CITATION:	*Air Raid Arcade Pty Ltd v Kang Seng Chung & Sandra Pi Su Chung* [2002] NTMC 047
PARTIES:	AIR RAID ARCADE PTY LTD v KANG SENG CHUNG & SANDRA SU CHUNG
TITLE OF COURT:	Local Court
JURISDICTION:	CIVIL
FILE NO(s):	20009454
DELIVERED ON:	16 December 2002
DELIVERED AT:	Darwin
HEARING DATE(s):	4, 5, 6, 11, 12, 14, March 2002 and 30 and 31 January 2002
DECISION OF:	MR LOWNDES

CATCHWORDS:

Lessor and Lessee – Lessors breach of covenant – burden of proof – proof of damage- unconscionable conduct on the part of the Lessor

REPRESENTATION:

Counsel:

Plaintiff:	Mr Tippett QC
Defendant:	Mr Cantrill

Solicitors:

Plaintiff:	De Silva Hebron
Defendant:	Bill Piper

Judgment category classification:	B
Judgment ID number:	[2002] NTMC 047
Number of paragraphs:	304

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20009454
[2002] NTMC 047

BETWEEN:

AIR RAID ARCADE PTY LTD
Plaintiff

AND:

KANG SENG CHUNG AND SANDRA PI SU CHUNG
Defendant

REASONS FOR DECISION

(Delivered 16 December 2002)

Mr Lowndes SM:

THE PLEADINGS AND BURDENS OF PROOF

1. The plaintiff bears the onus of proof in relation to the following matters:

    1. The defendants' breach of the covenant to pay rent and outgoings (clauses 4 and 5 of the lease)

    2. The defendants' breach of the covenant to deliver up the premises in good and tenantable condition. (clause 16.1 of the lease)

2. In their amended defence the defendants deny liability for those breaches. They purport to raise by way of defence various breaches of covenants on the part of the plaintiff. Those alleged breaches are repeated in the amended counterclaim as forming the basis of a claim for damages.

3. In my opinion, the defendants cannot rely upon those breaches as a defence to the plaintiff's action on the covenant to pay rent and outgoings. On a true construction of the lease between the parties, the covenant to pay rent and outgoings is not made dependent upon the lessor's covenant to repair and other covenants on the lessor's part. In other words, the defendants cannot contend that it was a condition precedent to their obligation to pay rent that the plaintiff should itself perform the covenants on its part: see *Hart v Rogers* [1916] 1 KB 646 at 651; *Taylor v Webb* [1937] 2 KB 283 at 289-290; *Chatfield v Elmstone Resthouse* Ltd [1975] 2 NZLR 269 at 275.

4. However, none of that precludes the defendants from counterclaiming damages based on alleged breaches of covenants by the plaintiff. The defendants carry the burden of proving those breaches according to the civil standard, namely the balance of probabilities.

THE PLAINTIFFS CLAIM

The Claim for unpaid rent and outgoings

5. The plaintiffs' claim for unpaid rent and outgoings is fairly straightforward. In that regard, I refer to Ex 14 which is, in effect, an acknowledgment as to the amount of rent and outgoings remaining unpaid. The plaintiff is able to recover rent and outgoings, irrespective of any breaches of covenants on its part. I am satisfied that the plaintiff has complied with the provisions of clause 5.5 as a condition precedent for claiming outgoings. Accordingly, the plaintiff is entitled to an award of damages in the sum of $ 13,970.03 on account of unpaid rent and outgoings.

The Claim for damage to the premises

6. The plaintiff's claim for damages in relation to the alleged failure of the defendants to deliver up the premises to the plaintiff in the same condition as at the commencement of the tenancy or to deliver up the premises in a tenantable condition is less straightforward.

The evidence of Kyla Jane Glastonbury

7. Ms Glastonbury gave evidence that she went to Mr Chung's premises on 7 July 2000 with Leslie Curtis to inspect the condition of the premises and to allow Mr Chung access to the premises to enable him to remove his possessions. Apparently, Mr Chung wished to remove his air-conditioners and fridges.

8. She said that the premises were empty and dirty. The witness said that she had a conversation with Mr Chung regarding making good the premises, particularly in relation to the walls and windows from which the air conditioners had been removed. During that conversation, Mr Chung inquired as to the whereabouts of parts of his cool room and other missing items. The witness told Mr Chung that she did not know where those items were. Mr Chung stated that he would make good the repairs and clean the premises.

9. Ms Glastonbury said that she returned to the premises on 11 July 2000 and met Mr Chung there. Mr Chung proceeded to clean up the premises and otherwise restore the premises. A couple of days the witness and Leslie Curtis returned to the premises to conduct an inspection. On that occasion Ms Glastonbury took a number of photos.

10. The first photograph depicted the rectification of the premises after the air conditioners had been removed.

11. The second photo showed the area from outside the premises. That photo showed "some patchwork with plywood."

12. The third photograph showed a kitchen with holes in the tiles. The witness went onto give this evidence:

> "The tap- where the tap fittings are and you can see where something's been pulled off the wall and then there's – all those little black dots are holes in the tiles where something's been drilled in."

13. With respect to the next photo in relation to where the rangehood was before it was removed the witness stated:

> "The ceiling tiles aren't replaced to match existing. There's some areas where the ceiling tiles are missing…… that's a piece of plywood… stuck on the wall."

14. The next photo depicted "dirt in front of sliding door."

15. The photo after that depicted the signage outside the premises which had been left behind.

16. The next photo showed holes in the tiles and marks from furniture that was on the floor.

17. The following photograph depicted damage caused by the coolroom. The witness said:

> "It's just showing the marks left on the tiles after the cool room was removed. Marks on the walls. The cool room fitted in that whole area that's pretty much outlined by the white around the edges with all the rust and white markings."

18. The next photo, captioned "small room adjacent to storeroom, rubbish left behind", depicted more items that were left behind.

19. That was followed by a photograph showing the dirty state of the storeroom.

20. All of the proceeding photos (ie those taken on 13 July 2000) related to the state of the premises after Mr Chung's clean –up. The witness was then asked to compare photos taken of the premises on 7 July before the clean-up. (the evidence in relation to those photos is dealt with at pages 55 – 56 of the transcript).

21. Ms Glastonbury said that she was unable to put a tenant into the premises on 7 July 2000. She said:

"We couldn't show tenants through the premises in the condition that they were in at that time."

22. The witness said that she had no further contact with Mr Chung after she had spoken to him on 11 July.

23. The witness gave the following evidence during cross - examination.

24. Ms Glastonbury said that she was unsure whether she had given any directions to anyone after Mr and Mrs Chung had vacated the premises for any items to be removed.

25. She said that on 7 July 2000 Mr Chung had complained to her about items of his having been removed from the premises. That conversation took place at the shop. The removalists were there at the time. They were there to remove the air conditioners and the fridges. The witness said that she was across the road watching those items being removed from the premises. She said that those people had not been engaged by Collier Jardine.

26. The witness gave evidence that Sitzlers had been engaged by Colliers Jardine before 7 July 2000 to remove items from the premises. She was not present when those removalists attended the premises. Nor did she know what was removed from the premises. The witness stated that she did not give instructions to have the coolroom removed from the premises.

27. The witness could not recall Mr Chung speaking to her about the state of the walls prior to June 2000. She could not recall him complaining about crumbling cement and peeling paint.

28. Ms Glastonbury said that she did not know who caused the damage to the tiles that she photographed. She did not know whether that damage was caused before or after the Chungs left the premises. She said that she did not know who had placed the rubbish and other material in the storeroom. She did not know whether that was placed there before or after Mr and Mrs Chung left the premises.

29. The witness had some recollection of Mr Chung complaining about the removal of the sign at the front of the premises. She stated that she had given no directions for that sign to be removed. She said that it been removed since the new tenants had moved in.

The evidence of Leslie Curtis

30. Ms Curtis gave evidence of attending the premises in July 2000. She referred to photographs taken by herself and Kyla Glastonbury.

31. She gave evidence that the premises were not in a tenantable condition (see the witness's evidence at pages 119-120 of the transcript).

32. The witness gave evidence that she had instructed Sitzlers to go and remove all the rubbish that was on the premises, including the coolroom and the rubbish that was left in the storeroom.

33. The witness said that after Mr Chung had cleaned up the premises she returned to inspect them. She said that the premises were unsatisfactory and she had to get a cleaner in. She believed that occurred after Sitzlers had attended the premises and removed the items.

34. Ms Curtis said that Sitzlers had removed the external sign, that being part of "the rubbish" that she asked them to remove. She said that item was removed after Mr Chung had returned to clean up the premises.

35. Ms Curtis stated that she instructed Sitzlers to remove what remained of the cool room

36. She said that she did not specifically instruct Sitzlers to remove the neon sign but if it was there it would have been taken out with the rest of the rubbish. She repeated that it was removed after Mr Chung had cleaned up the premises. She said that Mr Chung did not complain about it when he went to clean the premises. Nor did he complain to her about all that

remained of the cool room was one wall and the floor. She said that he did not complain to Kyla Glastonbury in her presence.

37. Ms Curtis said that she did not instruct anything to be removed from the premises until after Mr Chung had cleaned up. She said that she gave instructions for the coolroom to be moved after Mr Chung had left.

38. Ms Curtis stated that she did not give Mr Chung any notice that remaining items would be removed if he did not come and collect them.

39. Ms Curtis said that the complaint against Mr Chung was not about the air conditioners having been removed but about the fact that there was a piece of plywood in the gap and broken tiles.

