

42 Mr Basu, acting for the plaintiff, was not mislead. He issued each of the four invoices for the weekly tenancy offered by the plaintiff. Those invoices were addressed to the company, and were paid for by Appscloud [LP] trading at Rova Taxi Media; see the affidavit of Mr Vieira of 15 April 2019, exhibit 14C, annexure N at Court Book 714 to 718.

43 On the evidence presented, the purchaser of the business of Rova was the company, and not Mr Vieira personally. There is no evidence that Mr Vieira was ever intended to be personally liable for the actions of the company, nor did Mr Basu say that he was under that understanding. Common modern commercial experience is that anyone undertaking such a business as that which had been conducted by Rova, would conduct it through a company, giving the beneficial holder of the business the benefit of the veil of incorporation. Even if Mr Basu said that he were mislead, such an averment would be highly implausible. Mr Basu often referred to his company using the first person singular pronoun. I am not persuaded on the balance of probabilities that Mr Vieira was a party to the transaction conducted by the buyer of the Rova business, and the plaintiff. Mr Vieira is entitled to judgment in his favour.

Events after 30 June 2016

44 I turn now to consider the further dealings between the plaintiff and the company. As is clear from Mr Basu's email on 5 July 2016 at 5.21pm, he enclosed an invoice addressed to the company. It is numbered 01, and is dated 1 July 2016, even though it was only delivered on 5 July 2016. That invoice covered the period from 1 July to 7 July 2016. It can be found at CB 512. It was paid on 8 July 2016, as can be seen at CB 715. As to the further invoices:

Number	Period	CB	Paid	CB

02	8 July to 14 July	513	18 July	716
03	5 July to 21 July	514	25 July	717
04	22 July to 28 July	518	9 December	718

Each of those invoices and each payment was for $2,865.64.

45 On 5 July 2016, the administrator of Rova sent a letter to the plaintiff. It can be found at CB 176. It provided formal notice of what no doubt Mr Basu already knew. The relevant contents of the letter are these:

> "I advise that Steven Nichols was appointed Voluntary Administrator of the above company pursuant to resolution of the board of directors on 30 June 2016.
>
> The company has ceased to trade, and as administrator, I am not incurring liabilities in respect to same. I anticipate in providing a formal notice under s 443B(3) of the Corporations Act 2001 in the near future.
>
> Please provide a copy of any lease you hold with the company and advise the current rental position in respect to same. Please include details as to what point rent is paid and any security you hold in respect to unpaid rental obligations.
>
> On 17 June 2016, the company completed a sale of business transaction, which is currently subject to review by this office. I have recommended the business purchaser contact you directly in regards to the ongoing use of your premise, or alternatively, the recovery of their purchased assets from same.
>
> Should you have any queries regarding the above matter, please do not hesitate to contact Ryan Bradbury of my Wollongong office."

On the following day, the administrator delivered a notice under s 443B(3) of the *Corporations Act 2001*. It can be found at CB 182. The relevant part of the notice is this:

> "I again confirm that on 17 June 2016, the company completed a sale of business transaction. Therefore, as at my appointment on 30 June 2016, the company did not occupy the premise that it previous leased from yourself. There has been no trade on (sic) activity by the administrator's office, nor has any debt been incurred on behalf of the company by same."

I merely observe that the averment by the administrator of Rova is incorrect. On 17 June 2016, the purchaser may have paid the balance of the purchase price to Rova, but the sale transaction had certainly not been completed. The earliest date on which one could see completion as having occurred is on 30 June 2016, the same day on which the administrator was appointed.

46 On 26 July 2016 at 11.36am, Mr Basu sent an email to Mr Vieira. It is this:

> "Thank you for calling me yesterday, and apprising me of your situation regarding further tenancy or vacation. In this regard, can you please also send me an email once you have a firm decision.
>
> You mentioned about a willingness to purchase the property. At this stage, I could consider an offer around $2.5 Million for the property. The size of the property is around 550 square metres, including nine car spaces.
>
> Kindly ensure that all the present rent invoices are paid on time."

At 2.31 on the same day Mr Vieira replied to Mr Basu "To confirm our intention to vacate the premises this week. I have passed on your price to the party and will revert if he has an interest".

47 On the following day of 27 July 2016, at 9.34am, the plaintiff's then solicitor, Mr Otto Stichter, sent an email to the administrator of Rova. After pointing out that he was acting for the plaintiff, the letter continues thus:

> "We comment as follows:
>
> 1. Mr Steven Nichols of your office is the administrator for Rova Media Pty Ltd (Rova).
>
> 2. That company was the lessee of the premises 18/46 48 Buffalo Road, Gladesville.
>
> 3. The business undertaking of Rova has been sold, with the purchaser electing to move the business elsewhere rather than taking over the Rova lease.
>
> 4. Our client has engaged Colliers International to seek a new tenant for the premises.
>
> 5. The lease to Rova is personally guaranteed by David John Byrne and Matthew William Byrne.
>
> 6. Would you please advise the addressees for those two persons,
>
> if you have those addresses.
>
> 7. We also note that our client holds a bank guarantee for three months base rent.
>
> 8. It is our client's intention to claim any losses and expenses arising from the lessee's default from the bank guarantee and, if that guarantee is insufficient, from the guarantors.
>
> Those amounts cannot at this stage be quantified."

I observe that the plaintiff was clearly looking to pursue the claim that it makes in the 2018 proceedings.

48 On the day after that, however, Mr Stichter sent an email to Mr Vieira. That was sent at 6.15pm. After recording that he was acting for the plaintiff, Mr Stichter continued:

> "I am instructed that you are removing from the premises various fixtures and fittings which did/do not belong to the previous lessee, Rova Entertainment Pty Ltd, and that furthermore, damage has been, and is being, caused in removal.
>
> We advise that:
>
> (a) The costs of lessor's fixtures removed by you will be claimed from you, as will the cost of installation and of repairs/make good.
>
> (b) The costs of repair and make good for any lessee's fixtures and fittings removed will also be claimed from you.
>
> (c) The rent for the period of your occupation is also to be paid by you."

That can only be seen as pointing to a dispute, which I shall later determine, between the plaintiff and all the parties to these proceedings, about certain fixtures or fittings in the demised premises.

49 On 28 and 29 July 2016, there was an exchange of various emails between Mr Basu and Mr Vieira, showing some antagonism in the context of a dispute concerning ownership of an alarm system and a hot water system, again, the subject of a claim for damages, which I shall deal with in due course. On 1 August 2016 at 6.12pm, there was another email sent by Mr Vieira to Mr Basu. There was some agreement reached. The first line of the email refers to Mr Vieira agreeing to meet with Mr Basu at the time that Mr Basu had requested. The email then continues:

> "As discussed and agreed, we have left a few office desks which are in good order, that may be used by future tenants, as well as a few mobile display panels for pinning various papers, et cetera. We have cleaned and vacuumed the premises so it will look presentable for prospective tenants.
>
> We have never sought to take any roller door, or the like, so I can't understand your comments [in earlier emails].
>
> I look forward to finalising matters tomorrow.
>
> Regards."

50 On 2 August 2016, Mr Basu and Mr Vieira met at the premises for a "handover". According to Mr Vieira's affidavit (exhibit 14C):

> "At the time, and in view of the content and the tone of the emails of Mr Basu, I took a video and photos of the condition of the Premises. Annexed here to and marked 'V' is a copy of the photographs I took of the premises on that day. Annexed...is a USB drive that contains that video I took on 2 August 2016."

That USB is exhibit 14D. When it was shown, I observed that the premises as displayed on that video made looked like "Buckingham Palace" compared to the non-public areas of the Downing Centre. That may be hyperbole, but it was

my recording that the premises looked to be in good order, clean, and largely uncluttered. They appeared to me to be in a tenantable state. On 2 August 2016, the company quit the premises.

51 On 5 August 2018 at 12.45pm, Mr Vieira sent another email to Mr Basu. It is in these terms:

> "As per our meeting on 2 August, we are wanting to finalise matters and need your confirmation of the property hand over so that we can make the last payment owing to you for rent.
>
> We hope that the tenants that you brought through worked out for you.
>
> Kind regards."

On 8 August 2016, at 12.49pm, Mr Basu sent this email to Mr Vieira:

> "As per your acceptance to our offer below, the fourth week's rent has been due for the last two weeks. Please note that you will be charged interest for any delay of the rent payments.
>
> We are in the process of finalising the Damage and Make good for the property that you vacated, as being the last occupier of the premises. You will be contacted soon with all the details by our solicitor, Mr Otto Stichter."

On 9 August 2016 at 9.17am, Mr Vieira replied:

> "I left the premises in better, cleaner conditions than when I arrived, which I had no obligation to do. You did not visit the premises until a week before our departure, so I don't know what you are relying on. Please confirm your finalisation of the premises handover so we can pay the final week's rent."

On 18 August 2016, at 8.22am, Mr Vieira pursued Mr Basu by email:

> "Can you please advise so that we can finalise the matter.
>
> I am seeking your confirmation so that the final payment can be made and the matter finalised.
>
> There are no outstanding matters that I need to attend to and want to pay and finalise.
>
> I am not delaying the finalisation of the arrangement."

At 3.18pm on that day, Mr Basu replied, "You will be hearing from our Solicitor regarding the finalisation matter when it is completed at our end".

52 On 31 August 2016, a legal secretary at Mr Stichter's practice sent to Mr Vieira a letter which bears the date 30 August 2016. The letter can be found at CB299, CB536, and CB758. It was a letter of demand claiming $36,261.84, being the fourth instalment of rent, and the cost of replacing and installing a hot water system, replacing and installing an alarm security system, replacing and

installing carpets, making good walls damaged by the lessee's removal of fixtures and fittings attached by the lessee, the cost of removal of garbage and the replacement and making good of damage to fibre optic equipment. A further letter was sent by Mr Stichter to the company on 23 September 2016. That can be found at CB302, CB546, and CB769. It made an additional claim for the further costs of making good damaged data cabling and demanded payment now of $40,101.84 within seven days. There was a final letter prior to action, sent by Mr Stichter on 24 November 2016. Like his earlier communications of 30 August and 23 September 2016, the letter is addressed not only to the company, but also to Mr Vieira, albeit at the same address. The letter of 24 November 2016 enclosed a copy of a statement of claim, which Mr Stichter proposed to file in the Local Court at Burwood, unless, within seven days, the sum of $40,101.84 was paid to the plaintiff.

53 There can be no doubt that proceedings were actually commenced by the plaintiff against the company and Mr Vieira in the Local Court at Burwood. The plaint number was 360721 of 2016, in other words, the same plaint number as those proceedings have in this Court. I know that that was the plaint number in the Local Court at Burwood, because the early affidavits used in these proceedings were all sworn in proceedings in the Local Court at Burwood.

