District Court

New South Wales

Case Name:	Diaspora Holdings Pty Limited & Anor v The Owners Strata Plan No. 68608
Medium Neutral Citation:	[2024] NSWDC 46
Hearing Date(s):	16, 17, 18, 19 and 20 October 2023, 2 and 3 November 2023, and 11 December 2023
Date of Orders:	01 March 2024
Decision Date:	1 March 2024
Jurisdiction:	Civil
Before:	Weber SC DCJ
Decision:	1) That there be judgment and verdict for the defendant against the plaintiffs. 2) The plaintiffs pay the defendant's costs.
Catchwords:	STRATA PLANS - Operation of Car Park contrary to development application - Whether the tort of unlawful interference with trade forms part of the common law of Australia
Legislation Cited:	Interpretation Act 1987 Local Government Act 1919 Local Government Act 1993 Motor Traffic and Transport (Amendment) Act 1955 Strata Schemes Management Act
Cases Cited:	Baulkham Hills Shire Council v Mekol Pty Limited (No. 2) [1970] 3 NSWSR 206 Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd [2010] ACTSC 20 Construction, Forestry, Mining & Energy Union v Boral Resources (Vic) Pty Limited [2014] VSC 571 Deepcliff Pty Ltd v The Council of the City of Gold Coast [2001] QCA 342

	Farah Constructions Pty Limited v Say-Dee Pty Limited (2007) 230 CLR 89 Hardie Finance Corporation Pty Limited v Ahern (No.3) [2010] WASC 403 Johnson v Perez (1988) 166 CLR 351 Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 OBG v Allan [2008] 1 AC 1 Robson v Leischke [2008] 72 NSWLR 98 Sanders v Snell (1998) 196 CLR 329 Spencer v The Commonwealth (1907) 5 CLR 418 Terry Cross Financial Services v Misiti [2008] NSWSC 1365 The Owners – Strata Plan No. 4983 v Canny [2018] NSWCA 275 Warringah Shire Council v KVM Investments Pty Limited (1981) 45 LGRA 425
Category:	Principal judgment
Parties:	1st Plaintiff: Diaspora Holding Pty Ltd 2nd Plaintiff: CBD Asset Management Services Pty Ltd Defendant: Strata Plan 68608
Representation:	Counsel Mr Crossland Defendant: Mr Ilkovski Solicitors: 1st and 2nd Plaintiff: Clarke Kann Lawyers Defendant: Gilchrist Connell
File Number(s):	2021/363209
Publication Restriction:	None

JUDGMENT

Introduction

1 These proceedings concern the closure of a car parking business which operated in the basement floors of the commercial property known as 33 York Street Sydney.

2 From approximately December 2009, the second plaintiff (“CBD”) took over the operation of the car parking business from a related company, both of which companies were associated with Mr John Preston (“Mr Preston”).

3 The property at 33 York Street (“the Premises”) is a strata development of which strata scheme the defendant is the Owner’s Corporation.

4 In June 2010, the first plaintiff (“Diaspora”) purchased lot 16 in the 33 York Street strata plan. Diaspora is also a company associated with Mr Preston. Lot 16 had attached to it the rights to exclusively use two car parking spaces in the basement of the Premises. These exclusive parking rights were then in turn granted to by Diaspora to CBD.

The Issues

5 The Amended Statement of Claim originally pleaded five causes of action, though by final submissions the plaintiff had whittled down its claim to 2 causes of action; namely:

(i) An action in tort for unlawful interference with trade; and

(ii) Nuisance

6 Both causes of action revolved around the decision of the defendant to shut down the car parking business, the operation of which it considered to be unlawful. The decision was carried into effect most potently with the disconnection of the electricity to lot 16. This discontinuance of the electricity supply is the basis of Diaspora’s claim in nuisance.

Does the Tort of Unlawful Interference with Trade Exist?

7 It is necessary to first consider the issue as to whether the cause of action in unlawful interference with trade in fact exists, and if there is doubt as to that issue, what is the appropriate approach to the question of the possible existence of the tort of a judge at first instance such as myself.

8 The plaintiffs presented their cases as if there was little with which to be concerned of in relation to this issue. In so doing the plaintiffs contended that Pritchard J, then sitting as a judge of first instance in the Supreme Court of Western Australia “declared" that the tort formed part of the common law of

Australia (*Hardie Finance Corporation Pty Limited v Ahern* (No.3) [2010] WASC 403).

9 Her honour did so by following the decision of the House of Lords in *OBG v Allan* [2008] 1 AC 1.

10 With the very greatest of respect to Pritchard J, I do not consider that the approach which found favour with her Honour in relation to this potentially novel tort is a correct one for a single instance judge to adopt.

11 In *Sanders v Snell* (1998) 196 CLR 329, the High Court stated that:

> "We do not think it is necessary to decide in this case whether a tort of interference with trade or business interests by an unlawful act should be recognised in Australia."[30]

12 In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the High Court unanimously stated that "*there is but one common law in Australia which is declared by this Court as the final court of appeal."*(P563)

13 Further some 10 years later in *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89, the High Court unanimously stated that that it was a "*grave error*" for an intermediate court of appeal to find liability in the absence of High Court authority. The High Court explained that the grave error took two forms, namel; injustice and confusion.