40. The witness conceded that some of the things that were photographed could be regarded as reasonable wear and tear. She added that it was hard to tell what was fair wear and tear. She agreed that it would be equally hard to say what was not fair wear and tear for a tenancy of over 10 years.

41. The witness said that she had spoken to Sitzlers about the value of the cool room. She was told by them that it was worth nothing. She therefore asked Sitzlers to remove it.

The evidence of Kyle James Hercus

42. Mr Hercus gave evidence that he was a project manager for Sitzler Bros. He said that he recalled attending Mr Chung's premises. He said that he was contacted by Colliers Jardine to tender on the removal of items from the premises as well as some upgrading works. Those upgrading works included bringing the premises back into tenantable repair. He said that he quoted the amount of $17,658.68 to restore the premises to tenantable repair.

43. He gave evidence that Sitzlers were asked to remove some left over pieces of a freezer as well as some other items in the storeroom. The removal cost came to $ 909.44.

44. With respect to the coolroom, the witness said that it comprised the floor and the wearing slab and the floor insulation as well as the back wall. It could not be used as a cool room at that time. He said that the coolroom parts were not of any value.

45. The witness said that he also removed a sign at the front of the premises.

46. The witness was asked to comment upon Mr D'Arrigo's figure of $ 7,779 to bring the premises up to tenantable repair. As to whether that was a reasonable figure, Mr Hercus said:

> "Depending upon his scope of works…. We could have certainly done works to that figure. But it would not have been to the scope of work or quality of work that we were proposing to do."

47. During cross examination, Mr Hercus said that Sitzler Bros removed parts of the freezer as well as emptied the storeroom.

48. The witness was unsure as to when the items were removed from the premises. He believed that it was around August 2000.

49. Mr Hercus said that he had been told that the tenant had left the parts of the freezer at the premises.

The evidence of Allen Keith Fensom

50. Mr Fensom, a quantity surveyor, said that he had been requested by Colliers Jardine to provide an assessment of the cost of restoring the premises to a tenantable standard. The quote was for $11, 500.

51. The witness was asked whether the sum of $7779 would be a reasonable amount to bring the premises up to standard. He believed that was a bit under the market value.

The evidence of Robert Andrew D'Arrigo

52. Mr D'Arrrigo, an electrician and general maintenance man gave evidence that he was approached by Colliers Jardine to give a quote for carrying out work to bring the premises up to a tenantable standard and to carry out additional work. The witness said that he carried out the work quoted for.

53. The total cost of the work was $15,000. He attributed about half of that to work necessary to restore the premises to a tenantable standard ie $7,779.

54. Mr D'Arrigo said that in relation to the area where the air conditioners had been removed, a plasterer was engaged to dress the area with fibro. Mini-ord was put on the outside of the shop to make the area look respectable. The area was also painted.

55. Tiles were replaced in the kitchen area. The area was dressed in fibro for the following reason:

> " Because the walls were damaged throughout with holes because obviously they must have had kitchen sinks or whatever and things hanging off the walls, so in order to cover the holes we either had to plaster – we opted to dress it in fibro,…… we had to dress the back there because it just – the cost of cleaning or fixing up the back wall would have been far more than just dressing up with fibro and we opted to dress the rest of the shop to make it look the same."

56. In relation to photo 4 of 7 July 2000 work was done in relation to the ceiling. Mr D'Arrigo gave the following evidence:

> " …. We actually pulled the whole ceiling out due – we had to change some part of the ceiling so we opted to change the whole ceiling because for the price that they do the whole ceiling for, it's no point just putting a few things, because we had to change the light fittings as well. So once he changed the ceiling, the light fittings were pretty ordinary as well. So we opted to change the whole ceiling, put new lights as well."

57. As to the condition of the ceiling, the witness said:

> " …it was not in a presentable state. Well I wouldn't want a shop like that if I was going to into stay."

58. The witness stated that he acid washed the floors and walls.

59. Lights were replaced in the kitchen for the following reason:

> "In the kitchen, the lights…. Had oil obviously from the exhausts and being a kitchen had oil throughout the whole lights and in actual fact they're no longer – you can't use this kind of light fitting in a kitchen so really they shouldn't have been there in the first place anyway, so they had to be replaced"

60. During re examination, the witness said that he also repaired the wall area where the rangehood had been attached to the exhaust.

Mr Chung's evidence

61. Mr Chung told the Court that after he received the notice to quit he was never asked to sell any of his equipment to the owners. Nor was he asked to provide or sell the air conditioners built into the front of the building.

62. Mr Chung said that when he left the premises he took with him the air conditioners and part of the cool room. He left parts of the cool room therE. He said:

> "At the time, I asked Top End Removalist to take everything out and put it on the truck, they said they agree to do it, but they left things behind, including the exhaust fans and 2 door soft drinks behind."

63. Mr Chung said that he did not contact the removalists and request them to pick up the remaining items.

64. The witness gave evidence of attending the premises with his son to clean up the premises.

65. Mr Chung said that he told Colliers Jardine that he would like to go back to the premises and collect his belongings. He said that Colliers Jardine agreed to that.

66. The witness said that when he went back to the premises it needed attention:

" ..it was still a lot of things are not clean – left behind – not clean and also the need to good clean more. Need to spend more time to do more work and clean up works."

67. The following exchange took place between Mr Chung and examining counsel:

> "Q: Did you speak to whoever the representative or representatives from Colliers Jardine were when you went back there on this occasion regarding any property that had been removed?
>
> A: Yes. I did. After I found out my coolroom – section of coolroom and the bottom floor – bottom section of the cool room freezer and also my neon sign and I – I told them I need that back because without them I just could – the cool room freezer doesn't work, it has to be in one – the whole piece and also neon sign.
>
> Q: Well, dealing firstly with the cool room freezer, when you went back on the first occasion after you vacated, was the remains of the cool room freezer there or not?
>
> A: …no it wasn't there and at the time I didn't have a key for the – for the what I call at the back there a kind – there a storeroom there and then talk to Leslie Curtis – she said to me , everything whatever left behind would be put in the storeroom."

68. Mr Chung said that when he inspected the storeroom neither the parts of the coolroom were there nor the neon sign. Mr Chung said that he told Colliers Jardine he needed the sign. He said that Ms Curtis had told him that they had "dumped" it.

69. Mr Chung gave evidence that he had been told that the items had been removed by Sitzler Bros.

70. During cross examination, Mr Chung did not agree that he had left the premises in the state depicted in the photographs tendered during the plaintiffs' case. He was adamant that he gone back and cleaned up the premises. He said that he used caustic soda and water to clean premises. Mr Chung believed that he had performed a "miracle" in the clean – up. He said that he got rid of all the grease and dirt.

71. Mr Chung said that the walls were in that condition depicted in the photos during the tenancy.

72. Mr Chung claimed that some of the photos depicted the state of the premises prior to the clean-up.

73. The witness stated that he left the holes in the tiles as evidence for the court.

Conclusion

74. In relation to its claim for damage to the premises the plaintiff relies upon clause 16.1 of the lease which provides:

> "Except as otherwise expressly provided in the Lease, upon the expiration or other determination of the Term the Lessee shall at the Lessee's own cost and expense peaceably and quietly leave , yield up and surrender the Leased Premises to the Lessor free of occupants in good and tenantable repair, order and condition in all respects and clean and free from rubbish (fair wear and tear and damage by fire, flood, lighting, storm, tempest earthquake, explosion, riot , civil, commotion, war, Act of God or other inevitable accident and damage by causes beyond the control of the Lessee or its agents, employees, contractors or persons claiming through or under the Lessee only excepted)."

75. Clause 16.2 imposes an obligation upon the lessee to remove all chattels, plant machinery and all fixtures belonging to it upon the termination of the lease and to make good nay damage and disfigurement caused to the leased premises by the removal.

76. The requirement to yield up and surrender the premises in good and tenantable re[pair, order and condition in all respects connotes putting back into good condition something that was formerly in a better condition then it is now (See *Quick v Taff Ely Borough Council* [1969] QB 809. Pursuant to Clause 16.1 of the lease the defendants are obliged to "repair that thing which (they) took; (they) are not obliged to make a new and different thing" *(Lister v Lane and Nesham* [1893] 2 QB 212). "Repair" involves restoration of a thing to a condition it formerly had without changing its character (*W*

Thomas & Co Pty Ltd v Commissioner of Taxation (Cth) (1965) 115 CLR 58 at 72 pers Windeyer J).

77. The present case is complicated by a number of matters. First, it is unclear as to what condition and state of repair the premises were in at the commencement of the tenancy in 1989 or at the commencement of the present lease (ie 1997). Presumably, the premises were in a fit state to be operated as a restaurant open to and used by the public. Secondly, upon termination of the lease substantial alterations and improvement were made to the premises which went beyond a mere restoration of the premises to their former condition. Thirdly, the evidence shows that during the period 1989 to the date of termination the premises fell into some disrepair for which the lessee was not responsible and in respect of which the lessee was under no obligation to repair. This aspect is dealt with below in the context of the defendants' counterclaim.

78. Those matters aside, the covenant in clause 16.1 of the lease exempts the lessee from the obligation to repair damage which falls within the category of "fair wear and tear". "Fair wear" is considered to be deterioration caused by reasonable use of the leased premises. "Fair tear" is considered to be deterioration caused by the ordinary operation of the forces of nature. Accordingly, the defendants are not responsible for deterioration and dilapidation caused by their reasonable use of the premises and by the ordinary operation of natural forces (see *Haskell v Marlow* [1928] 2 KB 45).

79. The effect of the "fair wear and tear" exception was explained by Talbot J in *Haskell v Marlow* [1928] 2 KB 45 at 58-9 as follows:

> "Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces. The exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition

> everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce."