Claim against the company

54 I turn now to consider the claim against the company, but not considering issues relating to damages. The relevant part of the plaintiff's claim against the company, after disposing of the allegation of an equitable assignment, is this:

> 19. By an agreement (Occupancy Agreement) made partly by implied terms and partly by email exchanges between:
>
> (a) Pinaki Basu, the director of the Plaintiff, for the Plaintiff; and
>
> (b) The Second Defendant, either in his own right or for the First Defendant;
>
> The parties agreed that the First Defendant and/or the Second Defendant would continue occupation of the **Premises**.
>
> 21. The emailed agreed terms of the Occupancy Agreement were:
>
> (a) the occupation would be on a week to week basis;
>
> (b) the First Defendant would be paid rent in the amount of
>
> $2,865.64 per week'

(c) the above rent would be paid weekly;

(d) prospective tenants to be allowed to view the Premises;

(e) appropriate notice was given for vacating

22. The Occupancy Agreement included implied terms that:

(a) the occupant would take reasonable care of the Premises;

(b) the occupant would not damage the Premises;

(c) the occupant would not remove the lessor's fixtures and fittings; and

(d) the occupant would make good any damage caused by removal of the lessee's and/or occupant's fixtures and fittings.

23. The aforesaid implied terms arise as follows:

(b) (further, and, in the alternative) the terms are implied by law in that they arise by virtue of the nature of the agreement between the Plaintiff and the First Defendant and/or the Second Defendant itself.

24. The First Defendant gave one week's notice by email on 26 July 2016 of intention to vacate the Premises.

25. The Premises were vacated on 2 August 2016, being the date of return of the keys to the Premises.

55 I accept that there was such an occupancy agreement. The only written terms of the occupancy agreement are contained in the exchange of emails of Mr Basu of 5 July 2016 at 5.21pm, and the enclosed invoice, which I have already cited, and Mr Vieira's reply of 7 July 2016 at 9.38am, which I have already cited. This establishes a weekly tenancy at a rate of $2,865.64, commencing on 1 July 2016. Such a tenancy is determinable by the giving of one week's clear notice: *Lemon v Lardeur* [1946] KB 613, subject to any applicable statutory provision, and I have been referred to none.

56 There is, however, a dispute about implied terms. The plaintiff relies upon the decision of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266. The advice of the majority of the Board was given by Lord Simon of Glaisdale, the majority included Viscount Dilhorne and Lord Keith of Kinkel. At 282, Lord Simon said this:

> "Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied:

(1). it must be reasonable and equitable;

(2). it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(3). it must be so obvious that 'it goes without saying';

(4). it must be capable of clear expression;

(5). it must not contradict any express term of the contract.

Their Lordships venture to cite only three passages albeit they are familiar to every student of this branch of the law. In *The Moorcock* (1889) 14 PD 64 at 68, Bowen LJ said 'I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it would be found that in all of them, the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that in all events it should have. In business transactions

such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men'.

It is because the implication of a term rests on the presumed intention of the parties that the primary condition must be satisfied, that the terms sought to be implied must be reasonable and equitable. It is not to be imputed to a party that he is assenting to an unexpressed term, which will operate unreasonably and inequitably against himself.

In *Reigate v Union Manufacturing Co*. [1918] 1 KB 592 at 605, Scrutton LJ said 'A term can only be implied, it is necessary in the business sense to give efficacy to the contract, ie, if it is such a term that it can confidently be said that if at the time of the contract was being negotiated, someone had said to the parties, 'what will happen in such a case?', they would both have replied: 'of course, so and so will happen; we did not trouble to say that; it is too clear.' ‘

In *Shirlaw v Southern Foundries* (1926) Ltd [1939] 2 KB 206 at 227, MacKinnon LJ said 'Prima facie, that which in any contract is left to be implied and need not be expressed, is something so obvious that it goes without saying; so that, if, while the parties are making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, 'Oh, of course'."

57 However, there is a distinction to be drawn between terms implied as a matter of fact specific to the contract in question, and terms implied by law. In *Grocon Constructors (Victoria) Pty Ltd v APN DF2 Project 2 Pty Ltd* [2016] VSCA 190, a joint judgment of Santamaria, Kyrou and McLeish JJA, their Honours said this:

"138. A contractual term implied as a matter of fact is specific to the contract in question, and derives from the Court's view of the intention of the parties. The conditions for implying a term in fact into a contract was set out by the majority of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, and adopted by Mason J in Codelfa [1982] HCA 24; (1982) 149 CLR 337 ('BP Test')…

> 139. In adopting the BP Test, Mason J relevantly stated 'For obvious reasons, the courts are slow to imply a term. In many cases, what the parties have actually agreed upon represents the totality of their willingness to agree; each may be prepared to take his chance in relation to an eventuality for which no provision is made. The more detailed and comprehensive the contract, the less ground there is for supposing that the parties have failed to address their minds to the question at issue and then there is the difficulty of identifying with any degree of certainty the terms the parties would have settled upon had they considered the question'.
>
> 140. The conditions in the BP Test are cumulative, and import different considerations."

58 The plaintiff's amended pleading deleted par 23(a), which provided this:

> "they are implied in fact, in that the said terms were contained in the lease, and by reason thereof, are terms of the Occupancy Agreement; and"

The only allegation made by the plaintiff in the pleadings is that the terms were implied by law. The terms alleged to have been implied by law are not implied by law. As far as I am aware, there is only one term implied by law into a weekly tenancy. It can be found in the decision of the English Court of Appeal in *Warren v Keen* [1953] 2 All ER at 1118. That was an appeal from an order made by a County Court judge. The plaintiff, a landlord, had let premises to a defendant on a weekly tenancy. In the action brought by the landlord, the landlord sought to recover from the defendant 23 pounds and 5 shillings, being the cost of certain repairs to the premises. The landlord alleged in the particulars of claim that:

> "It was an implied term of the said tenancy that the defendant would use the said premises in a tenant like manner, would keep the same wind and watertight, and would make fair and tenantable repairs thereto. The defendant in breach of the said implied term has failed to use the said premises in a tenant like manner, has not kept the same wind and watertight, and has not made fair and tenant like repairs thereto."

The particulars delivered about the disrepair were essentially damage to walls through damp, either rising damp or damp going through the walls of the premises, affecting the plaster on the interior of the walls, or staining of the plaster, or its perishing below window openings and the cracking and breaking of external parts of walls and of windows not being waterproof, and of joints and paintwork being decayed, and of a leak in the hot water system. The County Court found for the plaintiff. The appeal was unanimously allowed by Somervell, Denning and Romer LJJ. Denning LJ commenced his judgment thus at 1120:

> "Apart from express contract, a tenant owes no duty to the landlord to keep the premises in repair. The only duty of the tenant is to use the premises in a husband like manner, or what is the same thing, a tenant like manner. That it is how it is put by Sir Vicary Gibbs CJ in *Horsefall v Mather* (1815) 171 ER 141, and by Scrutton and Atkin LJJ in *Marsden v Edward Heyes Ltd* [1927] 2 KB 7,8. But what does it mean 'to use a premises in a tenant like manner?'.
>
> It can, I think, best be shown by some illustrations. The tenant must take proper care of the premises. He must, if he is going away for the winter, turn off the water and empty the boiler; he must clean the chimneys, when necessary, and also the windows; he must mend the electric light when it fuses; he must unstop the sink when it is blocked by his waste. In short, he must do the little jobs about the place which a reasonable tenant would do. In addition, he must not, of course, damage the house wilfully or negligently; and he must see that his family and guests do not damage it if they do, he must repair it, but apart from such things, if the house falls into disrepair through fair wear and tear, or lapse of time, or for any reason not caused by him, the tenant is not liable to repair it."

59 That term is the only term that should be implied into this weekly tenancy. In any event, however, it appears to me that of the terms which the plaintiff says ought be implied, 22(a),(b) and (c) are really part of the term implied by law, to use the premises in a 'tenant like manner' implies the use of some reasonable care by the tenant. The fourth term, which the plaintiff alleges should be implied, cannot be implied, because of the way in which the pleading has been amended, but may well be covered by the requirement not to damage the demised premises either wilfully or negligently.

60 The plaintiff claimed, in the alternative to the implied terms in the weekly tenancy, in the tort of trespass to land. That allegation is contained in the following paragraphs of the second further amended statement of claim:

> "26. On or about 17 June 2016, the First Defendant and/or the Second Defendant commenced occupying the premises.
>
> 27. The First Defendant and/or the second defendant occupied the premises until 2 August 2016.
>
> 28. During the occupancy of the premises, the First Defendant, by and through its director, the Second Defendant, and the Second Defendant in his personal capacity, caused loss and damage to the premises.
>
> 29. The plaintiff's loss and damage is particularised in par 35 hereof."

The heading before those paragraphs of the statement of claim made it clear that it was an alternative claim in the tort of trespass. I have seen better pleadings in the tort of trespass than that, but it is clear what was intended, and

no quibble was made by Mr Freeman about the adequacy of the plaintiff's pleadings.

61 The relevant principle can be found in Fleming, Law of Torts, 10th Edition (2001), Thomson Reuters at 50:

> "Intentional invasions are actionable whether resulting in harm or not. Neither the intruder's motive, nor the fact that his entry actually benefitted the occupier is material. The requisite intent is present if the defendant desires to make an entry, although unaware that he is thereby interfering with another's rights. Thus it makes no difference whether the intruder knows his entry to be unauthorised or honestly and reasonably believes the land to be his. It may, however, affect the quantum of damages. A deliberate trespass is no trifling matter, but in cases of mistake, where no perceptible damage is done, only nominal damages are awarded; yet the verdict against the defendants is justified in order to defeat his adverse claim to the land. If, on the other hand, actual damage has occurred, as when (A) believing (B)'s land to be his, cuts a stand of timber or works a seam of coal, the award no more than compensates the plaintiff for the loss he has suffered as a result of the unauthorised entry. Viewed realistically, therefore, trespass as a remedy against dispossession is a tort of strict liability, vindicating a proprietary interest rather than a tort obligation."

62 A case on point is the decision of the Supreme Court of this State in *Singh v Smithenbecker* (1923) 23 SR (NSW) 207. There was a written contract of sale by which the plaintiff sold to the defendant 100 sheep at 1 pound per head, to be delivered on the plaintiff's property on 10 June 1922. On that date the plaintiff was ready and willing to deliver, but the defendant did not attend the plaintiff's premises. On the following day, Sunday 11 June, the plaintiff left his property early and locked the entrance gate. The only person on the property was a gentleman known as Poole, an old age pensioner who was as a matter of charity permitted to live there. There was evidence that the date in the written contract was inserted by mistake, and that 11 June was the date contemplated by the parties, initially. On that day the defendant went to the plaintiff's property, intending to take delivery of the sheep, but he found the gate locked. He climbed the fence, and was on his way to the house, met Mr Poole, who subsequently assisted him to muster and select 100 sheep. The defendant then drove the sheep over the plaintiff's land, took the gate off its hinges, and drove the sheep away. Mr Poole gave to the defendant a delivery note. When the plaintiff returned to his property, he was told what had happened. Two days later, he called at the defendant's agent's office for the cheque for the sheep, but failed to see the defendant. Later, he inquired at his

bank and was informed that there was no money paid to him. A fortnight later a cheque was tendered, but he refused it, and then commenced legal proceedings.

63 The parties to the proceedings each had a solicitor at Lockhart, so I assume that the proceedings were probably heard by the Supreme Court at Wagga Wagga with a jury. Cullen CJ said at 214:

> "There is nothing in the Six Carpenters' case that exempts a person from liability for doing damage to property, merely because in the
>
> first instance there was a good excuse for going on the land itself. It is not a case of treating the defendant as a trespasser ab initio, but treating him as a trespasser because of acts done unconnected with a mere entry to interview the proprietor of the land."