14 As to confusion, the High Court observed that pronouncements of law by intermediate courts of appeal that are either contrary to High Court dicta, or based on the absence of High Court authority, would adversely affect the operation of the doctrine of *stare decisis*. The Court explained that *stare decisis* would be so effected because lower court judges would feel obliged to follow, pronouncements of law made by an intermediate court of appeal, or a superior court (see *Farah* at [135]).

15 If this were to occur, the High Court explained the flow of the Australian common law would not have one source in High Court authority, but rather possibly several tributaries, which would be apt to cause confusion, and would be contrary to the position as settled by the Court in *Lange*.

16 In my view, it goes without saying that if the High Court was of the view that an intermediate appellate court should not find liability on the basis of a contentious tort without the High Court's authority, this warning must apply a fortiori to a single instance judge such as myself. In my view, it would be quite inappropriate for me to decide the issues before me assuming that the tort exists, as I have been effectively invited to do by the plaintiffs.

17 In support of their contentions, the plaintiffs referred me to the decision of Rein J in *Terry Cross Financial Services v Misiti* [2008] NSWSC 1365, they also referred me to the decision of Refshauge J in *Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd* [2010] ACTSC 20.

18 The plaintiffs submitted that these cases constituted examples of Australian first instance judges accepting the existence of the tort. I do not accept that this is the case. Both decisions were interlocutory; one an application for leave to amend, the other being a strikeout application. In both cases their Honours simply accepted that the tort may exist for the purposes of disposition of the interlocutory issue before them, as distinct from deciding definitively that the tort in fact exists.

19 The plaintiff also referred me to the decision of McMurdo P in *Deepcliff Pty Ltd v The Council of the City of Gold Coast* [2001] QCA 342 where her Honour on one view appeared to accept the existence of the tort. The defendants however point out (correctly in my view) that while her Honour may have accepted the existence of the tort, this acceptance was only a part in her Honour's reasoning that even if it existed, the tort would not have been established, on the facts before her. I should also note that her Honour's approach did not find favour with Williams JA who stated:

> "The reasoning of the [High Court] in Sanders v Snell follows that of the court in Northern Territory of Australia v Mengel. In the light of the reasoning of the High Court in those two authorities it is not for this Court, in my view, to hold that such a tort does exist in Australian law."

20 With the greatest of respect, I prefer the approach of Williams JA.

21 I note that his Honour's approach was also the approach of the Victorian Court of Appeal in *Construction, Forestry, Mining & Energy Union v Boral Resources*

(Vic) Pty Limited [2014] VSC 571, where their Honours, consistent with the approach of Williams JA, stated that:

> "To date, that [the High Court] has declined to decide whether the broader tort should be recognised as part of Australian law. The definitive decision which the appellant seeks — that the broader tort is not part of the common law of Australia — is a decision which could only be made by the High Court."

22 In summary therefore, in my view it is inappropriate for me to express an opinion as to the existence of the tort of unlawful interference with trade as I am urged to do by the plaintiffs. In my opinion, the possible existence of the tort is a matter peculiarly for the High Court.

Was the CBD Car Parking Business Operating Lawfully?

23 Having so concluded, it is strictly unnecessary for me to delve further into issues raised in relation to the alleged tort. That said it may be helpful if I was to express a view as to the lawfulness of the CBD car parking business. I take this course because the plaintiff correctly conceded that if the business which was allegedly the subject of the unlawful interference was itself unlawful, then the plaintiffs could not have suffered any loss by the interference.

24 Because of the fact that a finding on this issue is strictly unnecessary, together with considerations of the dictates of the Overriding Principle I shall touch upon this subject matter as briefly as possible.

The First DA

25 In respect of development application 6801/67 concerning 33/35A York Street and York Lane, the City of Sydney Council on 13 January 1969, gave its "permission to erect over the whole of the above-mentioned site a fourteen (14) storeyed building with three (3) basements". One of the conditions of consent stated that:

> "(iii) That the parking area shall not be conducted as a parking station"

26 The *Local Government Act 1919* was in force as at the date upon which Council gave its consent. The term "parking station" was defined in the *Local Government Act 1919*, by reference to the definition of that term in the *Motor Traffic and Transport (Amendment) Act 1955* (section 270C of the *Local Government Act 1919*). This section in turn defined "parking station" to mean:

> "Parking Station: means any land or building used for the purpose of accommodating vehicles upon payment of a fee or charge, but does not include a metred zone or metred space."

27 A "metred zone" or "metred space" is not presently relevant as both terms relate to public reserves and public roads (see section 270C of the *Local Government Act 1919*). Thus, the definition of "parking station" contemplated a place to accommodate vehicles upon payment of a fee or charge. That is precisely how CBD and its predecessor operated the car park. The defendant thus submitted that the very nature of the car park operation was prohibited by development application 6801/67. I agree with that submission.