80. However, the defendants bear the burden of bringing any deterioration or dilapidation in relation to the premises within the exemption of fair wear and tear (see *Haskell v Marlow* [1928] 2 KB 45; *Brown v Davies* [1958] 1 QB 117*; Wicks Farming Pty Ltd v Waraluck Mining Pty Ltd* [1996} 1 QD R 99.

81. Determining the extent of the defendant's liability to yield up the premises in good and tenantable state of repair subject to the "fair wear and tear" exception is no easy matter. The Court does, however, have photographic evidence as to state of the premises at the end of the lease. Those photographs, inter alia, depict damage occasioned by removal of tenant fixtures and fittings. In my opinion, the photographic evidence and the evidence of the various witnesses called in the plaintiff's case clearly establishes that the premises were not in a state that amounted to good and tenantable repair. Furthermore, it must be borne in mind that the defendants bear the onus of bringing any deterioration and dilapidation within the "fair wear and tear" exception. By and large they have failed to discharge that onus.

82. In my opinion, Mr D'Arrigo's figure of $7779 provides a reasonable guide as to the cost of restoring the premises to good and tenantable repair. That figure was arrived at after distinguishing matters of tenantable repair from an upgrading of the premises.

83. Accordingly, the plaintiff is entitled to damages in the sum of $7779 on account of the defendant's failure to yield up the premises in good and tenantable repair.

The claim for removal of the defendants' chattels

84. I do not believe that the cost of removing the defendants' chattels from the premises ought to be visited upon the defendants by virtue of the plaintiff's failure to comply with the provisions of clause 17.8 of the lease. The plaintiff, by and through its servants or agents, converted those chattels to its own use and are liable, in damages, to the defendants for that conversion. This issue is dealt with below in the context of the defendants' counterclaim.

THE DEFENDANTS COUNTERCLAIM

85. I deal with each of the alleged breaches of covenants on the part of the plaintiffs as follows:

Alleged breach of Clause 2.1

86. Clause 2.1 provides:

> "The Lessor, subject to the encumbrances and interests (if any) specified in Item 3 of the Schedule, hereby leases to the Lessee who hereby takes on lease from the Lessor the Leased Premises together with the right for the Lessee and its servants, agents and invitees to use the Common Areas in common with other persons entitled to use the same to be held by the Lessee at the rent and for the term and on and subject to the covenants and conditions contained in this Lease."

87. The defendants have failed to make out this breach. The evidence was that customers and invitees of the defendants did, in fact, have access to the toilet areas. The fact that patrons and invitees had to obtain a key from the defendants in order to gain access to the toilet area does not give rise to a breach of clause 2.1, at least in the way that the breach of that clause is pleaded.

Alleged breach of Clause 2.2

88. The defendants allege that in breach of its obligations pursuant to the Lease or otherwise implied , the plaintiff failed to maintain sewer pipes in proper

repair so as to prevent them overflowing into the leased premises. It is alleged that the said overflowing brought onto the leased premises both in the kitchen and dining area human faeces, condoms, tampons, grease ad filthy plastic containers as well as noxious or unwholesome fumes and odours. It is further alleged that the overflowing and its consequences prevented the defendants from carrying on their restaurant business.

89. The defendants purport to rely upon a breach of Clause 2.2. The specific allegation is that the plaintiff failed to exercise its right to effect proper repairs etc.

90. Clause 2.2 provides:

> "The Lessor reserves the right to install, maintain, use, repair, alter and replace pipes, ducts, conduits and wires leading through the Leased Premises and to pass and run air, electricity, telephone cables, drainage, sewerage, gas, water, heat and oil through such pipes, ducts, conduits and wires and to enter upon the Leased Premises for that purpose."

91. In my opinion, this clause does not assist the defendants in relation to their complaints about the drainage, and water and sewerage entering the leased premises. Clause 2.2 does not impose an obligation on the lessor to carry out the specified work and repairs; it merely reserves unto the lessor the right to perform those specified works and repairs as it deems appropriate.

92. Can the defendants avail themselves of any other clause in the Lease that might give rise to a breach of covenant on the part of the plaintiff in the specific terms alleged by the defendants?

Clause 12.2 of the Lease provides:

> "The Lessee shall give to the Lessor prompt notice in writing of: any structural defects which may from time to time become apparent in the leased premises; any accident to or defect or want of repair in any services or to fittings in the leased premises excluding any minor matters which are promptly repaired or rectified by the lessee; and

any other apparent circumstances reasonably likely to be or cause any danger, risk or hazard to the leased premises or any person therein."

Clause 12.2 is to be read in conjunction with Clause 15.5 which provides:

" The Lessor shall forthwith upon receipt of a notice relating to matters referred to in clause 12.2 effect such repairs to the leased premises to remedy the matter raised in such notice provided always that the Lessor shall not be obliged to effect such repairs if the responsibility therefor is placed upon the Lessee under this Lease."

Clause 15.5 is, in turn, to be read in conjunction with Clause 12.3. Relevantly, Clause 12. 3 (7) provides:

"The Lessee shall from time to time and at all times during the term:-

(7) keep and maintain the waste pipes, drains and conduits originally within the leased premises in a clean, clear and free flowing condition between their points of origin and their entry into any trunk drain and at the Lessee's own expense employ licensed tradesmen to clear any blockages which may occur therein and in addition shall regularly clean and service any grease trap provided for the exclusive use of the leased premises."

93. The combined effect of Clauses 12.2. 15.5 and 12.3 (7) seems to be that any obligation on the part of the lessor to effect repairs to such matters as drainage and sewerage is contingent upon (1) written notice of want of repair being given by the lessee to the lessor and (2) responsibility for the repairs resting with the lessor and not the lessee.

94. It follows, in the present case, that any breach of covenant on the part of the lessor must arise out of the combined operation of those clauses of the lease.

95. I now propose to deal with the evidence regarding the complaints made by the defendants with respect to the drainage and sewerage.

The evidence of Kenneth May

96. Mr May said that in 1999 he was an office director for Colliers Jardine, Darwin. He was instructed by the registered proprietor of Air Raid Arcade to manage the property. He stated that he was at Colliers Jardine for about 12 months after Air Raid Arcade Pty Ltd became the registered proprietor of the property.

97. Mr May gave evidence that the normal practice in relation to complaints by tenants was that they received a telephone call from a tenant regarding the particular problem, whereupon Colliers Jardine would call in the appropriate tradesman to rectify the fault. As to the procedure the witness gave this evidence:

> "There was a system of every call that came in that required rectification work being recorded on log and that indicated what the problem was and who the particular tradesman is that might be called in to rectify the problem. If there was something more serious, then some tenants would obviously write in with their request for remedial work. It was a matter of the tenants approaching Colliers and their particular preference of doing things."

98. Mr May said that over the 12 months that he managed the property Mr Chung made some mention of the air conditioner on the premises. He said that that was the main issue that he could recall in terms of complaints from Mr Chung. However, he added:

> "It's fair to say that in my position there were other property managers working for me or receptionists that might be logging the calls, so I wouldn't have looked at everything personally. But, however, monthly reports are done for the owner which actually log any particular issues that occurred during that month."

99. Mr May agreed that if no issues arose then there would no logging of a complaint.

100. The witness said that over the period he managed the property he met Mr Chung 3 or 4 times.

101. As to complaints made by Mr Chung, Mr May said:

> "I certainly recall with the various times that I've met with Mr Chung he did have complaints to make about Department of Social Security or the world at large, so to speak, rather than specifically about the Air Raid Arcade itself. I think he may have made reference to some of the previous owners, but they weren't really my concern as property manager for the new owners."

102. The witness said that he no record of any complaints from Mr Chung regarding any refusal or failure on the part of the owner to maintain the premises in either a structural sense or as regards plumbing.

103. Mr May said that he recalled Mr Chung raising his entitlement to use a store-room at the rear of the premises. Mr May said that the matter was to be referred to the owners for their response.

104. When asked whether any repairs had been carried out on the premises while he was at Collier Jardine, Mr May answered:

> "To the best of my knowledge there was none, however complaints could have come in. An order could have been placed with tradesmen, but that would have been recorded very specifically in the log or at the very least in the management reports to the owner."

105. During cross-examination, the witness said that Colliers Jardine never insisted on tenant's complaints being in writing because "there are some rectification works which require instantaneous work and by waiting for something to come in writing could delay the work being completed and undertaken."

106. The witness agreed that problems with blocked sewers would require an instant response for health reasons.

107. Mr May said that although there was no requirement that a complaint be in writing any complaint would be recorded by the person who received the complaint and logged.

108. The witness said that at the time he was working at Colliers Jardine the business was subject to quality assurance. He gave the following evidence in that regard:

> "Quality assurance is the system. It doesn't mean that there's not breakdowns in it, but to the best of knowledge everyone follows it specifically. And it is subject to audit and was audited during my time up there and passed."

109. The witness said that he had no recollection of Mr Chung having complained on two occasions about problems with the sewerage or at all. If there had been such a complaint then it should have been recorded and logged.

The evidence of Kyla Glastonbury

110. Ms Glastonbury said that in 2000 she was working as a property manager at Colliers Jardine.

111. She gave evidence that Mr Chung was served with a notice to quit on 23 May 2000. She said that following the service of that notice she attended Mr Chung's premises in relation to blocked drains. She said that she was not personally aware of any complaints regarding drains prior to 23 May 2000. She said that the subject complaint was received around 2 June 2000.