At 217, Gordon J said this:

> "Poole was not so authorised, the defendant was liable under the first count for trespass as his Honour the Chief Justice has pointed out, not for the original getting over the fence and going to the house to see whether the plaintiff was there to give delivery as agreed under the contract, but for his subsequent acts in mustering the sheep on the plaintiff's land, driving across the land and removing the gate in order to take the sheep off the plaintiff's land."

The jury had found a verdict for the plaintiff on an account of trespass for seven pounds, and on an allegation of conversion of the sheep, they found a verdict of 100 pounds. The appeal was dismissed.

64 The fact that the company was the lawful occupier of the premises for the period from 1 July 2016 to 2 August 2016, does not acquit it of any deliberate trespass to the land. If items such as the hot water service and the alarm were either the plaintiff's fixtures, or fixtures to which the plaintiff was entitled to possession, the removal of such fixtures or fittings amounts to trespass to the plaintiff's property, and the plaintiff would be entitled to succeed in an action for trespass to land. An alarm system and a hot water system were actually removed during the company's possession of the premises, but there is no evidence as to which person physically removed them. Even if there were such evidence, it would only point out a servant, agent or officer of the company. There is no evidence to make Mr Vieira personally liable or any such task.

Subsequent history of the premises

65 I now turn to discuss the subsequent history of the premises in question. This is necessary because of a defence raised by the guarantors that the plaintiff has failed to mitigate its loss. On Tuesday 5 July 2016, as I have already pointed out, the plaintiff sought from the company its permission to show the property to potential clients, accompanied by a real estate agent. On 7 July 2016, the company acceded to that request, if given, "a few hours' notice". In Mr Basu's affidavit on 28 February 2019, which is exhibit B3, the following evidence is given:

> "20. In or about early July 2016, I approached Colliers International for the purposes of appointing them agents to release the Premises.
>
> 21. On 11 July 2016, I received an email from Kellie Tattersall from Colliers International.
>
> A true copy of an email from Kellie Tattersall to me dated 11 July 2016 appears at p 13 of exhibit PB 001."

That can be found at CB 427. It contains this:

> 'It was a pleasure to talk to you earlier. I had a walk through your unit today to get an idea of the space. I'm glad I did, because the office/warehouse portions are a little different to the traditional warehouse units, and I can now understand how you are achieving a rate of $260 per square metre net.
>
> As I mentioned on the phone, Colliers deal with a variety of tenants; locals, national and international companies. Below are just a few comparable deals that Colliers have transacted in the last 8 weeks:
>
> 383 Victoria Road Gladesville 450 square metres @ $266 per square metre net-five year lease to Lawrence Group.
>
> 445 Victoria Road Gladesville 1,000 square metres @ $227.50 per square metre net-ten years lease to NRMA.
>
> Unit 31/28 Barcoo Street Chatswood 375 metres @ $235 per square metre gross-five year lease to Chatswood CrossFit [a gymnasium].
>
> Pinaki, we are confident that we can find you a replacement tenant, and suggest a similar rental to what the tenant is currently paying. We would love the opportunity to meet with you and discuss this opportunity. Are you free on Tuesday at 12.15pm?
>
> We look forward to hearing from you soon!"

Exhibit 11 is a photograph of the property at 383 Victoria Road Gladesville. It appears to have at one stage been a service station. The photograph shows it as being occupied by an electrical wholesaler. Exhibit 12 is a photograph of the premises at 445 Victoria Road Gladesville. That is now an NRMA car servicing facility. Exhibit 13 is a photograph of the premises at Barcoo Street Chatswood.

In which unit of those premises the gymnasium is, is not at all established by the evidence.

66 On 11 July 2016, on her visit to the plaintiff's premises at Gladesville, Ms Kellie Tattersall took the photographs numbered 55 to 58 in exhibit D. Poor copies of those photographs are scattered almost at random through the Court Book, which should really be Court Books, as three lever arch binders comprise the "Court Book". Photograph 55 shows the external appearance of the premises, where there is a garage entry and also pedestrian access to both the ground floor and to the office space on the first floor, and the sign advising that it was occupied by Rova Media is still present. Photograph 56 shows that the office was still being used. In a desk in the foreground one can see a gentleman going about business using the telephone. Photograph 57 also shows part of the premises clearly still equipped as if Rova Media had not left, and showing a piece of the anatomy of a man, who was sitting at his desk. Photograph 58 also shows furniture, and for example, potted plants, and business papers still in situ on the property, as if it were still being used by Rova Media, albeit that the company was in possession.

67 The affidavit of Mr Basu continues:

> "22. On or about 12 July 2016, I met with Kellie Tattersall, my purpose being to appoint Colliers international as agents to release the premises, if terms could be agreed".

An exclusive agency agreement was prepared by Colliers and sent to Mr Basu. He signed it on behalf of the plaintiff and returned it under a cover of an email on 15 July 2016. On 20 July 2016, Ms Tattersall sent an email to Mr Basu. After thanking him for his email of 15 July 2016, she said this:

> "It was my pleasure to have you visit my office and give you a market update. Attached is an executed leasing agreement and amended marketing proposal for your records. Could you please make payment of the same to Adcorp and let me know once it has been paid so I can get the ball rolling."

The email goes on to provide a telephone number for Ms Tattersall should Mr Basu wish to speak with her, and assuring Mr Basu that she would use her best effort to find him a tenant.

68 The affidavit of Mr Basu contains this:

> "25. On 21 July 2016 I received from Colliers a revised quote from Adcorp for the creation and installing of a, 'For Lease' signboard at the Premises. On or about 21 July 2016, I caused the plaintiff to make payment to Adcorp for the creation of and installation of the 'For Lease' signboard…
>
> 26. On 1 August 2016, the advertising campaign that had been proposed by Colliers commenced, and I was provided with a link to each of the advertisements that commenced to run on the websites of Colliers International, www.realcommercial.com.au and www.commercialrealeastate.com.au..."

An email of Ms Tattersall to Mr Basu of 1 August 2016 at 1.40pm can be found at CB 440 and CB 948.

69 Mr Basu's affidavit continues thus:

> "27. On or about 3 August 2016, I was informed by Colliers that an offer had been made to lease the premises".

He was advised of that offer by an email from Mr John Carney of Colliers, which can be found at CB 441, CB 446, CB 949, CB 953. The substance of the email is this:

> "It was nice meeting you yesterday. Please see below the offer in writing from the mechanic tenant. If you could let me know how you would like to respond to this.
>
> $100,000 per annum gross + GST rent.
>
> 4 year lease.
>
> 4 year option.
>
> 2% fixed increase including option period.
>
> 3 month gross BG.
>
> $20 million P/L insurance.
>
> All parking included for the unit."

The affidavit of Mr Basu continues thus:

> "The offer was less than the rent that had been paid by Rova Media under the lease, and was in my opinion too low and below market. For this reason, I instructed Colliers that the plaintiff was unable to accept the offer, however, the plaintiff was prepared to negotiate, and I provided instructions to Colliers as to the rent that the plaintiff was prepared to accept."

That email of instructions was this:

> "Thank you for the written offer, however, as I had indicated to Kellie in a separate email, the offer is much lower than the 2013 new lease we signed with Rova Media. The net rent at the time was $110,860. As you are aware, we pay outgoings of around 19K every year.

> Given the above situation, the minimum offer I can accept will be the 2013 rate of $130K Gross (including outgoings) plus GST. You can start with $140K gross plus GST and see what he says.
>
> The other items are okay with me."

Mr Basu's affidavit then continues:

> "I was informed by John Carney of Colliers that the party who made the offer was not prepared to increase its offer".

The email to that effect is an email of 4 August 2016 at 7.45am. It is this:

> "I spoke to the tenant and they only want to pay $100K pa Gross plus GST. I think we need to look for a company who can better utilise the first floor office".

70 Mr Basu then stated this in the affidavit from which I am quoting:

> "28. On 10 August 2016 I sought advice from Colliers as to targeting Start-up companies and to propose to Colliers the creation of a Start-up incubation centre".

The relevant part of the plaintiff's email of 10 August 2016 at 2.24pm is this:

> "I was also wondering [if] it would be a good idea to let out the premises as a Startup Incubation centre just like Stone and Chalk and Fishburners in the city. The downstairs can be used as a Convention room, or Labs room. Let me know your thoughts. The property is already wired up for fibre."

That brought this response from Colliers, at 5.34pm:

> "I believe we can try to canvas this style of user. If you have any other specific examples of these types of companies, I would be happy to call them".

Mr Basu's affidavit continues thus:

> "30. In or about November 2016, I had a telephone conversation with Kellie Tattersall of Colliers, who said to me words to the following effect: 'There have not been any concrete enquiries for the rental of the Premises. I have spoken to several of my business contacts, and some of the neighbours to the premises, as to the premises availability. However, no one has indicated any genuine interest in leasing the premises'.
>
> At this meeting, Kellie Tattersall provided me with a schedule of potential tenants and said to me words to the following effect 'This is a list of tenants who have either made an inquiry about the premises, or who I have contacted to see if they have any interest in leasing the premises'."

The list in question can be found between CB 447 and CB 449. Whilst it is three pages in the Court Book, it probably represents one long document. It contains 20 names. However, I have some doubts as to the reliability of the document in the form it is in before me, because it records the sending of brochures in March 2017, when according to Mr Basu's affidavit, this was provided to him sometime in November 2016. It may be that the dates as to

when brochures were provided was added subsequently, and the document is in a number of forms, as is, unfortunately, common these days.

71 On 15 November 2016, the plaintiff received a marketing quote from Colliers for further marketing of the premises. The email can be found at CB 450, but that is only the covering email. Mr Basu's affidavit continues:

> "32. In or about November 2016, the plaintiff received an offer to purchase the premises. I considered the offer of purchase to be too low, and below market, and for that reason the plaintiff did not accept the offer."

On 21 November, Kellie Tattersall sent to the plaintiff what she referred to as a Draft North District plan.

On 22 November at 12.17pm Mr Basu sent an email to Ms Tattersall, the subject being the Draft North District Plan. The email is this:

> "It was indeed great to meet you at your office. Thanks for the PDF plan for the North Districts. I have now transferred the funds to Adcorp Australia for the campaign".

On the same day, the plaintiff company remitted $3,580 to Adcorp Australia Ltd for further electronic advertising. On 2 December 2016, Ms Tattersall sent an email to the plaintiff:

> "We have been given the green light, and your property's web listing has been uploaded. See below link [omitted]. The draft for the SMH publication will be prepared in a couple of weeks, and I will forward it to you as I get my hands on in."

I assume, having been a Sydneysider all my life, that SMH is a reference to the Sydney Morning Herald, and that not only was there to be electronic advertising, but press advertising. On 23 December 2016 at 1.30pm, Colliers provided by email to Mr Basu three online web listing sites for the property now in question.

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72 The affidavit of Mr Basu of 28 February 2019, exhibit B3, continues thus about events in 2017:

> "35. On 17 January 2017 I provided further instructions to Colliers of the rental that would be acceptable to the Plaintiff if the Premises could be leased separately as a Warehouse and an Office."