28 The *Local Government Act 1919* has since been repealed and replaced by the *Local Government Act 1993*. However in my view, the proper construction of Development Application 6801/67, having regard to its enduring nature, continues to require reference to the definition of "parking station" in the *Local Government Act 1919* as at the date consent was given.

29 The defendant submitted that this approach was consistent with section 30(1)(c) of the *Interpretation Act 1987*. It was submitted that the Development Application 6801/67 created an obligation which had accrued under the *Local Government Act 1919* as at the date the consent was given. The subsequent repeal of the *Local Government Act 1919* therefore does not affect the ongoing operations of the definition of "parking station" as of 13 January 1969 in construing development application.

30 I accept this submission.

31 In my view, the proper construction of "parking station" as set out above provides a clear basis to conclude that CBD and its predecessor operated the car park contrary to Development Application 6801/67. This was so as the business involved using the Premises to accommodate cars upon payment of a fee.

The Second DA

32 33 York Street was also subject to a later Development Consent. Relevantly, clause 7(a) of DA 01/00884, included two relevant restrictions. The first was a restriction which is to be found in the first sentence which stipulates that:

> "The on-site car parking spaces, exclusive of service car spaces…are not to be used by those other than an occupant or a tenant of the subject building."

33 The second restriction was a restriction appearing in the second sentence of clause 7(a) which stated:

> "Any occupant, tenant, lessee or registered proprietor of the development site or part thereof shall not enter into an agreement to lease, license or transfer ownership of any car parking spaces or storage lots to those other than an occupant or tenant of the building."

34 The meaning of the words "tenant", "lessee" and "registered proprietor" in my view are relatively clear. The meaning of the expression "occupant" for the purposes of clause 7 however, is less clear and is critical to both the effect of the restriction on user, and the restriction as to dealing contained in clause 7 of the second DA.

35 The parties were in agreement that the decision of Hutley J in *Warringah Shire Council v KVM Investments Pty Limited* (1981) 45 LGRA 425 is authority for the proposition that the meaning of the word *occupant* "imports the occupation of property of some duration". The plaintiffs also accepted that "occupants" were not "visitors" or "customers".

36 The defendants went on to refer me to *Baulkham Hills Shire Council v Mekol Pty Limited (No. 2)* [1970] 3 NSWSR 206, where Hardie J was required to answer the following question:

> "Whether on the true construction of section 313(j) of the [*Local Government Act 1919*] council can require as a condition of an approval granted under Part XI of the [Act] the provision of suitable space or accommodation for vehicles likely to be used by employees and invitees of the occupiers of the proposed building."

37 The proposed building in that case was to be a two-storey building containing shops on the ground floor, and offices on the first floor, and there was to be a "car parking area with accommodation for sixteen cars to be provided on the subject land, and it was proposed to include two additional car spaces in the basement of the building, which would contain loading and unloading facilities".

38 Section 313(j) of the *Local Government Act 1919* stated:

> "where the building is to be erected in an area or part of an area to which this paragraph has been applied by the Governor by proclamation, the provision of suitable space or accommodation for vehicles likely to be used by the occupants of such building." (my emphasis)

39 Hardie J noted that if the "proposed building" was residential, then the application of section 313(j) of the *Local Government Act 1919* did "not give rise to substantial difficulties of interpretation" because it was "reasonably clear" that:

> "vehicles requiring consideration from the point of view of off-street space or accommodation are those likely to be used by persons living in the building, i.e. owners, tenants, members of their family, and also boarders or guests."

40 If the "proposed building" was commercial however, then the application of the provision his Honour accepted was "more difficult". At the end of the day however, his Honour concluded that in relation to a commercial building, section 313(j) of the *Local Government Act 1919* refers to:

> "vehicles likely to be used by the legal occupiers, whether owners or tenants, and also those used by persons who work in the subject premises so long as their presence on the premises has some element of regularity and continuity and permanence. On this view of the language used I am of the opinion that persons who visit the premises for short periods only as customers of a retail store or clients of a business conducted in the subject building do not come within the subclause. The answer to question (c) accordingly will be that the board is entitled to have regard to vehicles likely to be used by employees of the retail and other businesses proposed to be conducted in the subject premises, but not to vehicles used by customers or clients of such businesses."

41 Hardie's J reasons in *Baulkham Hills Shire Council v Mekol Pty Limited (No. 2)* were affirmed on appeal. They were also referred to with approval by the Court of Appeal in *The Owners – Strata Plan No. 4983 v Canny* [2018] NSWCA 275.

42 It should be noted however, that in that case, the Court of Appeal was dealing with a residential apartment building. The relevant development consent included a provision concerning parking which stated:

> "provision for the free parking of one hundred and four (104) cars by the occupants of the proposed building on the lower ground, ground and upper ground floors and fifteen (15) cars by visitors at the rear of the site."

43 The Owners Corporation had passed a resolution creating a new by-law which purportedly had the effect of excluding non-resident owners of parking lots from using their car spaces. The Court of Appeal had to determine who were to be "occupants of the proposed building" for the purposes of the relevant development consent, and whether use of the car park extended to non-resident owners of car spaces. Unlike clause 7(a) in the present case, there

was no restriction on dealing and car park spaces were bought, sold, and used from 1970 to 2014, including by non-residents.