112. The witness said that on that occasion she attended the premises with Leslie Curtis. Also present were a plumber and a health inspector. Ms Glastonbury said that she looked at the kitchen floor where there was supposedly sewerage. She saw a drain in the middle of the floor. According to her "there was just sort of residue where water had been." She said that she did not see anything that appeared to be sewerage; nor did she smell anything that resembled sewerage. The witness stated that she did not see any tampons or condoms.

113. Ms Glastonbury gave evidence to the effect that Mr Chung did not contact her and inform her that as a result of the attendance of the plumber and the health inspector he had difficulties carrying on the restaurant business.

114. During cross- examination Ms Glastonbury said that she was not aware that over the preceding 12 months (ie prior to 2 June 2000) that a plumber from Nightcliff Plumbing and Gas had attended the premises on a number of occasions to clear blockages in the sewer.

115. The witness said that between March 2000 and the termination of the lease she had walked past the premises on a number of occasions. At no time did she detect any stench coming from the premises. She did not notice a drain at the front of the premises which appeared to be frequently overflowing. She never saw any water running across the footpath.

116. Ms Glastonbury said that no complaints log book for tenants was maintained. There was, however, at the time a complaints register. As to the form that register took the witness said: "It's just if a letter comes in it's kept on a spreadsheet and actioned accordingly." The witness defined a "complaint" as a "complaint about management, staff etc"

117. The witness stated that any complaints regarding the state of the premises would be placed on the tenant's file. Ms Glastonbury said that a log was not maintained by the receptionist in which telephone complaints were recorded. The receptionist merely took maintenance requests. She said that they were placed in a maintenance request folder for each property.

118. The witness gave the following evidence in relation to maintenance requests:

> "The reception kept a folder with maintenance request forms in it and she gave each job order a number and she filled out a maintenance request form of who called , what the problem was, who the job order was sent to or who the job was sent to by…"

119. Ms Glastonbury said that from her knowledge of the files only one complaint was received in relation to the premises concerning the sewerage system prior to 3 June 2000. The complaint which was made in 1999 was contained in a maintenance request form. The witness stated that apart from the work done following the complaint in June 200 and the incident in 1999, no other work was done on the sewerage system in relation to the premises.

120. The witness said that she seen three invoices where drains were unblocked. Ms Glastonbury said that she was not aware of any work having been done in relation to the plumbing prior to the beginning of 1999.

121. The witness gave evidence that after Mr and Mrs Chung left the premises plumbing work was carried out. However, she was not aware of the extent of that work.

122. Ms Glastonbury said that she was not aware of any letters or communications from any government departments relating to either compliance or non-compliance with building or plumbing regulations with respect to the Air Raid Arcade.

123. Ms Glastonbury agreed that auditors had expressed some concern about the recording of complaints regarding the premises. (see T 399). Those complaints apparently related to complaints about Collier Jardine's management of the Air Raid Arcade.

124. The witness was referred to a tax invoice from Nightcliff Plumbing and Gas relating to work done at the Air Raid Arcade on or about 23 November 1999. The witness was then referred to another invoice from the same business bearing the date 8 June 1999 for work done at the Arcade. Ms Glastonbury was also referred to a further invoice for work done at the Arcade on or about 6 June 2000. She was taken to an account from Nightcliff Plumbing and Gas dated 22 January 2001 which apparently

related to a grease trap. Ms Glastonbury was then referred to a number of job orders from Colliers Jardine to Nightcliff Plumbing and Gas.

The evidence of Leslie Curtis

125. Ms Curtis gave evidence that during 1999 and 2000 she was an assistant property manager with Colliers Jardine. After April 2000 she was property manager.

126. The witness said that during her dealings with Mr and Mrs Chung she did not receive any complaints from them regarding structural aspects of the leased premises.

127. Ms Curtis gave evidence that she attended the premises on approximately three occasions.

128. The witness gave evidence of having attended the premises in about June 2000 concerning a plumbing problem. She stated that Mr Chung had called her informing her that there was sewerage all over the floor in the kitchen. She immediately rang the plumber and attended the premises. When she arrived she noticed that there was water on the floor. She observed that there was "residue of grease or something on the floor." She did not see anything that resembled sewerage. She gave the following evidence: "It just looked like sludge of some sort. Didn't look like faeces or anything like that, not that I could see." The witness stated that she did not smell anything like sewerage.

129. The witness gave evidence of having spoken to Mr Chung a couple of times over the telephone in relation to the non-payment of rent. As to any explanation given by Mr Chung, the witness stated that Mr Chung "babbled on" making references to the state of the economy. Ms Curtis said that Mr Chung's explanation did not relate to any structural defect to the premises.

130. Ms Curtis said that she would walk through the arcade at least once every two weeks and she never noticed any offensive or unpleasant odour outside the shop. The first she had heard of the odour was when it was mentioned in court.

131. The witness said that when she attended the premises in June she did not see any tampons, faeces, toilet paper on the kitchen floor.

132. Ms Curtis said that Mr Chung had never suggested to her problems of that nature. She went onto say that Mr Chung had never made any excuses or given any explanations for failing to pay rent in terms of being unable to carry on the restaurant business because of structural or plumbing defects. The witness said that he had never made any compliant to her that he was losing profit as a result of any structural or plumbing defects relating to his premises.

133. Ms Curtis did no believe that Mr Chung had rung her on 22 November 1999 in relation to drains at the premises.

134. The witness said that Mr Chung had told her in June 2000 that he was thinking of suing the plumber who had put the drainage pipe in the kitchen. She did not believe that Mr Chung had told her that the drainage had never been right and there had always been problems with the plumbing. Ms Curtis said that he did not tell her that he had recurrent problems with overflow in the kitchen. However, she agreed that in June 2000 Mr Chung was not happy with the state of the plumbing.

Mr Chung's evidence

135. Mr Chung gave evidence at the commencement of the lease in 1989 he arranged for some plumbing work to be done at the premises so as to make those premises suitable for a food outlet. Mr Chung said he paid for that plumbing work.

136. Mr Chung said that during the period prior to the sale of the premises to Air Raid Arcade in 1999 he had problems with the plumbing. He said that from to time effluence would enter the premises through the floor of the shop. He described it as “smelly”. Mr Chung said that on those occasions human faeces condoms and tampons came up through the floor of the food preparation area inside the kitchen. He said that occurred at least 3 to 4 times a year. On each of those occasions Mr Chung said that he informed the owner, Swinstead, or the agent, Colliers Jardine, of the problem. He said that a bit of work was done during that period. Mr Chung said that no one suggested to him how the problem could be permanently fixed.

137. Mr Chung gave evidence of one specific incident which occurred about 3 to 6 months after he started operating the restaurant business. That concerned the presence of human faeces in the grease trap.

138. Mr Chung gave evidence that in 1998 he had a conversation with Mr Capp, the intending purchaser of the premises. Mr Chung said that during that conversation he pointed out various defects in relation to the premises. Mr Chung did not mention to Mr Capp the problems with the sewer pipes or drainage as those problems were not occurring at the time.

139. The witness went onto say that during the period 1999 and May 2000 he made complaints to several people at Colliers Jardine regarding the state of the premises. Those persons included Ken May, Leslie Curtis and Kyla Glastonbury.

140. Mr Chung referred to a meeting he had with Mr May during the dry season of 1999. During that meeting Mr Chung said that he pointed out various defects relating to the premises, but no mention was made of any problems with the drainage or sewage. Mr Chung said that at the time there was no problem with the drainage.

141. Mr Chung said that during the tenancy he did not pour any fat down the sink. so as to cause a problem with the drainage. Mr Chung said that the washing of greasy pots and pans was done at the sink where the drain runs to the grease trap. He said that washing of pots and pans and anything do with grease did not occur at the two other sinks shown on the plan presented to the witness. Mr Chung said that at no stage did he or anyone to his knowledge pour fat down any of the drains shown in the plan.

142. Mr Chung gave evidence that up to 1997, when a new lease was entered into, there was not only waste material coming through the floor or through the drains, but there was also a recurrent odour. He said that the problem with waste material entering the premises continued after the new lease commenced. The odour also persisted during the period 1997-1999.

143. The witness stated that on each occasion waste entered the premises it became necessary to close the shop in order to clean up the shop and to remove the odour. That usually took about 2 to 3 hours.

144. Mr Chung added that during the time from 1997 until the premises were bought by Air Raid Arcade waste entered the premises through the drains approximately twice a year.

145. Mr Chung gave evidence of a specific incident which occurred in about May or June 1999. On that occasion there was a strong smell in the shop and a yellowy – black smelly substance like human faeces entered the shop through the floor of the premises. Mr Chung said that the plumber identified the substance as fat. Mr Chung then inquired as to where the fat was coming from. Mr Chung said that he received an invoice from Nightcliff Plumbing for the work that was done on that occasion.

146. The witness said that there was a recurrence of the problem in November 1999. The incident was reported to Colliers Jardine who arranged for a plumber to attend the premises. Mr Chung described the recurring problem

thus: “The sewage overflow is very smelly. In the kitchen area, food preparation area.” Mr Chung said that a plumber from Nightcliff Plumbing attended the premises and cleared the drain. The witness said that there had been an odour permeating the premises for days prior to the incident.

147. In relation to the November incident, Mr Chung said that he saw water and food scrap on the floor. He said it was black and smelly. The witness stated that on that occasion he did not see any faeces. On the occasion in question the shop was closed for about 2 to 3 hours during trading hours.

148. Mr Chung said that the next occasion on which there was a problem with the drains was in about May 2000. The incident occurred before 23 May 2000, which was the date the defendants were served with a notice to quit. There was a very strong smell before the incident. The overflowing extended to the dining area. There was a lot of liquid coupled with black food stuff which exuded an offensive odour.