The instructions are contained in an email sent on that day at 5.54pm. The substance of the email is this:

> "The division for the Warehouse and Office can be as follows if we eventually lease them out separately. My preference is to lease them together.
>
> Warehouse only:
>
> Area 200 square metres
>
> Plus two car parks.
>
> Office only:
>
> Area 282.2 square metres
>
> Plus 7 car parks.
>
> Total area:
>
> 482 square metres.
>
> Rent:
>
> Net: $260 per square metre.
>
> Outgoings: $40 per square metre.
>
> Total gross: $300 per square metre.
>
> In addition there will be GST."

73 Mr Basu's affidavit then continues:

> "36. On 1 March 2017 my brother, Debesh Basu, and I attended a meeting on behalf of the Plaintiff with Kellie Tattersall. We sought advice from Colliers as to separating the Premises into a Warehouse and a first floor Office. During this meeting Kellie Tattersall said to us, words to the following effect: 'Separating the Premises could present several issues, including the constructing of additional upstairs bathroom facilities, as the current Premises only has one toilet on the ground floor. The construction of a new bathroom facility would require council approval, and this may take a considerable amount of money and time'.
>
> 37. In addition to par 36 of this affidavit, during this meeting I had a conversation with Kellie Tattersall in words to the following effect: I said, 'Ryde Council has been considering Bunnings' request for the implementation of a new warehouse within the general vicinity of the Premises. What advice do you have as to possibly targeting IT and transport companies, given the possible existence of a Bunnings warehouse'. Kellie Tattersall said: 'The Premises is unique, in that there are no suburban trains or metro stations as public transport means to reach the site; the only public transport are city buses. This limits the opportunity for readily renting the property to Start-up companies and IT Office related companies. I also have an invite flyer to the Ryde Council sponsored Innovation and Future Smart Manufacturing conference at CSIRO offices in Ryde. You should go there and get some firsthand knowledge about future Ryde Council directions'.

> 38. In addition to pars 36 and 37 of this affidavit, Kellie also said to me at this meeting words to the following effect: 'We intend to advertise the Premises in Colliers' premier magazine'.
>
> 39. On 29 March 2017 I sought further advice from Colliers as to the appropriate rent and strategy for the releasing of the Premises."

The email sent on this day by Mr Basu to Ms Tattersall is this:

> "I managed to see your new listing in CommercialRealEstate.com. However was unable to see any listings in RealCommercial.com.au. Kindly advise.
>
> I presume we can start our net asking rent from $260 per square metre and make it negotiable to $240 per square metre or start with a firm $240 per square metre. Most of the properties in that area are listed at $230 to $260 per square metre net. Kindly let me know what you think."

The email goes on to reiterate the size of the Premises in question and give a net rent of $240 per square metre allowing outgoings of $40 per square metre, gives a total gross rent of $280 per square metre plus GST.

74 Mr Basu's affidavit par 39 goes on to tell me that on 30 March 2017 he was advised by Colliers that the asking rent for the property should be $240 per square metre. He deposed to accepting that advice. The email from Ms Tattersall can be found at CB455 and CB962 at the top of the page. There is no need to cite it. However, the evidence discloses that the advice of $240 per square metre was the net rent to be asked not the gross rent to be asked.

75 Mr Basu's affidavit continues thus:

> "40. In or about March 2017, on behalf of the Plaintiff, I approached Ryde Council and had an extensive conversation with the City Planner for Ryde Council, whose name I cannot recall, about the council's plans in the area.
>
> 41. In or about March 2017, on behalf of the Plaintiff, I attended the Innovation and Future Smart Manufacturing conference, sponsored by Ryde Council. The purpose of my attendance was to network with potential clients in IT related innovative business, and to discuss the possible creation of collaborative innovation hubs at the Premises. At the time of this event, the majority of the start-up hubs were located in the Sydney City CBD. I believe this was as a result of accessibility to the city from extensive public transport. A true by-copy of an advertisement Colliers International in their Industrial Solutions Magazine, March-April 2017 edition [is attached].
>
> 42. On or about 4 May 2017, I determined that the Plaintiff should move from an exclusive Agency Agreement with Colliers International to an arrangement whereby Colliers International would remain a non-exclusive Agent and the Plaintiff would engage other Agents on a non-exclusive basis to seek a tenant for the releasing of the Premises."

76 In addition to making Colliers a non-exclusive agent, the Plaintiff appointed a number of other agents. They were Ray White of Gladesville and West Ryde which was appointed on 4 May 2017, Auswin Property Management Investment Pty Ltd of Hurstville which was appointed on 22 May 2017, Glass Property Consultants Ltd of North Ryde which was appointed on 1 June 2017 and H T Bowden (NSW) Pty Ltd of Parramatta, which was appointed on 4 July 2017. The appointment of Auswin Property Investment of Hurstville was seeking to tap into the Chinese-speaking market. The appointment of Bowdens was obviously to increase exposure of a listing in Western Sydney. Mr Basu's affidavit continues thus:

> "49. The Plaintiff paid the following amounts for advertising, signboards and other costs associating with attempting to release the Premises:
>
> (a) $361.57 on 14 July 2016, for Colliers Commercial listing; and,
>
> (b) $3,580.50 on 12 December 2016, to Industrial Solutions for specialist listing, including publication of the Premises in the Sydney Morning Herald.
>
> 50. The Plaintiff and its agents were unable to obtain a tenant to lease the Premises between July 2016 (when Colliers International was engaged by the Plaintiff) and 1 January 2018 when a tenant agreed to lease the Premises and a lease commenced. This lease was renegotiated to start on 1 April 2018, the tenant to pay for all fit outs in the Premises."

77 The circumstances of the new lease are expanded on in Mr Basu's affidavit of 20 November 2019 which is exhibit B5. In that affidavit he said this:

> "5. In or about August 2017, I instructed Glass Property to engage in discussions with Global Art Solutions Ltd...[GAS]...as a potential tenant of the Premises. GAS is a business that stores expensive artwork and other valuable items.
>
> 6. The above discussions continued until early January 2018 when the Premises were leased to GAS. I was directly involved in these discussions. During these discussions I instructed Glass Property correspond with Sam Zammit (Mr Zammit) and Peter Repaja (Mr Repaja). Mr Zammit is the managing director of GAS. Mr Repaja is the owner of GAS.
>
> 7. During the course of these discussions, GAS commenced a lease of the Premises on or about 1 January 2018. During further discussions, which again I was directly involved in, the lease was renegotiated to start from 1 April 2018, to allow GAS to perform an extensive fit out of the Premises including Fire Compliance works for the purpose of running its business.
>
> 8. GAS fit out included, but was not limited to, the following:
>
> (a) the removal of sections of carpet, to install new rooms or other internal structures (which are discussed below in my affidavit);
>
> (b) the installation of vault room and supporting flooring; and

(c) the installation of new walls."

78 It is necessary to further consider the demise of the Premises to GAS but before I do that I must recite some evidence given by Ms Tattersall. There are in evidence three affidavits from Ms Tattersall. The first was sworn on 18 July 2017. It was sworn under the name of Kellie Selikman, that name being Ms Tattersall's married name but for professional reasons she uses her maiden name. I have endeavoured throughout these reasons to refer to her by her professional name. However, at the time that the second and third affidavits of Ms Tattersall were put into evidence, I had not read her first affidavit and was unaware that Kellie Tattersall and Kellie Selikman were the same person and that error was heightened by the fact that in the cover sheet for the first affidavit, Ms Tattersall's first name was incorrectly spelt. Ms Tattersall's second affidavit was sworn on 21 June 2019 and her third affidavit was sworn on 30 July 2019. Those affidavits are exhibits E1 and E2. Ms Tattersall's first affidavit goes only to issues of damages.

79 In her affidavit of 21 June 2019, exhibit E1, Ms Tattersall said this:

> "21. Following an inspection, if the party continued to show interest, it was usual practice for that party to tender a formal offer for the Premises. During the course of the Engagement [of Colliers by the Plaintiff], I received five offers as follows:
>
> (a) $80,000 gross being $165.98 gross per square metre. I cannot now recall the terms of this offer;
>
> (b) $90,000 gross, being $186.72 gross per square metre. This lease was for a period of two years;
>
> (c) $100,000 gross, being $207.469 gross per square metre. This lease was for a period of five years with a five year option;
>
> (d) $120,000 net, being $288.96 gross per square metre. This lease was for a period of five years with a five year option; and
>
> (e) An offer of purchase for the Premises for $1,200,000.
>
> 22. In respect of the $120,000 offer, set out in par 21(d) of this Affidavit, this was verbally provided and was conditional upon the offering company's first choice of a different property not being leased to that company. The offering company was able to lease its first choice of property. As such the offer for the Premises was withdrawn.
>
> 23. I provided the remaining offers to Mr Basu, who responded to me with words to the following effect 'It's too low. I cannot accept this'."

80 In her oral evidence, Ms Tattersall said that the offer of $80,000 gross was made around August 2016. She also said that an offer of $90,000 and the offer

of $100,000 per annum gross were also made early in the period when Colliers International was the sole agent. It is clear from evidence that I recited yesterday that the offer of $100,000 per annum gross rent was made by the motor mechanic which offer could not have been accepted in any event because of the limitation on the use of the Premises to which I also referred yesterday.

81 Ms Tattersall was unable to tell me when the inquiry was made by the company which was prepared to pay $120,000 gross per annum if their first choice of venue could not be rented. The significance of that potential tenant is, of course, that the rent that that company was prepared to pay was equivalent to the rent that was payable by Rova. The net annual rent payable by Rova to 31 July 2016 was $117,608 and the rent that would have been payable by Rova if it had remained in possession from 1 August 2016 was $120,982. Because sometimes the rent was referred to in net terms and sometimes in gross terms and sometimes in a rate per square metre, sometimes in an annual lump sum, there was often confusion as to what the relative offers meant. The parties very conveniently prepared an agreed aide memoire on the rent amounts for the Premises that became exhibit N and if this matter goes further is something that should be considered carefully.

82 The guarantors qualified a certified practising valuer, Mr David Bird, from whose report I quoted towards the beginning of these reasons. His opinion was that as at August 2016, November 2016, May 2017 and July 2017, the net annual rent per square metre for this property was $215 and that the gross amount per square metre was $250. Mr Bird's report is exhibit 15. Those were his assessments of the fair market value rent that would have been payable for the Premises. That opinion is expressed in a report dated 17 March 2019.

83 It is clear from Mr Basu's evidence that Colliers International did not obtain for him the successful tenant but that that tenant was obtained for him by Glass Property Consultants of North Ryde.

Lease to GAS

84 I turn now to make some observations and findings about the eventual tenant of the Premises, GAS. Annexure AF to the affidavit of Mr Vieira sworn on 15

April 2019, exhibit 14C, is a search of GAS which can be found at CB810. GAS was incorporated on 3 August 2017. Its registered office and principal place of business was unit 17, 46-48 Buffalo Road, Gladesville, that is the unit in the strata plan next to the unit owned by the Plaintiff. That confirms that the director and shareholder of the company was Mr Peter Repaja and that the secretary of the company was Mr Zammit. According to evidence given by Mr Basu, prior to the incorporation of GAS, a related business was being conducted in unit 17. It can be seen therefore that the eventual tenant for the property was the occupier of the neighbouring lot.

85 In evidence is an agreement to lease between the Plaintiff and GAS. It is exhibit 4. It is dated 12 January 2018. It is a lengthy document containing 17 pages drawn by Messrs Hunt & Hunt, and annexured to it is the lease proposed to be entered into between the Plaintiff and GAS. The actual lease entered into can be found at CB785 as annexure AE to Mr Vieira's affidavit of 15 April 2019. My attention has not been directed in any way to any difference between the proposed lease annexed to the agreement to lease and the lease itself, the only difference I can see is that the name of Hunt & Hunt has been removed from the cover sheet of the lease.