44 Payne JA (with whom McColl JA and Emmett AJA agreed) concluded that:

> "In my view, the permission to use Elizabeth Bay Gardens extends to any person properly described as an "occupant" of Elizabeth Bay Gardens. An "occupant" of Elizabeth Bay Gardens includes, at least, each of the present respondents as owners of strata parking lots. The respondents are "occupants" of Elizabeth Bay Gardens in that their presence in Elizabeth Bay Gardens as an owner of a parking lot has the element of regularity, continuity and permanence described by Hardie J, albeit in a different context, in Mekol (No 2)."

45 It can be seen therefore that a person who is a "visitor" is not a person whose attendance is "regular, continuous or permanent".

46 The defendant submitted that the consequence of these authorities in these proceedings was as follows. A "visitor" is neither a "tenant" nor an "occupant" for the purposes of the first sentence of clause 7(a).

47 In this regard it should be noted that CBD's own evidence is that the signs which it used to invite parkers to its car park were directed to both "tenants" and "visitors".

48 The defendant went on to argue that accordingly, CBD's own business model as formulated, at all times, was in contravention of the first sentence of clause 7(a). I agree with this contention.

49 Next the defendants submitted that "casual parkers" (who Mr Preston conceded constituted the majority of CBD's business (**TP49:24-32**)) were by definition persons whose attendance at the building was neither regular, continuous, or permanent. The defendant submitted that this concession led to the conclusion that CBD, by accepting the cars of "casual parkers", operated the business contrary to the restriction on user in clause 7(a). I also agree with this contention.

50 On this basis, in my view much evidence which was adduced in the proceedings, to the effect that the "casual parkers" were customers or clients of the various commercial tenants or proprietors was irrelevant. This is so as even if the "casual parkers" were customers or clients of the business, they were neither "occupants" nor legal occupiers of this commercial building for the

purposes of clause 7(a) (*Baulkham Hills Shire Council v Mekol Pty Limited (No. 2)*).

Subsequent Actions in Breach of Clause 7(a) of the Development Consent

51 Mr Preston's evidence was that on or about June 2003, 33 York Street Pty Limited, a company of which he was a director, purchased Lot 2 in the Premises (**CB29, [19]; DX13 Tab 4**). This gave 33 York Street Pty Limited an entitlement to use four car parking spots (**CB29; [19]**).

52 On or about 26 September 2003, 33 York Street Pty Limited granted to Premier Finance Pty Limited ("Premier Finance"), another company of which Mr Preston was director, the right to use its car parking spots (**CB30, [25]**). From about 9 October 2003, Premier Finance owned the business name CBD Parking (**DX13, Tab 5**). CBD Parking was the business trading name of CBD and thus, Premier Finance was CBD's predecessor to the business name CBD Parking.

53 The plaintiff relied upon these transactions however, I do not believe that they in fact assist the plaintiffs' case. I take this view as there is no evidence that as of 26 September 2003 Premier Finance was an "occupant", within the legal meaning of that term, as discussed above. Clearly CBD Parking, being a mere business name, was thus not a juridical person, and could not be an "occupant" of 33 York Street.

54 The defendant submitted that the evidence suggested that Premier Finance was also not an "occupant". A company search demonstrates that Premier Finance did not, at any time, have the Premises as its registered office or as a place of business (**CB97-98**). Thus, the defendant submitted that 33 York Street Pty Limited's grant of a licence to Premier Finance on or about 26 September 2003 was contrary to clause 7(a). It was submitted that the restriction as to dealing in clause 7(a) prevented 33 York Street Pty Limited, as a registered proprietor, from entering into an agreement to licence the car parking spots with a person who was not an occupant or tenant of the building.

55 I agree with this submission.

56 There were a series of further transactions between companies controlled by Mr Preston and relied upon by the plaintiffs which I do not consider advance the plaintiffs' case. After the defendant terminated the car park management agreement with Premier Parking, Premier Finance was appointed as interim car park manager. According to Mr Preston, between 1 November 2003 and 21 March 2004:

> "Premier Finance was the interim car park manager on the same terms as Premier Parking had operated, except that Premier Finance charged a nominal management fee of $1. Premier Finance operated the car park under the business name CBD Parking (**CB31, [30]**)."

57 The defendants contended that any use that Premier Finance made of 33 York Street Pty Limited's car spots during that period of time was also contrary to clause 7(a). It submitted that after 23 March 2004, when by-law 40 was made, any agreements that Premier Finance made with "exclusive rights holders" were also contrary to clause 7(a) as Premier Finance was not an "occupant".

58 I should interpolate that by-law 40 allocated separate car parking spaces to individual lots.

59 I agree with the defendant's contention.

60 On or about 5 September 2005, Kapowie Pty Limited ("Kapowie"), another company of which Mr Preston was a director, became the owner of the business name CBD Parking (**DX13, Tab 5**). Mr Preston gave evidence that he did inform the defendant of the fact that Kapowie had taken over operations of the car park (**TP39.40-42**). There was no evidence however that Kapowie was an occupant of the Premises. As with Premier Finance, a company search (**CB546-559**) shows that Kapowie did not have a registered office or a place of business at the premises, whilst it operated the car park as CBD Parking.