149. The witness said that he reported the incident to Colliers Jardine, stressing the urgency of the matter. He subsequently spoke to Leslie Curtis who informed Mr Chung that she was unable to attend the premises because she was in a conference. Mr Chung said that he told Ms Curtis that he intended to report the matter to the health inspector and to take legal action in relation to the drainage problem. Mr Chung said that Ms Curtis replied thus: “The courts will take a million years”.

150. Mr Chung said that Leslie Curtis called a plumber straightaway. A plumber attended the premises. Leslie Curtis also attended the premises. According to Mr Chung, Leslie Curtis did not appear to be interested in the problem.

151. Mr Chung stated that as a result of the problem the shop had to be closed for the whole of the day in order to clean up the shop. No trading took place that day and previously prepared food had to be disposed of.

152. After being referred to the video which was taken at the premises (Ex 24) Mr Chung was asked what he meant by the word "condensate". He replied:

> "It's meaning the cold water and condensate – if there – there is oil coming down during he cooking there might be – that's a way of condensate – the oil is stay there and solid – it becomes solid."

153. When asked where does it become solid, the witness stated:

> "It's on the floor. We wash – the – before we washing and the cool – cool waters which is come from the – the coolroom and the freezer and it's coming down every minute and there might be – if there is oil one there, little bit there, that might condensate because it.. see the cool – cool and make the hot and condensate…."

154. Mr Chung stated that at no stage did he deliberately pour oil or any fatty substances down the drains.

155. The witness said that he washed the floor from time to time because the floor would get dirty. He added:

> "Preparing the woks and do the cooking. Sometime might be the – oil might be on the floor like when you do the tipping on the oil to the – where there's cooking might be a little bit oil is coming down the floor, might be, and in the quick kitchen area and could be possible – there is a possibility that oil is on the floor sometime while you're cooking because you use the wok."

156. Mr Chung was then taken to that part of the video showing water running across the footpath from a gap between the two buildings to the gutter. Mr Chung said that he had complained about that over a period which started before the new owners took over the arcade. He had complained to Colliers Jardine and the previous owners.

157. Mr Chung gave evidence of having brought the problem with the water to the attention of Mr Capp.

158. During cross-examination, Mr Chung said that the stench emanating from the premises had occurred periodically during the tenancy.

159. Mr Chung gave evidence to the effect that if the problems with the premises were not fixed he would stop paying rent. He said that that he stopped paying rent in November 1999 and did not pay rent for December 1999 nor for January, February, March April, May and June 2000.

160. Mr Chung said that he had never written a letter of complaint in relation to the problems with the premises to Colliers Jardine nor to the previous owners.

161. The witness recalled the plumber's (Mr Forrest) attendance at the premises . He agreed that Mr Forrest told him that him fat in the pipe was causing the blockage in the drains. Mr Chung gave evidence to the effect that he had no idea about that as he was not an expert. The following exchange then took place between cross-examining counsel and the witness:

> "Q:… and Mr Forrest was telling you that if you put fat down that pipe it goes solid – it condensates and goes solid, is that right?
>
> A: How do I do it?
>
> Q: Mr Forrest was telling you that?
>
> A: Yeah he was said to me but how do I do it?
>
> Q: And what he was saying to you is that if put fat down the sink which leads to that pipe it will keep blocking it up?
>
> A: How do I put the fat down there? "

162. Mr Chung was then referred to the video in which he pointed out a pipe which was running down the side of the coolroom. That pipe went down the front of the coolroom into the floor. Mr Chung said that on the video he had possibly used the words "the oil condensates and makes it solid." He added:

163. "I didn't say hot oil. The oil is coming down from there and accidentally and it's happened to – because cooking area."

164. The following exchange then took place between cross-examining counsel and the witness:

> "Q: So the oil that was blocking up your drains accidentally got into the pipe, did it?
>
> A: Yeah, during the long period of time and that's been accumulated.
>
> Q: I see, but Mr Forrest – he suggested that – did – did Mr Forrest suggest to you that you stop putting oil into the drain?
>
> A: how could we stop – how do we stop? This oil is when we cooking. That oil is in the hot – what is we – we cook and the oil just – because we have never seen it or that's all done by the proper Australian Standard and order by Territory trader – Australian Standard and you got me for that ; I don't know.
>
> Q: I see, did Mr Forrest suggest to you at any time to stop putting oil in that drain?
>
> A: He – yes he did but it doesn't make sense to me."

165. When it was put to Mr Chung that he bore the obligation of keeping drains unblocked he stated:

> "No, I be in charge of above the ground but not the bottom of the ground."

166. Mr Chung said that when the drains became blocked he would ring up Colliers Jardine and tell them there was a blockage and that a plumber was needed. He said that Colliers Jardine responded quickly.

167. During re-examination, Mr Chung said that he had no idea how fat got down the drain. Mr Chung said that Mr Forrest had not told him that oil from the condensate was going into the drain. The witness said that he did not ask Mr Forrest where the fat came from.

Mrs Chung's evidence

168. Mrs Chung gave evidence to the effect that she did most of the cooking at the restaurant. She said that she did not use animal fats for cooking. She

used vegetable oil to grease the pans and woks. The oil which was used was in liquid form. Mrs Chung stated that she had never poured oil down the drains in the floor.

169. The witness said that they had problems with the drains in the floor over the period of their tenancy. Her actual words were: " ..it always blocking the pipe it block." The following exchange then took place between examining counsel and the witness:

> Q: "When you say 'always' was that over the whole of the period that you were occupying those premises or over any particular period?
>
> A: Roughly two months or three months."

170. The witness went onto say that over the period 1999 to June 2000 the problem occurred about 5 or 6 times. Mrs Chung said that on those occasions there was "water, all in the kitchen." The incident would usually occur between 10 and 11 am. The water entering the premises would make a rumbling noise. Mrs Chung said that the water contained faeces. She said that plumbers attended the premises when those incidents occurred.

171. Mrs Chung remembered Mr Forrest, the plumber, attending the premises. However, she said that she did not talk to him about the cause of the problem; nor did he say anything to her about the matter. Mrs Chung stated that Mr Forrest did not mention what might have caused the blockage; nor did he say anything about grease. Mrs Chung said that Mr Forrest never showed her what she should do about cleaning out the drains in the floor. She said that he did not tell her anything about the drain in the floor.

172. Mrs Chung gave evidence that she kept the drains clear by regular hosing ie twice a day.

173. The witness said that when she arrived at the shop in the morning she would detect a strong odour.

174. Mrs Chung stated that she never put any oil or grease down the drains. Nor did she see anyone pour any oil or grease down the drains.

175. The witness gave evidence that when the health inspector attended the premises he was informed of the strong smell which permeated the shop.

176. The witness then went onto give evidence about the motel upstairs which had cooking facilities and the relationship of that area to the leased premises. Mrs Chung said that the drain seemed to be worse when the motel was full.

177. Mrs Chung was referred to the water running across the footpath, as shown on the video. She was unable to say where the water was coming from. However, she said that it was not clean water: it was like "soap". She said that the running water occurred every day. Mrs Chung stated that she had spoken to someone about it. According to Mrs Chung the odour from the running water smelt like sewerage.

178. The witness said that she could not remember the name of the plumber who told her to use the sink that goes to the grease-trap for oily material. Mrs Chung did not know why the plumber had suggested that she use that sink. The witness said that she did not why the plumber was at the shop when he told her to use that sink. She went onto say that the plumber did not unblock a pipe before that conversation took place.

179. The following exchange took place between cross-examining counsel and the witness:

> Q: "..were you present when Mr Forrest spoke to your husband about the problem with the blocked pipe?
>
> A: Yes.
>
> Q: And were you present when Mr Forrest told your husband that the problem was because there was fat and oil congealing in the pipes and blocking it?

A: I can't remember."

180. Mrs Chung agreed that the plumber had told her to use one sink for oily, greasy material. After being told that she started using that sink for the oil.

The evidence of Simon Chung

181. Mr Chung junior, the son of Mr and Mrs Chung, gave evidence that during the period 1998 to the middle of 2000 he worked in the shop and otherwise attended the shop. He said that about twice a week he noticed an odour which resembled the smell of sewerage. He said that the smell peaked when the motel upstairs was fully booked.

182. Mr Chung gave evidence that he had seen faeces on the floor of the premises 10 –20 times.

183. The witness said that one of his friends had commented upon the odour emanating from the premises. He also recalled a regular customer complaining about the smell.

184. The witness gave evidence of a conversation between his father and Mr Capp during which his father informed Mr Capp of the drainage problems. According to the witness Mr Capp said that he would fix the problem.

185. During cross-examination, Mr Chung said that the last time he saw faeces on the floor was about two weeks before the shop closed.

186. The witness was aware that a plumber had told his parents to put the oily material in one sink and to wash the crockery and glasses in another sink.

Mr Forrest's evidence

187. Mr Forrest, a plumber from Nightcliff Plumbing, gave evidence of having attended the premises on 5 or 6 occasions to clear blocked drains.

188. The witness told the court that on each occasion the "drains were blocked because of the bulk of fat on my rods as I pulled them out, they were covered in fat." As to the cause he stated:

> "It's when hot liquid – hot liquid fat goes down the pipe and it solidifies as it goes down. It cools off and solidifies and it gradually blocks up backwards as it's blocking."

189. Mr Forrest agreed that if hot fat was continued to be poured down the drain which had been released from blockage on prior occasions you would expect the drain to block.

190. The witness said that no other drains in the shop or building were blocked with fat.

191. Mr Forrest said that the blockages were "from the kitchen, downstream." The witness described the substance from a blockage thus:

> " There's white – very greasy, white particles of various sizes, food scrap, pieces all broken up all in it and very slimy water."