86 The lease was for a term of five years commencing on 1 April 2018, terminating on 31 March 2023 with an option to renew for a further period of five years. Conveniently, exhibit N tells me that the lease provides that for the year commencing 1 April 2018, the annual rent is $200 per square metre net and $240 per square metre gross. For the year commencing on 1 April 2019 it is $215 per square metre net and $255 per square metre gross. For the year commencing 1 April 2020, it is $230 per square metre net and $270 per square metre gross. For the year commencing 1 April 2021, the rent is $240 per square metre net and $280 per square metre gross, and for the final year of the first five year term, the annual rent is for $250 per square metre net and $290 per square metre gross. In short, the rent payable by GAS will only match that which would have been paid by Rova, commencing on 1 April 2022. This is relied upon by the guarantors in their argument that the rent being paid by Rova was not a fair market rent and that the Plaintiff ought to have mitigated its

loss by taking a much lower rent during the period immediately after both Rova and the company left the Premises.

87 The major consideration, as far as I am concerned, about the GAS lease is this: it clearly commenced on 1 April 2018 because work needed to be done by GAS on the Premises before GAS could move into it and commence to pay rent. Exhibit 3 is a letter from a firm of solicitors known as Focus Legal of Chatswood addressed to Mr Zammit of Global Art Solutions which enclosed an application for a complying development certificate. Section C of the application required the applicant to describe the development proposal to be carried out. What has been written is this:

> "Global Art Solutions is a fine art logistics company. The existing warehouse is to undergo a fit out to make the Premises suitable for the storage of works of art. Much of the ground floor of the Premises will be taken up by a climate controlled storage facility and bank vault. The first floor will be used as an office space and non-climate storage area. A penetration measuring 2 x 15 m will be cut out of the first floor slab to allow for scissor lift access to the first floor storage."

Section D of the application for the development certificate required an estimate of the cost of the development. The estimate provided was between $150,000 and $160,000. That was no small improvement. That was much more than the usual "fit out" one would expect in a demised property of the type that the Plaintiff was offering. This was major capital works. One can understand therefore the initial rental to be paid by GAS being lower than the market rate and only increasing to the appropriate market rate later during the term. The term of the lease to GAS, a term of five years, is also a lengthy one, together with its option to renew for a further five years. One can understand that investing up to $160,000 in capital works on the Premises, that the proposed tenant, GAS, would want to stay in the Premises for as long as possible. One would expect it to be a good tenant. Especially is that so when the tenant also was the tenant of the adjoining unit, unit 17. It appears to me that GAS was a good find as a tenant for the Plaintiff, although initially providing a lower rent, the rent increasing to a fair market rent with a potential long term tenancy, giving security to the Plaintiff for its investment.

A failure to mitigate?

88 I turn now to consider the guarantors' argument that the Plaintiff has vowed to mitigate its loss. As far as the common law is concerned, I need only to refer to the decision of Austin J in *Young v Lamb (No 2)* [2001] NSWSC 1014. In that his Honour said this:

> 29 Where a tenant fails to pay rent in breach of the lease, and the landlord fails to mitigate his loss by re-letting the premises, damages for loss of rent should be assessed on the basis that the landlord would have been able, if he acted reasonably, to re-let the premises at a realistic monthly rental after a reasonable period for re-letting had expired. That is, damages should be the difference between the rent payable under lease, and the realistic rental that the landlord would have received had he mitigated his loss: *Marshall v Mackintosh* (1898) 78 LT 750. .
>
> 30 What is the standard which the plaintiff must observe when acting to mitigate his loss? In *Karacominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313, at paragraph 187, the Court of Appeal of New South Wales said:
>
> > "A plaintiff who acts unreasonably in failing to minimise his loss from the defendant's breach of contract will have his damages reduced to the extent to which, had he acted reasonably, his loss would have been less. This is often misleadingly referred to as a duty to mitigate, although the plaintiff is not under a positive duty. The plaintiff does not have to show that he has fulfilled his so-called duty, and the onus is on the defendant to show that he has not and the extent to which (*TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130). Since the defendant is a wrongdoer, in determining whether the plaintiff has acted unreasonably a high standard of conduct will not be required, and the plaintiff will not be held to have acted unreasonably simply because the defendant can suggest other and more beneficial conduct if it was reasonable for the plaintiff to do what he did (*Banco de Portugal v Waterlow and Sons Ltd* [1932] AC 452; *Pilkington v Wood* [1953] Ch 770; *Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd* [1976] 1 NSWLR 5).
>
> 31 Where the assessment of damages relates to a commercial operation, the question relates to what the plaintiff "would do in the ordinary course of business": Sacher Investments at 9; *Wenkart v Pitman* (1998) 46 NSWLR 502."

Of course the primary reliance is upon what fell from the Court of Appeal in *Karacominakis v Big Country Developments*, a decision of Giles JA with whom Handley and Stein JJA concurred. However, that is conveniently cited by Austin J and I need not go back to the Court of Appeal's decision.

89 However, yesterday when I quoted certain terms of the lease granted by the Plaintiff to Rova, I quoted contractual terms requiring the Plaintiff to mitigate its loss. As has been submitted by Mr Lees, for the guarantors, that is expressed

in mandatory terms and appears on its face to carry a greater burden than the common law burden and appears to invert the relevant onus of proof. However, minds can well differ on what is meant by "a reasonable rent", a concept which is not defined in the lease. In his written submissions [MFI 16] Mr Lees said this:

> "25. The Court would find that the Plaintiff acted unreasonably in doing or failing to do the following things:
>
> (a) Advertising the premises with an asking rent that was well above the market rent at the time.
>
> (b) Not reducing the asking rent sooner and by a larger amount (to the market rate).
>
> (c) Not proceeding with the full advertising campaign recommended by its agent, Ms Tattersall, in August instead of December 2016.
>
> (d) Not carrying out the make good repairs and removing the rubbish from the premises sooner.
>
> (e) Not making more realistic or competitive counter-offers to the offers it received.
>
> (f) Not accepting the $100,000 offer or alternatively $90,000 offer, or alternatively the $80,000 offer, that were made in around August 2016."

I need to deal with each of those submissions separately.

90 Mr Lees laid great reliance on the opinion of Mr Bird. That opinion however was provided some three years after relevant events and valuers often act in a conservative fashion and provide conservative estimates. The simple fact is that Rova was paying a net rent of $244 per square metre per annum until the period ending 31 July 2016 and was due to pay a net rent of $251 per square metre for the year commencing 1 August 2017. Despite all the evidence that was called, no evidence was called to say that this was an unacceptable rent in the market at the time, that it was, for example, exorbitant.

91 When Ms Tattersall first inspected the property, she sent an email to Mr Basu on 11 July 2016 at 2.37pm which I have already quoted, but which I need to reiterate. In it she says that she could understand, having inspected the premises, how the plaintiff was able to achieve a rate of $260 per square metre net. It had not in fact actually achieved that at that time, it was due to become $251 per square metre per annum net. However, Ms Tattersall then quotes

three recently let premises, one of which was providing a net annual rent of $266 per square metre. She then said to the Plaintiff:

> "we are confident that we can find you a replacement tenant and suggest a similar rental to what the tenant is currently paying."

Here is a real estate agent from Colliers International telling the Plaintiff that she was confident that she could obtain a tenant at a rate at least equal to that which would be payable by Rova had Rova remained in possession. Furthermore we know that Ms Tattersall found a potential tenant who if its first choice of accommodation could not be obtained, was prepared to pay a rent which was greater than that which would have been payable by Rova had it remained in possession. That was clearly during the exclusive agency period, that is from 12 July 2016 to 12 January 2017. In those circumstances, I am not persuaded that the advertising of the Premises with the asking rent that was being sought by the Plaintiff was unreasonable.

92 The next submission was that the Plaintiff acted unreasonably in not reducing the asking rent earlier than it did or by a larger amount. I was referred by Mr Lees in particular to the email of Mr Basu to Ms Tattersall of 13 February 2017 at 4.11pm in which he advised her that he thought the rent that he was seeking was "justified". However, it is clear from the emails of 29 March 2017 and 30 March 2017 which I have quoted, that advice was given to the Plaintiff that the realistic asking price was $240 per square metre and that advice appears to have been accepted by the Plaintiff. Bearing in mind the other considerations to which I have just pointed and bearing in mind what I consider to be a very good letting of the premises to GAS, I am not persuaded that the Plaintiff acted unreasonably in not reducing the asking rent sooner or by reducing it to a much lower rental.

93 The next submission was that the Plaintiff acted unreasonably in not proceeding with the full advertising campaign initially recommended by Ms Tattersall in August but delaying the full advertising campaign until December 2016. Considering the enthusiastic advice given to the Plaintiff by Ms Tattersall in July, I accept that Mr Basu on behalf of the Plaintiff sought to minimise costs in anticipation that he would find a new tenant soon. When that did not occur, he acceded to the full advertising campaign suggested and paid the amount of

money which I have quoted from his affidavit of 28 February 2019 today. Again I do not consider a delay of some three months to be unreasonable in the circumstances.

94 The next submission was that the Plaintiff acted unreasonably in not carrying out the make good repairs and removing rubbish from the premises sooner. The "rubbish", was only removed in May 2017. However, what Mr Basu continuously referred to as "rubbish", a term strenuously maintained by Mr Ireland of counsel for the Plaintiff, was in fact chattels rather than garbage or droppings or the sort of things one puts into a garbage bin. These were chattels left on the premises. Such photo evidence as there is and in particular the video evidence recorded by Mr Vieira which is exhibit 14D persuades me that the premises were left in relatively good order.

95 In any event, although carpets were not replaced, they appear to have been steam cleaned on 11 December 2016 as is shown by the document at CB417 and CB925 and there was oral evidence given by Mr Basu that some repairs to the carpet by way of the closing of rents in the carpet were made at a cost of approximately $500. Such rents as are shown in the photographs were not particularly large and detract very little from the amenity of the premises. The painting of the walls of the premises was carried out in October 2016. Mr Basu paid for the painting in full on 2 October 2016 so that the painting was done relatively soon after the company quit the premises on 2 August 2016. The “garbage” was removed and paid for on 28 May 2017 but it was not really garbage but really abandoned chattels. I am not persuaded on the balance of probabilities that the Plaintiff acted unreasonably in not carrying out the make good repairs and removing rubbish earlier than actually occurred.

96 The next submission raised by Mr Lees was that the Plaintiff did not act reasonably in making "more realistic or competitive counteroffers". There is no legal requirement that one treat the property market as if one were bargaining in an oriental bazaar. However, it is clear from the email correspondence which I quoted yesterday that Mr Basu was prepared to negotiate, to compromise, but it appears that, for example, when he sought to negotiate with the mechanic who was offering a gross annual rental of $100,000 per annum that is a gross

rental of $207 per square metre per annum, that that party was not prepared to entertain any counter offer. Again, I do not believe that there is any substance to this submission.