61 Accordingly, the defendant contends that rights which Kapowie took over from Premier Finance in relation to the operation of the car park were also in contravention of clause 7(a). The reason for this contention was clear, namely; Premier Finance itself was not an "occupant"; therefore, Premier Finance could not, consistently with clause 7(a), make an agreement with Kapowie, or confer the benefit on Kapowie, of the car park spaces.

62 Further, as Kapowie was not, and never became, an “occupant” it could not make an agreement or take any licence in relation to the car park spaces, on its own account. The defendant thus contended that for these reasons, Kapowie used the car spaces contrary to clause 7(a). I agree with that contention.

63 The defendant went on to contend that the same conclusion applied to the situation from on or about 9 March 2010, when CBD became the legal owner of the business name CBD Parking. CBD was not an “occupant” of the Premises as at that date. A company search shows that CBD did not have a registered office or a place of business at the Premises as at that date (**DX13, Tab 2**).

64 The defendant contended that CBD Asset could not, therefore, take from Kapowie any agreement or benefit of any agreement in respect of the car spaces.

65 I agree with this contention.

The Tea Room

66 In answer to the defendant’s contentions, the plaintiff asserted that CBD was an “occupant” of a tea room on Level 2, namely the lot owned by 33 York Street Pty Limited. The defendant contended that this assertion could not be accepted from on or around 9 March 2010. This was so it was submitted, as during the period from about June 2008 to 30 June 2012, 33 York Street Pty Limited had leased the entirety of Level 2 to another company, ITC Pty Limited (“ITC”) (**CB1109; CB1129; CB1136,[21-23]**).

67 The defendants contended that any suggestion that CBD occupied or used the tea room contrary to the plain demise given by the lease by 33 York Street Pty Limited to ITC of all of Level 2 should not be accepted. I agree with this contention.

68 After ITC vacated Lot 2, 33 York Street Pty Limited leased Lot 2 to another company, Deals Sydney Pty Limited (“Deals Sydney”). Curiously, in respect of that transaction, Mr Preston produced two identical leases, both of which were dated the same day, and signed in an identical manner. The only difference

between the two leases was that one lease carved out the demise the tearoom and a bathroom (**CB696; CB2010)**.

69 Mr Preston's explanation for this curious state of affairs was in my view unsatisfactory (see **TP65:46-69:23**). Mr Preston's evidence was that:

(1) He and Mr Persson signed the lease with a representative of Deals Sydney (**TP66:41-43**);

(2) Within a day or so of signing, a dispute developed with Deals Sydney who wanted the tea room and bathroom removed from the lettable area of Lot 2 on account of some issue with outgoings (**TP62.27-45, TP66.8-16**);

(3) The lease was changed to remove the tearoom and the bathroom but rent and outgoings were kept at the same amount (**TP67.44-47**);

(4) Even if the tearoom was not excised that CBD would have continued to use it as it had been in the past (**TP68.10-15**); and

(5) the lease was signed again for a second time (**TP68.17-34**).

70 The defendant submitted that I should reject Mr Preston's evidence as it was unclear and implausible. I agree with this contention. I do so for a number of reasons; first, in my opinion it is implausible that a tenant would have an issue concerning the level outgoings, excise part of a lettable area and not negotiate down the rent payable.

71 Secondly, Mr Preston's explanation for why the rent was not reduced, being that Lot 2 was leased at significantly less than the market rate previously received, conflicts with the evidence which indicated that the total amount of the payments due to the lessor under the Deals Sydney lease was $278,875, while for the ITC lease it was $252,918 (**TP67.44- 47; CB601; CB699; CB2013**).

72 Thirdly, Mr Preston's explanation that the original lease needed to be re-executed because it effected the base year calculation is inconsistent with the fact that the base year outgoings pursuant to clause 3.1 were fixed at $76,927 in both versions of the Deals Sydney lease (**TP67.37- 42; CB669; CB2013**).

73 Fourthly, in my opinion, it is inherently unlikely that two leases signed at two different times by three different individuals would carry what were in fact identical handwritten markings at identical locations of each page.

74 I do not accept the evidence of Mr Preston in relation to either the lease to Deals Sydney or the fact that there was more than one lease executed. I consider that the better view as to that the lease which purported to carve out the tearoom was prepared to suit the suggestion that CBD occupied the tearoom. I do not accept that a second lease was signed carving out the tearoom or that CBD in fact occupied the tearoom.

75 There was evidence however that the tea room was used by Mr Preston's companies from time to time as a place for storage. It seems to me however, that the better view of the situation was that such use was pursuant to a licence, albeit an implied one.

76 I should add that in any event, even if CBD was an "occupant" within the legal meaning of that term, in my view, for the reasons earlier explained, CBD could not allow the use of car spaces by persons who attended the car park as "casual parkers", "visitors", "customers" or "clients" of tenants or registered proprietors of the Premises.