192. The witness said that on the occasions he attended the premises he detected an odour: "it created from what was coming back up on the floor."

193. Mr Forrest gave evidence that he had informed Mrs Chung that the cause of the blockage was fat.

194. The witness said that on the occasions he attended the premises he did not see faeces or excrement flowing onto the floor.

195. Mr Forrest agreed that if there were a blockage downstream from the restaurant and downstream also from areas such as from motel rooms and toilets upstairs then that could cause a back flow to the drain hole in the kitchen. He also agreed that that could also cause, as part of the back flow, a spread of faeces or human waste of condoms or tampons on to the kitchen floor.

196. During re-examination, Mr Forrest said that he did not see faeces, condoms, tampons etc on any of his visits to the premises. He said that on the occasions he attended the premises he did not detect a downstream blockage.

Mr Ryder's evidence

197. In his report (Ex 7) Mr Ryder stated:

> "I have seen a video taken by Nightcliff Plumbing which supports my opinion that blockages in the drain were upstream of the ORG and associated with the defendants shops drain which consequently means that the only drain to encounter problems would have been the defendants drain and the cause of those problems would have been due to the amount of fat and oil they were pouring down the drain which would solidify as it cooled going down and stick and build up on the sides of the drain. Eventually food scraps and /or anything else that was put down the drain by the defendants would sit on the solidified fat instead of coming down the drain. Once enough solidified fat and/or food scraps had accumulated the drain would block causing the water, food scraps and other matter put down the drain to come back up through the floor wastes. It has been my experience that blockages brought about by the deposit of fats can cause significant odour."

198. I believe that the floor wastes and drains are more than adequate to cope with their intended use and further that they have a larger capacity (ie 255 units) than that required by the present codes of practice."

199. Mr Ryder's report was supplemented by oral evidence which he gave at the hearing (refer to pages 166-219 of the transcript).

Mr Roberts' evidence

200. In his report (Ex 25) Mr Roberts stated that the overflow relief gully situated in the courtyard did not meet the requirements of the operative codes.

He stated:

"The courtyard is completely unsuitable for the installation of an overflow relief gully. There is nowhere for discharge to run except into the storm water drain which is at the same level. This is not allowed under the Health regulations. If the storm water drain was blocked the run off water would go down the sewer gully and that is illegal…… If there was a sewer blockage or constriction, which might be caused by material entering from the downstairs toilets or the upstairs rooms, the amount of pressure necessary to lift the grate in the Chung's restaurant kitchen could be achieved and it would cause solid effluent to discharge onto Mr Chung's kitchen floor. The rain water grates might become blocked with leaves, papers, and or rubbish that has found its way to the courtyard area, and if there was a overflow of the relief gully the whole courtyard would become a cesspit. It might even overflow into the centre as a whole.

If the overflow relief gully overflowed liquid into the courtyard it is possible and likely that there would be an overflow into the floor area of Mr Chung's restaurant at the time.

In my opinion the plumbing installation as it was in 1989 until Mr Chung left in 2000 was inadequate and did not comply with all the relevant codes. It was possible and in fact probable that under heavy load conditions, effluent would back up in the restaurant floor gullies and depending on the pressure liquid or solid might make their way into the restaurant floor. …….

I have had extensive experience with plumbing. It is very common for materials such as plastic Coca –Cola bottles, condoms, brushes, rags and cloth and other material to be put down toilets and end up in the pipes.

In my opinion it is highly likely that a plastic coca-cola could find its way into the floor outlet pipes from the pipes from the toilet facilities on the first floor. They could not find a way from Mr Chung's floor waste gully unless very high pressure was used and even then the smaller diameter of the pipes would prevent it. In my opinion it was not possible for this amount of pressure to be generated without specialist equipment. However the pressure of the toilet flushing and the diameter of the pipes used in the toilet would readily allow it."

201. Mr Robert's report was supplemented by oral evidence which he gave at the hearing (refer to pages 529-551 of the transcript)

Mr Capp's evidence

202. Mr Capp gave evidence that he was a director of Air Raid Arcade Pty Ltd, the owner of the Air Raid Arcade. The Company took possession of the premises on or about 8 February 1999.

203. Mr Capp said that prior to taking possession he had inspected the premises. He said that he spoke to Mr Chung on 30 October 1998. The purpose of that meeting was to check the rent position, the condition of the property and fixtures and fittings. Mr Capp stated that he did not discuss the actual condition of the premises.

204. The witness gave evidence that after Mr Chung left the premises plumbing work was carried out at the Air Raid Arcade.

205. During cross-examination, Mr Capp stated that he was not informed in monthly reports between February 1999 and the end of May 2000 that on five or six occasions a plumber had been to the premises to clear blocked drains.

206. Mr Capp said that when he met Mr Chung he did not ask him about any problems he had with the premises. He said that Mr Chung did not draw his attention to any problems with the premises.

207. Mr Capp said that when he attended Mr Chung's premises he did not notice any odour apart from the normal type of food smells.

208. The witness said that when he spoke to Mr Chung he spoke of getting loans etc but said nothing about problems with the premises.

209. Mr Capp stated that he never saw any water running across the footpath outside the premises.

210. Mr Capp was subsequently recalled to give evidence concerning his meeting with Mr Chung on 30 October 1999. Mr Capp said that he had never seen Simon Chung before. He stated that only Mr and Mrs Chung were present at

that meeting. He denied that a conversation occurred between himself and Mr Chung concerning the drains.

211. The witness said that he did not become aware of any plumbing problems until October /November 2000.

Mr Dudgeon's evidence

212. Mr Dugdeon said that he was the occupant of shop 5 of the Air Raid Arcade between 1991 and 1999. He recalled plumbers working in the courtyard area of the arcade on several occasions. He could not recall whether the courtyard was actually flooded.

213. The witness said that he was a regular customer of Mr Chung's shop. Towards the end of 1998 he noticed, on several occasions, a strong smell emanating from the shop premises. He also gave evidence of having seen the kitchen floor of the premises flooded. He said that he had seen Mr Chung mopping up the floor on more than one occasion. The witness gave evidence to the effect that the odour from Mr Chung's premises smelt like sewerage. Mr Dudgeon gave evidence that the restaurant was periodically closed. He said that as a result of the shop being closed periodically he frequented another establishment.

The evidence of Susan Flynn

214. Ms Flynn gave evidence that she operated a beauty salon under the name of Vogue Beauty during the years 1994 to 2000 in the premises at the Air Raid Arcade. During her tenancy she came to know Mr Chung.

215. Ms Flynn recalled several instances when there was a problem with flooding or overflowing water.

216. As to the first occasion, sometime in 1998, she gave the following evidence:

> "There's a particularly bad one I remember in around about 1998, where sewerage – raw sewerage from the toilet area came across the arcade and under the door into my shop. When I got to work, the girl working for me was busy trying to clean it up."

217. The witness said that was the first time that the floor flooded. She said that there were lots of leaks from the ceiling at various times.

218. Ms Flynn went onto say that flooding down the side of the building occurred on a few occasions.

219. The witness stated that the worse occasion was just before she sold the shop in about 2000. On that occasion the kitchen area of Mr Chung's premises had flooded. She said that Mr and Mrs Chung had called her in to show her was happening. She said that what she saw looked and smelt like sewerage.

220. Ms Flynn said that she was a regular customer of the restaurant but after that incident went elsewhere.

221. Ms Flynn said that she had on other occasions detected a sewerage type smell from Mr Chung's premises and other shops in the arcade.

222. The witness then gave evidence of problems with her own shop.

223. She said that when she first met Mr Capp she promptly told him of her problems. She said that she was fairly irate at the time. She told him of problems with her air conditioners. One of them had leaked badly to the point of not being useable. She told him about the leakage and damage. She also mentioned the walls which needed painting. She said that Mr Capp said that he would rectify the defects. She said that nothing was done.

224. Ms Flynn gave evidence of being hospitalised in about March 1999. She said that occurred after she had spoken to Mr Capp. As a result of her illness, Ms Flynn caused a biological assessment to be made of her premises. That report was not supplied to Colliers Jardine or Mr Capp. She did, however,

ask Colliers and Jardine to do something about the state of her premises. Nothing was done for quite a while.

225. The witness said that she left the premises in August 2000 because she was "fed up" with the state of the premises and nothing being done. She said that she had carried out her own repairs – replacing tiles and painting water damaged walls. Nothing was done by Colliers Jardine or the owner until just before she left the premises.

226. The biological assessment obtained from Biocheck became Ex 33 in the proceedings.

Conclusion

227. The defendants carry the burden of establishing the alleged breach viz a failure on the part of the plaintiff to maintain sewer pipes and drains in proper repair so as to prevent them overflowing into the leased premises.

228. Although the evidence points to there being problems with the pipes and drains on a number of occasions I am unable to be satisfied on the balance of probabilities that the obligation to maintain the sewer pipes rested with the plaintiff.

229. There are three possible explanations for the problems that occurred. The first is that there was a structural problem with the drainage and sewerage system. If that were the case then the plaintiff would be obliged to maintain the pipes. The second is that other tenants in the arcade eg the motel upstairs, were responsible for causing the blockages. If that were substantiated then it is arguable that the plaintiff was under an obligation to prevent the conduct of other tenants from interfering with the defendant's quiet enjoyment of the leased premises. The third is that the blockages were caused by the defendants pouring fat down the drains. If that were the case, then the plaintiff would bear no responsibility; indeed, the defendants would be in breach of clause 12.3(7) of the lease.