97 The final submission is that the Plaintiff acted unreasonably in not accepting the offers of $80,000 gross per annum or $90,000 gross per annum or $100,000 gross per annum. Even Mr Bird's assessment says that the gross annual rental was $120,500. That is much greater than either $80,000. $90,000 or $100,000. Considering that the $100,000 offer could not be accepted because it came from a motor mechanic who was unable to carry on his trade in the unit in question, one must look at the offer of $90,000 per annum, but that is $30,500 per annum less than the fair market rent as determined by Mr Bird. I find it impossible in such circumstances to find that the offer of $90,000 per annum was a reasonable offer based on the terms of the a contractual written obligation of the Plaintiff as contained in the terms of the lease granted by the Plaintiff to Rova. $30,500 is not a sum of money to be sneezed at. In the circumstances I find no substance in that submission either.

98 Looking at the matter overall, on the evidence that I have quoted so far, I believe that the Plaintiff did all that it reasonably could to obtain a tenant at a reasonable rent. Whether a rent is reasonable depends upon a number of things. It depends not only on the quantum of the rent but the term of the lease and the nature of the lessee. For example, one would expect a higher rent to be paid by a lessee who takes the property for a short term. The evidence of Ms Tattersall confirms that. One would also expect a tenant with a good history of paying rent, a good credit history, to obtain a better rent than a person with no credit history or a person with a "start-up" business or a person whose business was speculative or which is some way might be thought to be noxious or noisome.

99 The offer of the $100,000 per annum rent by the motor mechanic is an offer directly on point. As I have already pointed out, the by-laws of the strata plan inhibited a carrying on of any automotive type business in the strata plan. That difficulty was dismissed as being a mere bagatelle (my characterisation) by Mr Lees in his submissions. He pointed out that the unit 18 was the largest unit in

the strata plan and therefore would carry the largest entitlement in voting. However, the unit entitlements can be found in exhibit G, the search of the common property of strata plan 61065. Lot 1 has an entitlement of 550, lot 2 522, lot 3 522, lots 4, 5, 6 and 7 have an entitlement of 513 and lot 8 has an entitlement of 517, lot 9 has an entitlement of 417, lot 10 an entitlement of 600, lot 11 an entitlement of 573, lot 12 an entitlement of 554, lot 13 554, lot 14 564, lot 15 499, lot 16 490, lot 17 appears to have an entitlement of 701 but lot 18 has an entitlement of 785. I am no mathematician but it would appear that lot 18 was hardly in a position to force its will upon the majority of the lot holders of the strata plan. There being no evidence that the holder of unit 18 could force its desire upon the other unit holders, I must reject the submission made by Mr Lees in that regard.

100 Considering both the contractual requirement to mitigate and the common law principle of mitigation, I am not persuaded on the balance of probabilities that the Plaintiff failed to mitigate its loss.

Interest rate of 12% a penalty?

101 The next issue to which I shall turn concerns a submission put to me by the guarantors that the agreed contractual interest rate of 12% per annum constituted a penalty. The first thing I would point out is that it appears that both the initial lease granted by the Plaintiff to Rova and the second lease granted by the Plaintiff to Rova were prepared by a solicitor acting for the Plaintiff. I know that Rova were represented by the firm of Hughes & Taylor of Drummoyne (CB611), in other words both the Plaintiff and Rova were at the time the leases were executed legally represented.

102 There was much debate about what the appropriate interest rate might be. Exhibit J is a large chart of interest rates compiled by the Reserve Bank of Australia. The chart has a large number of columns identified by numerals commencing with B and ending with the numerals AC, that is, there are 28 columns. The parties argued as to which was the appropriate column. The guarantors argued that the appropriate column was column K which is headed "Lending rates, housing loans, banks, variable, standard, owner/occupier." The Plaintiff argued that the appropriate column was column T which is headed

"Lending rates, personal loans, term loans (unsecured), variable". As at August of 2013, that is when the second lease began, column K provided an interest rate of 5.93% whereas column T provided an interest rate of 14.37%. When I consulted the chart, it appeared to me that the appropriate column was column E which is headed "Lending rates, small business, variable, other, overdraft". That provided an interest rate at the same time of 8.95%.

103 One thing that can be said is that the property in question was not a home occupied by its owner. Column K is completely inappropriate. Furthermore, the rate for a personal loan is hardly the applicable one, so column T is equally inapplicable. As I said, it appeared to me that the applicable interest rate appeared to be under column E, which is 8.95%.

104 The guarantors pointed out that the Plaintiff was only paying an interest rate of 4.2% per annum as at 26 May 2018 (see exhibit 10) and the Plaintiff pointed out that it was paying an interest rate of 15.65% per annum on its credit card (see exhibit H).

105 The plaintiff was only paying an interest rate of 4.2% per annum on its borrowings from the bank because all its borrowings were secured by mortgages on the residential properties owned by the Plaintiff rather than on the commercial property, the current property, owned by the Plaintiff or on a combination of the residential properties and this commercial property. Mr Basu gave evidence that he had been advised by the bank to obtain credit in that fashion because he could thereby acquire a lower interest rate. That was very good advice, but cannot be used, in my view, by the guarantors to submit that therefore the appropriate interest rate is one where the interest is secured on residential premises which are generally thought to be much more secure than commercial premises. The corollary of such reliance by the guarantors would be that if a property was owned outright by an investor and the investor was paying nothing to a bank, that the interest rate payable in the event of a default would be nominal. That is an absurd position.

106 Of course I was taken to a number of authorities. The first is *Esanda Finance Corporation Ltd v Plessnig* (1989) 166 CLR 131. Wilson and Toohey JJ said at 141:

> "We are unable to accept their Honours' [Full Court of the Supreme Court of South Australia] reasoning. It overlooks the principle that the payment of an agreed sum is a penalty only if it is 'out of all proportion' or 'extravagant, exorbitant or unconscionable'; AMEV UDC Finance Ltd v Austin (1986) 162 CLR at 190; see also O'Dea v Allstates Leasing System (WA) Pty Ltd (1983) 152 CLR at 400 per Deane J. The reasoning of the majority places too much emphasis upon the superior bargaining position of a finance company resulting in a conclusion that the mere possibility of unfairness lurking in the formula contained in cl 5 is sufficient to characterise cl 6 as a penalty. The adoption of such a criterion fails to allow for the latitude that necessarily attends the conception of a genuine pre estimate of damage. The clause is to be construed from the point of view of the parties at the time of entering into the transaction. The character of a clause as penal or compensatory is then to be perceived as a matter of degree depending on all the circumstances, including the nature of the subject matter of the agreement."

At 153 Deane J said this:

> "The question whether particular provisions of an agreement defining the rights and liabilities of the parties upon termination for breach purport to impose a penalty must be determined as a matter of substance. If such provisions do no more than impose upon the defaulting party an obligation to pay an amount (whether specified or to be calculated in accordance with a nominated formula) which
>
> represents a genuine pre estimate of the damage (including loss of bargain) which the innocent party would sustain by reason of the breach and consequence termination, the provision will not impose a penalty nor will they impose a penalty merely because they operate to withdraw an incentive for observance by the defaulting party of the terms of the agreement.
>
> Such provisions will not be penal unless their operation is, as a matter of substance, to impose some additional or different financial obligation or burden upon the defaulting party in the nature of a disincentive or punishment for breach; *Cf.Acron Pacific Ltd v Offshore Oil NL* (1983) 157CLR 514 at 520."

107 Mr Lees referred me to the decision of the High Court in *Paciocco v Australian New Zealand Banking Group Ltd* [2016] HCA 28, a decision containing 78 pages, but did not refer me to any particular passage in it. I have read most of the judgment and there is no suggestion that their Honours, who were considering late payment fees charged by banks and similar charges as to whether they be penalties or not, changed the law of penalties in any way.

108 It has been submitted on behalf of the Plaintiff that there is no way in which I could find that the agreed interest rate of 12% per annum was extravagant, exorbitant or unconscionable. I accept that submission. Really the guarantors' submission is based on counsel's opinion more than anything else. It is in my view, important to realise that at the relevant time, that is the time of the entry of the Plaintiff and Rova in the second lease, they were both legally

represented and one can hardly point to any inverse bargaining power such as is often invoked in cases where the person imposing the alleged penalty is a bank or finance company and the person who must pay the alleged penalty is an average person or everyday consumer. No evidence has been adduced that the interest rate agreed by the parties was a penalty and, of course, when one reads *Paciocco* one can ascertain that evidence was adduced as to the actual cost to the banks of the loss caused by, for example, a person paying a debt late or going into overdraft. No evidence having been adduced and considering the variables to which I have been referred, there is no way that I could possibly find that the agreed interest rate was a penalty. The submission in the regard by the guarantors is rejected.

Whole rent recoverable

109 There are a few minor matters to discuss before I go to the question of the quantum of damages. The first is that the Plaintiff has the ability as lessor to recover the whole of the rent for the balance of the term, assuming Rova stayed in possession of the premises until the end of the term on 31 July 2017. That appears to me to be clear from the terms of the lease itself, but counsel nevertheless referred me to cases such as *The Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 in particular at 32, and *Lewy v Moss Nominees Pty Ltd* [1996] NSWCA 325 per Priestley JA with whom Clarke JA and Giles AJA concurred. His Honour pointed out that it was submitted by the appellant guarantors that the entire term of the lease could only refer to the whole of the period of time during which the lease subsisted and in that case they submitted that the entire term came to an end either upon the termination of the lease by the lessor or the ejectment of the lessee from the premises. The respondent to the appeal in that case relied inter alia on the *The Progressive Mailing House Pty Ltd v Tabali Pty Ltd*. His Honour clearly accepted the principle in that case and dismissed the appeal. I accept that the Plaintiff is entitled to recover from the guarantors the rent that would have been payable by Rova up until 31 July 2017.

Outgoings

110 The next issue to which I should advert is the submission made by Mr Lees on behalf of the guarantors that the Plaintiff failed to prove what the relevant

outgoings were which affects the quantum of the rent for the final year of the lease. When he made that submission, my jaw fell agape. No one, during the course of the evidence had mentioned outgoings. It was only raised by Mr Lees in his address. The simple fact is that the estimate was given by Mr Basu of what the outgoings were. That was never challenged. No challenge was made to Mr Basu nor was any challenge made to Ms Tattersall who accepted what Mr Basu told her and would clearly have an idea of what the reasonable outgoings were. They were estimated by Mr Basu to be $40 per square metre per annum. Indeed, even Mr Bird accepted that they were at least $35 per square metre per annum. There being no challenge to Mr Basu or any witness for the Plaintiffs, or indeed any witness at all, as to what the quantum of the outgoings was, I reject the submission that that it has not been proved. It was accepted by everybody during the course of the evidence and therefore did not become any issue that needed to be addressed.

Replacement costs

111 The next item concerns the claim by the Plaintiff for replacement costs. I was referred of course to *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8; (2009) 236 CLR 272. In that case there was a lease of office premises for a term of ten years. The lease contained a covenant by the tenant not to make or permit to be made any substantial alteration or addition to the premises without the written approval of the landlord first obtained, which was not to be unreasonably withheld or delayed. Although the tenant applied for such consent, it commenced work on the proposed alterations before any site meeting could be held at which the landlord was going to consider the proposed alterations. Work continued until it was finished. The landlord did not consent to the work and sued the tenant in the Federal Court. It obtained judgment for a sum of money most of which was an assessment of the difference between the value of the premises at the end of the term with the old foyer and the value with the new foyer constructed by the tenant. The amount of damages was increased on appeal by a substantial amount being the cost of restoring the foyer to the original condition as well as lost rent during the period of the restoration. The High Court held that the loss sustained by the landlord from the tenant's failure to perform its contractual obligation to preserve the

premises without alteration which had not been approved and that the loss was the cost of restoring the premises to the condition in which they would have been if the obligation had not been breached, in other words, the increased award of damages made by the Federal Court was the correct measure of the damages.