77 In my view, CBD could not confer on these persons the status of legal occupiers merely by giving them a car space to use temporarily. For the reasons which I have endeavoured to explain, persons first need to be "occupants" of the Premises before they can be offered the right to use the car spaces.

CBD operated the car park in breach of the restrictions contained in clause 3 of the Second DA

78 This is a further legal impediment which in my opinion makes the manner of the operation of the car park by CBD unlawful. This impediment arises from the Second Development Application.

79 Clause 3 of DA 01/00884 states:

> "The car park must not be used as a public car park."

80 Under the *Local Government Act 1993*, one of the activities which require the approval of council under section 68, is the operation of a public car park. "Public car park" is defined in the dictionary of the *Local Government Act 1993* to mean:

> "any premises used for the purpose of accommodating vehicles of members of the public on payment of a fee, but does not include a pay parking space under the *Road Transport Act 2013* prescribed by the regulations."

81 Thus, as the evidence was that CBD accommodated vehicles of persons who were not "tenants" or "occupants" of the Premises, then CBD was by definition offering the car park spaces to persons who were members of the public, and did so on payment of a fee.

82 Thus in my view, as CBD did not have approval from council to make available to car spaces in the manner in which it did, it follows that it was therefore operating a car park contrary to both section 68 of the *Local Government Act 1993* and clause 3 of DA 01/00884.

The Actual Operation of the Car Park Business

83 The defendant submitted that in an event, CBD Asset in fact operated the car park at the Premises as a public car park by expressly permitting members of the public to use the car spaces.

84 Considerable time in the proceedings was devoted to the manner in which the CBD Car Parking business actually ran, The plaintiffs case was that there was in operation a manual which if complied with, they contended, would lead to the conclusion that the business was at least designed to run lawfully.

85 The Manual is to be found at CB298. It relevantly provided:

> **Tenant Parkers:**
>
> Those with allocated spaces in office tenancies go straight to their space and do not require assistance. In case they are full they can use one of our spaces which is chargeable.
>
> **Visitors/Customers/Contractors/Deliveries/Patients:**
>
> Work out where they are going and what they are doing there. Send the parker to the high rise or low rise lift bank as required and remind them of closing time.
>
> **Refusals**
>
> If they do not like the rate or should not be there, back the car out for the driver if requested or they are struggling.
>
> The Parker should know the Tenant they are visiting or place they are going as minimum. If they "stray", you are full or they have no business in the building, direct them to York Street (left at the end of the lane into Erskine then right onto York) or Sun Parking (right at the end of the lane onto Erskine then right to Kent).

86 The defendant called evidence to demonstrate that in fact the CBD business was not run in conformity with the manual, but rather CBD offered parking to all comers.

87 Given my earlier conclusions, I do not believe that it is necessary for me to descend in to these factual issues in any detail. I shall accordingly only deal with that evidence in a summary manner.

88 The defendant relied primarily on the evidence of Mr Choo. Mr Choo was CBD's longest and most experienced employee. Prior to opening a café business in the foyer, Mr Choo worked in the car parking operation over an extended period of time. The Plaintiffs suggest that Mr Choo was not a disinterested witness. This it was put on the basis that the profitability of his current business, a café, which was located at the foyer of the Premises, depends on the goodwill of the OC. This proposition was rejected by Mr Choo. Mr Choo's evidence as to the true operations of the car park as set out in **CB1077-1079, [11]-[26]**. The thrust of Mr Choo's evidence is that if there were available spaces, CBD allowed all comers to park for a fee. I accept the evidence of Mr Choo in preference to the witnesses called by the plaintiffs on this issue.

89 The plaintiffs called Messrs Smith, Tipping and Persson who also worked in the car park with Mr Choo at different times. Their evidence was intended to establish that the car park operated consistently with the manual.

90 In my view, the evidence of these witnesses should not be preferred over Mr Choo's evidence. Stated briefly, as I have indicated, Mr Choo's experience of the car park operation was much greater than that of Messrs Smith, Tipping and Persson.

91 In addition, as to Mr Smith: in his affidavit he describes that he would go into Lot 16 to consult the manual when required, however on cross examination he was unable to describe Lot 16 and, in that regard, made reference to level 2 (**CB2181 [10], TP171.7-30**). When asked about Lot 16, he appeared to know nothing about it (**TP171.7-22**).

92 As to Mr Tipping, when he was cross examined about his reasons for asking questions of parkers, he stated that he did so in order to assist the customer to "get to where they needed to go". He made no mention in his evidence of the requirement to vet visitors to the building in the manner as set out in the manual (**TP209.9-29**).

93 Furthermore, as to the evidence of Messrs Smith and Persson, the defendant submitted that these witnesses were primarily engaged as building manager assistants, and spent relatively little time within the car park. Mr Smith spent most of his time in the building management side of the business and by his own estimation only spent 25% of his time in the carpark, primarily in the mornings (**TP169.25-44**). The remainder of his day was spent at a number of other properties which CBD was engaged to manage (**TP169.40-48**). The defendant submitted that his knowledge and understanding of the operations of the car park were limited. I agree with this submission.