230. I have taken into account the evidence which suggests that there were other problems with the drainage apart from those being experienced by the defendants on the leased premises. However, the onus is on the defendants to establish a breach on the part of the plaintiff with respect to the problems which occurred on the leased premises. In my opinion, all three hypotheses to which I have referred are of equal probability so that the choice between them is a mere matter of conjecture: see *Richard Evans & Co Ltd v Astley* [1911] AC 674 at 687 per lord Robson; see also *Holloway v McFetters* (1956) 94 CLR 470 at 482 per *Williams, Webb and TaylorJJ*.

231. However, in the event that I have erred in reaching that conclusion, and it was in fact open on the evidence to be satisfied as to either one of the two other hypotheses, the defendants' claim must still fail. The defendants were obliged under clause 12.2 of the lease to give prompt notice in writing of any structural defects or defect or want of repair to any services. No notice in writing was ever given by the defendants to the lessor in the terms contemplated by clause 12.2. I do not consider that any complaints that might have been made by the defendants to the lessor by and through it agents satisfied the requirements of clause 12.2. Nor, in my opinion, was compliance with clause 12.2 waived by the lessor by and through its agents or servants. Clause 28.1 makes it clear that no variation or waiver of the lease or any part thereof or of right created thereunder shall be effective unless in writing signed by each of the parties.

232. Moreover, even if the defendants were able to establish the relevant breach, they have failed to prove damage flowing from that breach. That aspect is dealt with in a separate part of this judgment.

233. Finally, I am unable to be satisfied on the balance of probabilities that a conversation took place between Mr Capp and Mr Chung during which Simon Chung was present ,and during which Mr Capp said that he would fix

the drains. The state of the evidence does not permit a finding one way or another.

Alleged failure of the plaintiff to prevent and/or repair termite infestation in the dining room of the leased premises and the alleged failure of the plaintiff to do all things necessary to eliminate and/or prevent the invasion of the leased premises by rodents and other pests. Alleged failure of the plaintiff to effect proper repairs to walls of the leased premises to enable them to comply with all legislative and other health and building standards in relation thereto and failure to prevent rising damp and otherwise to render them suitable for a restaurant and take away food shop. Alleged failure of the plaintiff to effect proper repairs to roof and ceiling to prevent water leakage from the air conditioner's hole in the kitchen

Mr Chung's evidence

234. Mr Chung gave evidence that apart from problems with the plumbing he had other difficulties: "the defect of the wall crack, water leaking from the ceiling and that."

235. The witness went on to say:

> " …the front of the building, between the two, Warehouse 73 and the Air Raid Arcade, in between there is a gap there. The waters kept leaking, non-stop and I was very upset…… the waters kept dripping down and I consistently informed the owner and who is in charge of that building and – and every time I see them – because he was actually showing interest in buying that property…. The water just kept coming , dripping down , and going to the walkway."

236. The witness said that water was "actually seeping through the brick and the wall is actually falling off." Mr Chung was referring to the wall inside the shop.

237. Mr Chung said that he had brought the problem of water penetration to both Mr Swinstead's and Mr Capp 's attention.

238. The witness went on to say:

> " …. There was a crack and I think some water seeping there and there was termites actually. I mean all the ants is actually infested to the area."

239. Mr Chung said that he also brought to both Mr Swinstead's and Mr Capp's attention the problem with the ants.

240. The witness said that these ants were inside and outside the concrete: the wall, was in his words, "blistering". According to Mr Chung the ants were eating the bricks.

241. Mr Chung said that the problem with the wall and the insects occurred in the dining area of the restaurant. Mr Chung said that there were no insects in the kitchen area.

242. Mr Chung gave the following evidence in relation to problems in the dining area:

> "In the dining room in the ceiling, ceiling from the top, the waters kept dripping down and also the water's coming out from the dining area, which is in the same wall which I was complain about, which right down the floor corner area the waters coming out slowly, never stop…. from the side, on the corner of the – on the floor area between the wall and the floor, just right on the corner area. That's the – and there is a tile on that but the waters keep coming out from there, little bit…"

243. As to the kitchen area, the witness gave the following evidence:

> "There is a hole which is before Air Raid Arcade Pty Limited bought the property, before that, and the plumber was instructed by the – well, called by the – Mr Swinstead, Julian Swinstead company, called in to dismantle my bain –marie and the kitchen area , and… the waters actually – and there's the hole is still there and I didn't know the – and also in the kitchen area there is a roof that leaking very badly. It's during the wet season."

244. As to which part of the roof was leaking, Mr Chung said:

> "Close to the hot water system, just right next door. I would assume that hole is when they connected the split system air-condition by Mr Swinstead's company and that hole probably just left a hole there, little bit hole there, that's dripping."

245. Mr Chung said that the hole was in the ceiling, "right on the corner in the kitchen."

246. The witness said that nothing was done to fix the problem.

247. Mr Chung gave the following evidence regarding problems relating to the installation of the air –conditioning system:

> "The waters kept dripping into the ceiling area and dampened the ceiling and eventually the colour getting very bad. It look very ugly to me."

248. The witness said that Mr Swinstead had asked him to rectify the problem. Mr Chung patched the ceiling, but that did not fix the problem.

249. Mr Chung gave evidence that he had problems with rats or rodents prior to the plaintiff purchasing the Air Raid Arcade building. Mr Chung said that he and his wife caught about 23 rats. As to where they were coming from:

> "They seem to be coming from in between the gap Warehouse 73 and the Air Raid Arcade, and through to the exhaust fan we suspect one place. And the other two: one is through to the – which is between the wall of dining area and the kitchen area there is a hole which is before the building got sold. They left a wall – left a hole there. That's come through the bottom, through the sewerage system. And the other thing is might be come through the air-condition when install it. Might be piping. The hole there might be – there is a hole there, bigger hole, might be come through there."

250. Mr Chung said that he had spoken to Mr Swinstead twice about that problem.

251. The witness went on to give the following evidence concerning the gap between the wall of the Air Raid Arcade and the adjoining building:

> "Water leaking through to the wall on the Air Raid Arcade side, dripping down, going right through the building. Go through the walkway and into the – to the storm water or something, to the street, and then inside the shop 1 and there is water seeping through the brick and cracking and mould blistering in the wall. The water coming down from the ceiling in the dining area, in the hall between shop 1 and shop 3, and actually there is a cabinet there and there is a hole I show Mr Capp, and then I went in to the kitchen area and I also said to her, told her about – this dismantling pipe from the bain –marie still left in…"

252. Mr Chung said that he pointed out the gap between the two buildings and the water seepage problem to Mr Capp. He said that also showed Mr Capp the ceiling where the water was dripping. The problem with the ants was also pointed out to Mr Capp. Mr Chung said that Mr Capp said to him words to the effect of "no problem, he can fix it."

253. Mr Chung said that he did not mention to Mr Capp the problems with rats and rodents.

254. The witness said that he did not have any further discussions with Mr Capp prior to being notified that the property had been purchased by him.

255. Mr Chung gave evidence of a conversation he had with Mr May at the leased premises in late 1998. Mr Chung said that he told Mr May about the problems with water penetration, the walls, the ceiling, dampness and ant infestation.

256. The witness also gave evidence of another occasion when Mr May and Ms Curtis both attended the premises. He said that on that occasion he had pointed out the problems to them. He said that they appeared to show disinterest.

257. Mr Chung said that he had complained to Ms Curtis about the ant infestation.

258. During cross examination, Mr Chung said that he taken steps to keep the premises free of vermin. He said that he did his best to keep the premises clean. Mr Chung went on to give the following evidence:

> "…not my authority to block the thing which is like – they have a – from the air conditioning connection, the hole might be there and also the exhaust fan. There's a fan there. It comes – really I cannot – this is – under the – under the – the – I mean the building board is standard, the health is standard, and there's from – the bottom of the – there is a hole there between the two gap, it's coming from there and this – beyond my control for that."

259. Mr Chung said that he had installed the exhaust fan before he had started up the business. Mr Chung said that it was possible that the rats were entering the premises through the exhaust fan.

260. During re-examination, Mr Chung was asked if there was any sort of screen or thing to block vermin coming through the holes where the exhaust fans were. The witness replied as follows:

> " No the way the exhaust fans set – there's a fan which is night time before we go home we have to turn it off and there is a – you get a – when it's – when we turn it on that's how it actually suck all the things out to there that's hole it's got to have some hole there to suck. It cannot block that's a …"

261. Mr Chung said that he did not know the actual set up of the fan.

Mrs Chung's evidence

262. She also gave evidence of moisture problems and of concrete "floating off" in the dining area of the premises. She said that she noticed a problem with moisture in the wall all the time. It was particularly evident during the wet season. Mrs Chung said that whenever the wall was painted the moisture would appear a couple of months later.

263. Mrs Chung gave evidence of seeing ants coming out of the power point. She also said that the ants were coming in from the concrete. She said that she used the vacuum cleaner to remove the ants daily. But the ants returned. Mrs

Chung said that they sprayed before they they went home each night; but that didn't even eradicate the problem. She said that the problem with the ants had been going on for quite a while.

264. Mrs Chung said that she did not speak to Mr Capp when he came to the shop. She said that she had never seen anyone from Colliers Jardine look at the ants on the wall. She also said that she had never complained to Colliers Jardine about the ants.

265. Mrs Chung said that over a period of a couple of years she had caught 23 rats, using rat traps. That occurred over the last couple of years of the tenancy. She was unable to say where the rats came from. However, she said that there were holes on the premises that might have given the rodents access to the premises. She gave this evidence:

> "They got a hole on the top of the roof and also the cappuccino side they got a hole and also exhaust fan because they – when we stopped the – when we turn off the exhaust fan so the fan was stopped they come from there, yes."