112 The judgment was that rara avis, a unanimous joint judgment of the High Court of Australia, French CJ, Gummow, Heydon, Crennan and Kiefel JJ. At the foot of p 286 of the CLR their Honours said this:

> "However, in cases where the contract is not for the sale of marketable commodities, selling the defective item and purchasing an item corresponding with the contract is not possible. In such cases diminution in value damages will not restore the innocent party to the 'same situation...as if the contract had been performed'."

On p 287 their Honours said this:

> "So, here the landlord was contractually entitled to the preservation of the premises without alterations not consented to; its measure of damages is the loss sustained by the failure of the Tenant to perform that obligation; and that loss is the cost of restoring the premises to the condition in which they would have been if the obligation had not been breached."

113 I was also referred to the decision of Ward CJ in Eq in *Midcoast Petroleum Pty Ltd v Keldros Pty Ltd* [2019] NSWSC 970. At [279] her Honour said this:

> "It is noted that if the lessor has repairs actually carried out that is strong evidence that the cost of the works is the proper amount of damages (Jones v Herxheimer [1950] 2 KB 106) but that, otherwise, the lessor should prove the actual diminution in the value of the premises to achieve more than nominal damages, (Espir v Basil Street Hotel Ltd [1936] 3 All ER 91; James v Hutton [1950] 1 KB 9; [1949] 2 All ER 243)."

At [285] her Honour said this:

> "The basis on which Midcoast sought to maintain its claim to items that might be said now to have become otiose because of the renovations was that it was the obligation at the date of the termination of the Lease that was relevant. However that does not take into account s 133A of the Conveyancing Act. A whole series of items relating to the shop premises cannot possibly now be recoverable (such as the items relating to the shop counter which has now been relocated and the items relating to the new toilets which have been installed). Although it was said that some of the areas of the shop premises (such as the rear elevation) had not been altered, I was left with insufficient evidence to be able to conclude that the claim to make good items (even those where rectification works were admitted by Keldros to be required as at the date it vacated the Lease) are now recoverable."

At [300] her Honour said this:

> "Midcoast has succeeded but only to a very minor extent compared to the amount it claimed from Keldros (this being most evident in terms of the remediation claims). "

Her Honour went on then to limit the costs recoverable by the Plaintiff.

114 I was also referred to the *Waterways Authority of New South Wales v Coal and Allied Operations Pty Ltd* [2005] NSWSC 1285, a decision of Barrett J. The relevant principles are contained in [24] to [26]:

> 24 This measure of common damages is sometimes described as the measure in *Joyner v Weeks* [1891] 2 QB 31. Lord Esher MR said in that case, at p.43:
>
> > "That rule is that, when there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to have been left."
>
> 25 The correctness of this approach, in an appropriate case, was recognised by the *High Court in Graham v Market Hotels Ltd* (1943) 67 CLR 567.
>
> 26 There may, however, be circumstances in which the cost of putting the premises into the contracted state does not represent the applicable measure of damages. That will be so where, for example, the lessor does not, in reality, want or require premises in the contracted state and is well content to have and enjoy the premises in the state in which they actually exist at the end of the term. As is recognised in cases such as *James v Hutton* and *J Cook and Sons Ltd* [1950] 1 KB 9 and Re Zis; *O'Donnell v Keogh* [1961] WAR 120, such a lessor does not suffer through the breach damages commensurate with the cost of causing the premises to be in the contracted state, although that lessor may suffer damage to the extent of any reduction in the value of the reversion and, if there is no basis on which the court can come to that conclusion, damages will be nominal only.

I was also of course referred to s 133A of the *Conveyancing Act*, a provision which of course is referred to by Ward CJ in her judgment which I have quoted.

Quantum

115 I trust now that I have addressed sufficiently the general issues to be able to turn to the damages claimed.

(a) Rent

116 The first relevant claim is the claim for rent for the balance of the term that would have been paid by Rova had Rova remained in possession of the premises and paying rent. Rent for July 2016 was $9,800.94. Rent for the remaining 12 months of the lease was at the rate of $10,094.96. That sum

multiplied by twelve is $121,139.52. The total of the rent is $130,940.46. That must be reduced by the amount paid by the company, namely $11,462.56. That reduces the sum payable to $119,477.90. From that sum also must be deducted the amount of the bank guarantee as shown in exhibit 2, $28,498.25, reducing the amount payable to $90,979.65. In the pious expectation that I would have finished giving these reasons by the close of business yesterday, I only calculated interest until yesterday. I trust that no one will be aggrieved by the lack of interest for one day. Interest on $90,979.65 at 12% per annum for 2.68 years is $29,259.06. The total payable is $120,238.71.

(b) Hot water system

117 I turn now to the various losses claimed in both the 2016 and 2018 proceedings. The schedule of losses claimed in each statement of claim is identical. The first item concerns the hot water system. The hot water system in question was installed by the plaintiff pursuant to its obligation under the first lease, special condition 14 found at CB253 and repeated in the second lease at CB160. On 31 July 2009, the plaintiff purchased from Cass Brothers the hot water system in question: It cost $2,659.50 (CB275). There was some work associated with its installation. At CB273 is a tax invoice from CMF Plumbing dated 10 August 2009. The work done by it is recorded thus:

> "04/08/09 We drilled a core hole through the concrete slab for the new drainage line. We ran a 50 mm PVC drainage line and a 15 mm copper cold waterline from the new upstairs tea sink through to the existing services at the sink downstairs. We then installed a ZIP Hydro Tap unit and new flick mixer tap in the upstairs tea sink [both supplied by owner]. We then connected water and drainage to the new sink and tested for leaks."

118 The sum charged was $2,238.30 plus GST. The total was $2,462.13. Clearly only a small part of that work included the installation of the hot water service. I would allow for the cost of the installation of the hot water system and the provision of the hot water system itself, $3,000.

119 The hot water service was repaired under warranty on 10 August 2009 (CB277). However, subsequent service of the hot water system was paid for by Rova. These are the relevant dates, amounts and page numbers of the Court Book:

Date	Cost	Page number
24 August 2011	$288.20	519
25 May 2012	$218.48	521
4 October 2012	$614.02	522
27 November 2013	$234.85	523
17 December 2014	$154.00	524

The total of those sums is $1,509.55. If one need any reference to the affidavit evidence, one need only go to Mr Vieira's first affidavit, exhibit 14A, of 24 March 2017 at [27].

120 There is no dispute that the hot water service was removed. The hot water service was removed by someone on behalf of the company. The company through Mr Vieira believed that Rova was the owner because the item appeared on Rova's depreciation schedule. That probably occurred because Rova had been paying for maintenance of the hot water service since 24 August 2011. However, it is clear to me that the hot water service was only removed after 2 July 2016, that is after the company was in possession of the hot water service. Fortunately, I was not addressed by anybody about the law for fixtures. I would merely repeat the maxim quicquid solo plantatur, solo cedit. It was clearly a fixture. It was the landlord's fixture. The removal of it amounted to trespass to the land in accordance with the principles that I quoted yesterday.

121 There is a quotation dated 12 August 2016 for a new hot water service and for its installation. That can be found at CB227. The cost is $5,244.33. However, that is only a quotation. The hot water service has not been replaced. It may be that the present tenant, GAS, has no need of it. Why it has not been replaced

is not adequately explained on the evidence. However, when GAS leaves the premises, there may be a need for the Plaintiff to install a new hot water service. The appropriate thing to do in my view is to award a sum providing for the deferred payment of the quoted sum. If one defers the quoted sum of $5,244.33 until 31 March 2023 at 4%, one obtains 77 cents in the dollar. That would reduce the amount to $4,038.13. If one defers the quote until 31 March 2028, when the GAS second term would expire, the deferral rate is 63 cents in the dollar. That reduces the sum to $3,303.93. I would therefore be prepared to allow $3,650 for the hot water service. However, other questions will arise; will any future tenant want that hot water service reinstalled? Might a future tenant require a whole kitchen to be installed, or a larger system? In the circumstances there must be a discount. I am prepared to allow the sum of $2,000. That will be paid by the company.

(c) Alarm System

122 The next claim is in respect of the alarm system. I find this claim to be unscrupulous. At CB279 is a depreciation schedule for unit 18. That shows that the total cost in 1999 of "alarms, hoses and nozzles" as $1,339.94. I am prepared to proceed on the basis that almost the entirety of that sum relates to the installation of the alarm system. The "hoses and nozzles" may refer to some fire prevention devices. A new alarm system was installed on 28 June 2015. By that time, the old system was 16 years old. The old alarm system had been depreciated at the rate of 10% per annum. That would indicate that its residual value was 18.53% of its original cost. That would indicate that its value at the end of 16 years was $252. The new alarm system was installed by Rova Media which paid for it on 7 July 2015. The cost of the new system was $4,073.18 (CB725). In evidence at CB520 is an email from Mr Vieira to Mr Basu dated 28 July 2016 at 9.03pm. It says, inter alia, this:

> "As you indicated the building had a [alarm] system that was replaced due to fault and you refused to repair. There has been no damage caused by Rova or myself. The alarm system was located in the same position as previous."

123 There is no dispute that the alarm system was removed by someone on behalf of the company. Again, the alarm system is typically a fixture. Even if it were a tenant's fixture, it was left in situ in the premises when Rova essentially gave up possession on 30 June 2016 or perhaps more correctly on 1 July 2016 as

Rova paid rent until 30 June 2016. Yesterday I had cause to quote cl 12.3 of the second lease granted by the plaintiff to Rova. When Rova quit the premises, the Plaintiff as the owner of the premises, was entitled to possession of the alarm system. No one has addressed me on the provisions of the *Sale of Goods Act 1923* as to whether this was specific property in deliverable state where the property may have passed to the purchaser on the payment of consideration or the entry into the contract. All I can find is that the alarm system was still in situ when Rova gave up possession, that it then became the possession of the Plaintiff and that trespass has been caused by the company.

124 The quotation obtained by the Plaintiff can be found at CB230. That should be compared with the account paid by Rova on 7 July 2015 which can be found at CB725 but a much clearer copy of it is at CB566. There are a large number of similarities between the account of Buffalo Locksmiths paid by Rova and the quotation of Buffalo Locksmiths provided to the Plaintiff. However, there notable dissimilarities. The greatest dissimilarity is in the ultimate price. Rova paid on 7 July 2015 $4,073.19. The quotation created by Buffalo Locksmiths for the Plaintiff on 11 August 2016, some 13 months later, is $6,263.87. Such a gross difference is not explicable merely by CPI increases or the like over a period of 13 months. Importantly, at CB566 there was a charge for "useables" which included “Labour, cabling, conduit and other useables", which was $846.92. The quotation obtained by the Plaintiff shows under “miscellaneous”, useables and there is a separate labour cost. The quotation for the useables is $407 but the quotation for the labour is $2,112. However, the quotation makes it clear that the quotation was a "rough estimate only". At CB230 immediately prior to the quotation being made, this sentence occurs:

> "Adam would need to attend site to check what parts are there (damage to cable/cut too short, etc.)." [Misspellings corrected]

125 In the circumstances, I cannot accept the quote as being reliable. I accept the invoice of 28 June 2015 paid on 7 July 2015 as being a fair measure of the Plaintiff's loss allowing for depreciation to be cancelled out by price increases. The sum of $4073.19 deferred until 31 March 2023 gives a figure of $3,136.36 and deferred to 31 March 2028 is the sum of $2,566.11. I would allow $2,800. However, I then must raise these questions. Will a future tenant want an alarm

system? Will a future tenant like GAS install its own alarm system? In the circumstances I would only allow $1,500. That must be paid by the company.