94 Finally, as to Mr Persson, the defendant submitted that he also primarily worked in the building management side of the business, and only worked in the carpark at most once a week to cover a shift, or a break. He did not park cars (**TP239.17-TP293.22, TP240.36-TP241.4**). The defendant went on to submit that Mr Persson gave no evidence that he turned customers away or indeed as to the nature of his duties in the carpark (**CB2177 [8](e), TP240.40-241.4**). The defendant submitted that given these facts, I should not accept his evidence as to the car park operations. I agree with this submission and as I have stated previously, prefer the evidence of Mr Choo who's knowledge of the car parking operations was extensive.

95 The defendant called Mr Danks. He was a member of the public who, not having any business at the Premises, stated that he was permitted to park his car. He said that he did so on about 4 to 5 occasions. This evidence was consistent with Mr Choo's evidence, namely that it was common for all comers to be able to park their cars if there was space available. I accept Mr Dank's evidence which is supported by that of Mr Choo.

96 The defendant also called Mr Varker-Miles. His evidence was that he had observed persons leave their cars for the valet, but not go to the lift well.

Rather he said that he saw them leave the Premises. The defendant submitted that the clear inference to be drawn from this evidence was that those persons had no business in the Premises and were members of the public who parked their cars at the Premises. I agree with this submission.

97 Mr David Preston, the brother of Mr Preston, also gave evidence as to the conduct of the car park. Mr David Preston was familiar with the car park operations having been associated with them during the period 2005 to 2016 (**CB870, [8]**). In cross-examination, he described blue car parking signs being placed on Erskine Street close to York Lane, which was the entry lane to the car park. This signage had arrows which directed would-be parkers into York Lane. Mr David Preston said they were "standard signage around the city for parking, and that the signs would go out not necessarily at the top of the ramp, but out on the street" (**TP178:42-44**). In my view, the evident purpose of the signs was to attract drivers on Erskine Street to park in the premises (**TP179:15**).

98 For these reasons, I find that the CBD business in fact operated unlawfully at all material times.

CBD operated the car park in breach of the restrictions in clause 8 of the Second DA

99 Finally, the defendant submitted that there was a further reason why CBD's business was unlawful. This argument relied upon Clause 8 of the Second Development Application.

100 Relevantly, Clause 8 stated:

> "The common property service vehicle spaces, bicycle area, ramps and aisles must not be used for the parking or storage of vehicles or boats, apart from service vehicles within the service vehicle spaces."

101 Mr Choo in his evidence stated:

> "When a car was left with me to be parked, I parked the car in any empty car space. I would also leave cars on ramps and other spots which were not marked or designated as a carpark space, provided it was accessible and possible for me to leave a car at that location. If it was physically possible for me to park a car in a location in the Carpark, I would park a car there. Sometimes I would double park the cars (i.e., one in front of another). This was done so that as many cars as possible could be parked in the Carpark. On occasions when I did this, I had to move cars around to free up the car for a customer who had returned to retrieve their car (**CB1078, [19]**)."

102 I accept Mr Choo's evidence, both generally and in relation to this issue. Indeed the evidence to which I have just referred was uncontradicted, as such I accept the defendant's submissions as to this aspect of the operation's illegality.

Conclusion on Legality

103 For these reasons, I have concluded that at all relevant times the CBD parking business was being conducted unlawfully, and thus even if the tort of unlawful interference with trade is taken to exist, the elements of the tort could not be made out in this case.

The Expert Evidence

104 Given my conclusions on the issue of the existence of the tort of unlawful interference, issues relating to the expert evidence adduced by the parties are also unnecessary for me to resolve. That said, given the criticisms by the plaintiffs of the defendant's expert, I shall express certain views on the issue of expert evidence; albeit very briefly.

105 The plaintiffs made considerable criticisms of the evidence of the defendant's expert Ms Jennings-Jones. These criticisms in my view were unwarranted. Ms Jennings-Jones' approach to the quantification of damages, and the approach adopted by the plaintiff's expert Ms Karam were starkly different.

106 I unhesitatingly prefer the approach which Ms Jennings-Jones has adopted. I consider that her approach to the valuation of a business which the plaintiff allegedly lost to be an orthodox one, which involved the quantification of that value as at the date of the breach (*Johnson v Perez* (1988) 166 CLR 351), and by reference to the underlying concepts of value as explained by the High Court in *Spencer v The Commonwealth* (1907) 5 CLR 418.

107 The plaintiffs especially criticised Ms Jennings-Jones ultimate conclusion that the CBD business was of nil or virtually nil value. That valuation is to be contrasted with the valuation of Ms Karam which was in excess of $1 million. The plaintiff's submitted that the evidence of Ms Jennings-Jones and her ultimate conclusion as to the value offended common sense. For the reasons articulated by Ms Jennings Jones I consider that the contractual foundations of

the car parking business conducted by CBD was so shaky as to inevitably lead to a conclusion that the value of its business was in fact nil or close to nil.