266. Mrs Chung said that no food scraps or rubbish were left on the premises to attract rodents.

267. The witness then gave evidence about the hole in the ceiling located "near to the sink at the corner, near to electricity points of the hot water system." She said that the hole had been there a couple of years. She said that she had spoken to Colliers Jardine about the hole. She had also told Mr Capp about it, to which he replied "No worry, I can fix it." That conversation took place when Mr Capp came to shop at the time he was expressing interest in purchasing the building.

268. Mrs Chung said that she did not tell Mr Capp about anything else; only the hole in the ceiling.

269. The witness said that when Mr May and Ms Curtis attended the premises she pointed out to them the hole in the ceiling which was leaking water. According to Mrs Chung neither responded. Mrs Chung stated that she did not point out to them any other problems such as the damp wall or the ants. She said that she did not complain about the rats that she had been catching.

270. During cross -examination, Mrs Chung said that they had a pest exterminator treat the premises a couple of years ago for cockroaches. The premises were sprayed. Mrs Chung said that they paid for the pest treatment. Mrs Chung added that since 1989 they would have had the premises treated 2 or 3 times.

271. Mrs Chung gave evidence that they did not get anyone to come in and help get rid of the rodents.

Mr Capp's evidence

272. See the summary of Mr Capp's evidence above in relation to Mr Chung's complaint about the drainage.

273. Mr Capp stated that when he met Mr Chung, Mr Chung made no complaint of cracked walls nor dampness. Nor according to Mr Capp was any mention made of rats.

274. When Mr Capp was recalled at a later stage he said that he was not aware of water damage and water overflow damaging the walls until after Mr and Mrs Chung had vacated the premises. He stated that he had not received any reports from Colliers Jardine regarding wall damage on the premises leased by Mr and Mrs Chung.

275. Mr Capp said that Mr Chung did not bring to his attention any problems with the premises.

276. Mr Capp agreed that by way of letter dated 15 February 1999 Mr May informed him of a complaint made by Mr Chung concerning a roof leak in the restaurant kitchen.

277. The witness stated that he had never received any reports about moisture and dampness in the wall at Mr Chung's premises.

Conclusion

278. In relation to the alleged failure of the plaintiff to do all things necessary to eliminate and/or prevent the invasion of the leased premises by rodents and other pests, I accept that a number of rats or rodents entered the subject premises and were caught by the defendants. However, clause 8.5 of the lease provides as follows:

> "The Lessee shall take all proper precautions to keep the Leased Premises free of rodents, vermin, insects and pests and will if so required by the Lessor but at the cost of the Lessee employ from time to time or periodically pest exterminators for such purpose."

279. Clause 12.3 imposed an obligation on the defendants to keep the leased premises clean and free from dirt and rubbish.

280. It was the defendants who were obligated under the lease to take all proper precautions to keep the leased premises free of vermin, rodents etc. In order to establish a breach on the part of the plaintiff (eg breach of covenant for quiet enjoyment) it was incumbent upon the defendants to prove that having duly complied with the provisions of clauses 8.5 and 12.3, the presence of rats or rodents on the premises was beyond their control and due, for example, to an accumulation of rubbish in the gap between the Air raid Arcade and the adjoining building (Warehouse 73) and the state of disrepair of the premises which resulted in vermin entering the premises from outside

the leased premises. In my opinion the defendants have failed to discharge that burden.

281. If, however, I have erred in reaching that conclusion and the plaintiff, by its failure to prevent vermin entering the leased premises, is found to have interfered with the defendant's quiet enjoyment of the premises, the defendants have failed to prove consequential damage.

282. In relation to the alleged termite/ant infestation the same general reasoning applies. It is clear that there were insects on the premises which resembled "ants". However, the evidence does not so far as to identify the precise nature of those "ants": it is unclear whether they were, in fact, termites. They may well have been a variety of ants that are frequently found on premises in the Northern Territory from time to time. The defendants have failed to satisfy the Court that the problem with the "ants" fell outside the purview of the covenant imposed by clause 8. 5 of the lease.

283. Once again, in the event I have erred in the conclusion I have reached, it is my considered opinion the defendants have failed to prove consequential damage flowing from any breach of a covenant on the part of the plaintiff.

284. In my opinion, the defendant's claim for breach of covenant based on the presence of vermin and ant infestation must fail for other grounds. If, as the defendants allege, the problem with vermin and ants was occasioned by a failure on the part of the plaintiff to keep the premises in good repair and condition, the defendants failed to comply with the provisions of clause 12.2 of lease which required the lessee to give written notice to the lessor as to any structural defects, want of repair or any other circumstances likely to be or cause any danger , risk or hazard to the premises or any person thereon.(See also clause 15.5)

285. In my opinion, the defendants' claim based on the plaintiff's failure to prevent rising damp and to repair the roof and ceiling must fail for the same

reason viz that the defendants failed to give the requisite written notice pursuant to clause 12.2 of the lease. But that aside, the defendants have failed to prove consequential damage.

286. Save and except for the matter concerning a leak in the roof I am unable to be satisfied on the balance of probabilities that Mr Capp was aware of any defects in relation to the premises.

Alleged failure of the plaintiff to abate rent pursuant to clause 6.1 of the lease during the period the premises were wholly unfit for occupation due to over-flowing sewerage

287. In my opinion, the circumstances of this case do not give rise to the operation of clause 6.1 of the lease (read in conjunction with clause 15.3) and the defendants have failed to establish grounds for relief by way of abatement of rent. But even if the circumstances fell within the purview of clause 6.1 my findings above in relation to the drainage and sewerage issue would preclude the defendants from being able to avail themselves of the relief afforded by that particular covenant.

Defendants' claim for conversion

288. In my opinion, this claim should succeed for the following reasons

289. The plaintiff failed to comply with the provisions of clause 17.8 of the lease which provides:

> "Upon the Lessor becoming entitled to re-enter the Leased Premises
>
> Under any provision of this Lease the Lessee shall forthwith upon notice given by the Lessor remove from the Leased Premises all fittings, fixtures, plant, equipment, shop fittings, stock-in-trade or other articles upon the Leased Premises brought thereon by the by the Lessee and in default of the Lessee effecting such removal the said items shall become the property of the Lessor who may dispose of the same in such manner as it in its discretion shall determine. The cost of the removal, storage and disposition shall be payable by the Lessee to the Lessor on demand. None of the said items shall become

> the property of the Lessor without the Lessor first having given to the Lessee notice of the Lessor's intention to exercise such right in accordance with this clause."

290. Clause 24 of the Lease sets out the requirements for notices ie form and method. Significantly, the notice must be (1) in writing (2) addressed to the address for service of the recipient and (3) signed by or on behalf of the sender.

291. The evidence clearly establishes that no notice was given by the plaintiff to the defendants as contemplated by clauses 17.8 and 24 of the lease.

292. I reject the submission made on behalf of the plaintiff that the chattels were abandoned by the defendants thereby giving the plaintiff the right to dispose of the chattels. In my opinion, the plaintiff converted those chattels to its own use and is liable to the defendants in damages.

293. I do not believe that there is sufficiently reliable or cogent evidence to enable me to quantify the damages that should be awarded to the defendants on account of the conversion. I do, however, reject the evidence adduced in the plaintiff's case to the effect that that the items left on the premises were "rubbish" and valueless. In all the circumstances I propose to award the defendants nominal damages in the sum of $1000.

The claim based on unconscionable conduct contrary to the provisions of Part 1VA of the *Trade Practices Act*

294. Counsel for the defendants made the following submission:

> " … I would seek to rely upon those indications that I've already dealt with as indications of unconscionable conduct on the part of the plaintiff, essentially coming down to the fact that the plaintiff, if only through its agent, was aware and must have been regarded as being aware at least from the middle of February 1999 of problems with the premises, which they never did anything about but let the plaintiff continue on and on and on to the stage where he didn't pay rent and where he was evicted. And in my submission that could be regarded by the court as amounting to unconscionable conduct."

295. In my view, no unconscionable conduct, within the meaning of the Trade Practices Act, can be imputed to the plaintiff by and through its servants and agents, particularly in light of the conclusions which I have reached in this matter.

The matter of damages for breach of covenant

296. I have determined that with respect to each of the alleged breaches, save one, the defendants have failed to discharge the requisite burden. Therefore, it is not strictly necessary to consider the defendants' claim for damages as any claimable damages can only flow from a breach of a covenant of the lease. However, I have formed the opinion that even if the defendants had been able to establish a breach of any of the covenants of the lease, they would still have failed in their action for damages.

297. The defendants claimed that as a result of the alleged breaches they were unable to properly conduct the restaurant business being operated at the leased premises and suffered a consequential loss of custom and loss of profits.

298. In support of that claim the defendants relied upon the following (1) oral evidence of a few customers ceasing to frequent the establishment (2) tax returns and (3) financial statements.

299. In my opinion, the evidence relied upon by the defendants is not sufficiently cogent to establish that the apparent loss of profits flowed from any of the alleged breaches of covenant on the part of the plaintiff. I consider the financial documentation relied upon and the circumstances under which it came into existence to be unreliable. Furthermore, the defendants have not been able to exclude on the balance of probabilities other plausible explanations for the apparent downturn in the business eg those relating to the general economy or factors connected with the general operation of the business.

JUDGMENT

300. There will be judgment for the plaintiff in the sum of $ 21,749.03

301. In relation to the counterclaim there will be judgment for the defendants in the sum of $ 1000.

302. I will hear the parties as to costs.

Dated this 16th day of December 2002.

_____

JOHN LOWNDES
STIPENDIARY MAGISTRATE