(d) Carpet

126 The next item is carpet. The current carpet was installed on 17 September 2008 at a total cost of $6,734 (CB285). I note at CB290 that the outgoing tenant MG UPS Pty Ltd paid to the Plaintiff $5,554 in order to enable the Plaintiff to make good the existing carpets. The new carpet was probably funded mainly by what the outgoing tenant paid for making good the existing carpet. The Plaintiff claims $8,800 being the cost of new carpet quoted by Stevens Carpets Pty Ltd of James Ruse Drive, Granville. However, new carpets have not been installed. As I have mentioned earlier, at CB417 and CB925 is an account from The Steam Cleaners dated 11 December 2016 for $720 for steam cleaning the carpet on the first floor of the premises. There is no corresponding averment in any of the affidavits, this account being only in annexures to affidavits. Oral evidence was given by Mr Basu of such an amount being paid for cleaning and he also gave oral evidence about the sum of $500 being paid to someone to stitch up tearing in various places of the carpet. However, he did not claim either the $500 or the $720. Learned counsel for the Plaintiff sought leave to make the amendment against the company and Mr Vieira but not against the guarantors during the course of addresses. I refused to grant leave because no one had had an opportunity of dealing with that claim.

127 In any event, the carpet is still in situ in the premises. As I pointed out, that has now been let to GAS which will be potentially the tenant until 31 March 2028. There are pictorial representations of the state of the carpet. They can be found in Mr Vieira's affidavit, exhibit 14C, at [81] and the photographs are annexure AH to that affidavit and there is the video exposed on 2 August 2016 which is exhibit 14B upon which I already commented today. One must wonder what the value of the $8,800 might be if, some time on or after 31 March 2028, the carpet needs to be replaced. I would allow a nominal $1,000 for any necessary cleaning or some discounting of rent payable by GAS. I would point out that the current carpet has now been in situ for 11 years and as far as the evidence disclosed is still being used by GAS.

128 The amount which I have allowed ought be paid by the guarantors. After all, the company was only in possession for the premises for 33 days between 1 July and 2 August 2016, yet Rova had been in possession of the premises between 1 August 2009 and 1 July 2016.

(e) Wall repairs and painting

129 The next claim is in respect of wall repairs and painting. Originally claimed was the sum of $6,996 inclusive of GST, pursuant to a quotation from Painting Projects NSW Pty Ltd of 9 August 2016 (CB234). There is, however, an invoice from Gold Touch Painting Services dated 4 October 2016 for $4,900 (CB236). In Mr Basu's affidavit of 28 February 2019, exhibit B3, at CB397, he said that he paid $4,900 in full on 2 October 2016. I therefore allow $4,900. I allow interest on that sum at the rate of 12% per annum from 3 October 2016 to 4 December 2019, that is the sum of $1,858.08. The total of those two sums is $6,758.08. That must be paid by the guarantors. Again, one must consider the length of the period during which Rova was in possession, Rova's covenant to repaint, and the short period of time in which the company was in possession. It might be thought that damage was done to the walls when the company removed from the walls, Velcro which had been affixed to the walls by Rova in order to support its decorations. However, the damage was done to the walls when Rova affixed the Velcro. When the Velcro was removed it would be inevitable that the first layer of paint would come off with the Velcro. One could hardly repaint premises when there was Velcro on the walls. It had to be removed. This sum must be paid by the guarantors.

(f) "Garbage" removal

130 The next claim is in respect of "garbage" removal. As I have sought to point out this is really removal of unwanted chattels left on the premises. There is no evidence that anything was brought onto the premises by the company or Mr Vieira. They were there to remove what they had purchased from Rova. Anything that was left on the premises belonged to Rova. There is no evidence that what was left on the premises had passed into the legal possession of the company. $500 was paid in cash for the removal of the unwanted chattels. I allow that sum. Interest on $500 at 12% per annum for 2.52 years is $151.20. The total is $651.20.

(g) Fibre optic equipment and data cabling

131 The final two items are a claim for fibre optic equipment and a claim for making good data cabling. The Plaintiff claims under the first heading $4,662. That is on a quotation from Telstra. That quotation can be found nine times in the Court Book. I regret I find it necessary to recite the number of pages on which this piece of paper can be found. It is found at CB238, CB386, CB410, CB423, CB545, CB572, CB767, CB833 and CB931. The quotation for the making good of the data cabling is from All Electrical World and is for the sum of $3,840. That can be found on CB240 and merely on five other pages of the Court Book. There is a conflict in the evidence about this equipment.

132 Evidence concerning it can be found in Mr Basu's affidavit of 16 May 2019, exhibit B4. Between [23] and [26] he explains in detail the claims made by the Plaintiff. However, what he does not say is how the equipment came to be there. It appears to me that all of that equipment was installed by Rova. Mr Vieira addresses this issue in his affidavit of 15 April 2019 which is exhibit 14C. In particular, he addresses it at [87] to [91]:

> 87. As to the fibre optic equipment, the same were ordered and paid for by Rova Media with a company called Escapenet. Mr Basy asserts in his E-Mail of 28 July 2016 that the NBN company had services in the building during the tenancy of Rova Media. Annexed hereto and marked "**AJ**" is a copy of a printout from the NBN website which records that they would not be servicing the Gladesville area until late 2018. NBN were not providing services to Rova Media.
>
> 88. In my experience with the RSLCOM Australia Pty Ltd as noted above, fibre services could be spliced and re-terminated and there is no requirement to replace 100 metres of fibre to the nearest fibre access point as per the quote provided by the plaintiff, a copy of which is annexed hereto as marked "**AK**".
>
> 89. Annexed hereto and marked "**AL**" is a document purporting to be an invoice for internet and telephony service for the Premises dated December 2016. This company was a provider of internet and telephony services to Rova Media. As to the data cabling, the removal of our equipment and rack was managed by IT Removalists.
>
> 90. The quote issued by All Electrical World 90916 relied on by the plaintiff reads as if for replacement of data cabling concerned for the entire Premises. Apart from the cutting of Ethernet cable to allow for the removal of the rack, to my observation the remainder of the network cabling was entirely untouched and in good working order. Annexed hereto and marked "**AM**" is a picture where the Ethernet cables were cut to allow for the removal of equipment.
>
> 91. The All Electrical World quotation 90916 refers to supply, installation and testing of 58 Cat 5 point items. At the time the Company vacated the

> Premises, I estimate from my testing that there were no more than 20 Ethernet port connections that were in the Premises in good working order. Therefore there was no basis for the supply of 58 such items. I would also say there is no basis for the patch panels to be charged to the Company as any patch panels removed with the computer rack were purchased by the Company from Rova Media and were not the property of the plaintiff. The cable ends can be respliced and a new Ethernet connector attached which can be done with a new provider of internet services.

133 In view of that evidence, I can accept that there were 20 Ethernet point connections which were severed. Based on the All Electrical World quotation at CB240 I would allow 20 times $20, 20 times $30 and 20 times $10 and one $120. The total of that is $1,320, rather than the total quotation made by All Electrical World of $3,840.

134 However, the material to be supplied by Telstra appears to be material that would be supplied to a tenant by the tenant's choice of the provider of telephony and internet services. Clearly, enough cable has been left for a new provider to splice into cables that remain in situ. It has not been necessary for the Plaintiff to provide any of these services to the current tenant as the current tenant may not need them. It may not be necessary or convenient for them to be provided to any future tenant either. This may be because the current tenant and any other potential tenants have no need of the services that Rova provided for itself or have very different needs and who knows what the state of technology may be in 2028? For example, it would be of no utility for the Plaintiff to provide a Telstra router at a cost of $2,800 if the current or a future tenant had an alternative provider which would need to provide its own router at its own cost. In these circumstances, a purely nominal award should be allowed for these matters. I would allow the sum of $2,250. That will be payable by the company.

(h) Totals

135 In summary therefore, the damages payable by the guarantors are the rent and interest, $120,238.71, the carpet $1,000, the wall repairs and painting and interest $6,758.08 and the removal of abandoned goods and interest on that sum, that is $651.20. The total of those items is $128,647.99.

136 The damages payable by the company are interest on late paid rent of $2,865.64 for the period from 28 July 2016 to 18 December 2016. That sum

was calculated by Mr Freeman or by his solicitor as being $64.83. To that must be added the sum for the hot water system of $2,000, the alarm system of $1,500 and the claims in respect of fibre optic equipment and making good the data cabling. That is the sum of $2,250. All those claims are in the tort trespass. The total of the sums of $5,814.83.

Orders

137 For those reasons, in matter number 00360721 of 2016 I give verdict and judgment for the Plaintiff against the First Defendant for $5,814.83. I give verdict and judgment for the Second Defendant against the Plaintiff.

138 In matter number 00050775 of 2018 I give verdict and judgment for the Plaintiff against each of the Defendants for $128.647.99.

Envoi

139 I cannot leave this case without observing a number of things. The first is the condition of the Court Book. It was delivered to me as three lever arch binders. Most of the primary documents, that is the annexures to the affidavits, were duplicated at least twice, some of them as many as nine times. When I removed the duplications et cetera, I reduced the volume of the Court Book from three lever arch binders to two lever arch binders. There was no attempt to arrange the documents in any useful order which has made my task extremely, physically difficult. Some emails appear in different volumes of the Court Book let alone as annexures to different affidavits. What the parties ought to have done is put together once only all the relevant primary documents in chronological order and then have the affidavits resworn which could refer to each of the documents in the agreed tender bundle. That is what Court Books should be, not what was here done, merely putting every pleading and affidavit and other exhibits into binders which although very nicely presented, created a major problem for me.

140 The other matter on which I ought comment is that. I was not greatly assisted by any of the parties on the question of damages. The Plaintiff claimed the full amount. No concession was made nor any alternative submission that if I did not, for example, allow the total cost of the renewal of the hot water service as claimed that there should be a fall-back position such as the one that I

eventually found. Counsel's duty is not merely to advocate their client's cause but also to assist the Court. The same criticisms can be levelled at the defendants, because they said nothing should be paid and themselves made no alternative submissions by way of assistance to the Court. The only exception to that was Mr Lees who did provide a submission as to the quantum of the interest that ought be paid by the guarantors, a submission that I unfortunately could not accept because it is based upon the alleged failure to mitigate.

Note: The quantum of the judgment entered against the guarantors was subsequently amended as the sums of rent in [116] were based on net rent rather than gross rent, an error contained in MFI 6 [47].

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Amendments

19 March 2020 - *Dating of decision malfunction corrected

19 March 2020 - Addition of heading "The parties" at commencement of judgment