108 I should also add that Mr Jennings-Jones made her assessment of the value of the business lost to CBD on the assumption that the CBD business was lawful. In my view, this was in an incorrect assumption. If the correct assumption of the illegality of CBD's operation is adopted the conclusion that the plaintiff suffered no loss to my mind becomes inevitable.

Nuisance

109 In a recent decision of *Robson v Leischke* [2008] 72 NSWLR 98, Cavanagh J analysed the authorities applicable the tort of nuisance, and summarised the elements of the tort as follows:

> "In my view, the plaintiffs must establish that there has been an interference with their use of the land which was substantial and unreasonable. What is unreasonable must be considered objectively between the parties having regard to a range of factors."

110 The plaintiffs' case is that the disconnection of the power to Lot 16 by the Owners Corporation constituted such a nuisance.

111 The defendant says that the disconnection of the power in all circumstances was neither substantial nor unreasonable.

112 As to the issue of substantial interference the defendant drew attention to the fact that the sole permitted use of Lot 16 was as a storage room. It seems clear from the evidence however, that CBD had operated its business from the lot.

113 The evidence was that when the power to Lot 16 was disconnected this did not affect the provision of lights and other basic house utilities to Lot 16. The defendant submitted that in the circumstances the disconnection of the power supply did not substantially interfere with the lawful use of Lot 16, that is to say its use as a store storage facility.

114 I agree with this submission.

115 The defendant further argued that even if the disconnection may be considered to be a substantial interference with the use of Lot 16, such interference was not unreasonable. In this regard defendant points to an email from Mr Keith Wenban to the Owners Corporation solicitor Mr Colin Cunio, of 19 February

2016. In that email Mr Wenban who provided building management services to the defendant, recites that he has discovered unauthorised changes to the supply of electricity to Lot 16.

116 Mr Wenban stated that these modifications were neither noted nor approved on the "as built" drawings. He explained that in his opinion that the modifications required the cutting off of non house power to Lot 16. This was necessary, he explained, as the unauthorised alterations created occupational health and safety issues. These safety issues he stated effected not only Lot 16, but rather potentially effected the supply of energy to the building generally (see CB page 1871).

117 The plaintiffs attempted to downplay the views expressed by Mr Wenban. They did so on the basis that at the that he gave this advice to the Owners Corporation, he was not the holder of an electrician's license. I do not consider that this argument has any validity. The evidence was that Mr Wenban had previously held appropriate licence qualifications as an electrician, but he had let his licence lapse when a career change made the holding of such a licence unnecessary (See TP345). He was in my view well qualified to give the opinion which he did, and the defendant was entitled to rely on that advice.

118 Mr Wenban's concerns as to the occupational health and safety issues occasioned by the unauthorised changes to the common property electrical supply went uncontradicted. Upon receiving Mr Wenban's advice and no doubt on the instructions of the Owners Corporation Mr Cunio, the Owners Corporation solicitor, immediately wrote to Diaspora's solicitors in the following terms:

> "I am instructed to inform you of a grave concern of my client in relation to the supply of power to Lot 16. I am instructed that there have been changes made to the power supply which are not noted or approved on the as built or any modified drawings for the building, nor have they been approved by my client. In addition, the power to Lot 16 is not separately metered, but rather is connected to the common property meter.
>
> My client requires your client to immediately address the unauthorised changes by restoring the supply to its previously approved state and installing a separate meter. Prior to such works taking place your client must inform my client as to the proposed nature of the works and those person [sic] who will be conducting the works. My client requires a representative to be present during the conduct of the works.

> In the event your client does not take action by **5:30pm on Tuesday 23 February 2016**, my client will take appropriate action to address this matter without further notice. Such action may include temporarily disconnecting the power to Lot 16. My client will look to your client in relation to any costs associated with taking appropriate action (emphasis in original) (**CB1802**)."

119 There is no evidence that Diaspora took any remedial action in the face of this communication. The defendant submitted that there was accordingly no evidence that the subsequent lack of electricity supply to Lot 16 was attributable to any act of the Owners Corporation. This it was submitted was based on the fact that as Diaspora had never taken any steps to have its own metered power supply installed in relation to Lot 16.

120 I agree with this submission.

121 Finally, the defendant argued that the Owner's Corporation had a positive statutory duty to keep and maintain the common property, of which the electrical supply infrastructure formed part. The defendant relied in this regard upon section 106 of the *Strata Schemes Management Act*. The defendant went on to submit that as the advice to it was that the steps which it took in relation to the electricity supply were necessary for Occupational Health & Safety reasons, which reasons affected the whole building, it could not be considered to be unreasonable for the Owners Corporation to discharge its statutory duty.

122 I also agree with this submission.

123 It follows that for these reasons that the plaintiff's claim in nuisance must also fail.

Conclusion

124 For the foregoing reasons there should be judgment and verdict for the defendant against the plaintiffs. Costs should follow the event.

Orders

(1) That there be judgment and verdict for the defendant against the plaintiffs.

(2) The plaintiffs pay the defendant's costs.