IN THE COUNTY COURT OF VICTORIA

AT MELBOURNE
COMMERCIAL LIST

Revised
Not Restricted

Case No.CI-11-04165

TERRY DENIS EVANS & ORS (ACCORDING TO THE SCHEDULE) — Plaintiff

v

THURAU PTY LTD
ACN: 006 319 642 — Defendant

JUDGE:	HER HONOUR JUDGE KENNEDY
WHERE HELD:	Melbourne
DATE OF HEARING:	8 December 2011
DATE OF JUDGMENT:	15 December 2011
CASE MAY BE CITED AS:	Evans & Ors v Thurau Pty Ltd
MEDIUM NEUTRAL CITATION:	[2011] VCC 1444

REASONS FOR JUDGMENT

Catchwords: Construction of clause in lease of apartments located in the Falls Creek Alpine Resort - clause obliges Lessee to make the apartments available to the public when they are not being "used" - whether a default can arise absent a determination by the Falls Creek Alpine Resort Management Board - whether "use" in any event in this case - whether notices of default given under s146 *Property Law Act* 1968 are valid.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J. Tomlinson	Charles Morgan & Associates
For the Defendant	Mr S. Hopper	Aitken Partners

HER HONOUR:

1 By originating motion dated 29 August, 2011 the plaintiff Sub-Lessees seek various relief under s137 of the *Property Law Act* 1958 in relation to two notices of default dated 17 August, 2011 which were served by the defendant in relation to two apartments located in the Falls Creek Alpine Resort.

2 The defendant, Thurau Pty Ltd, and the Alpine Resorts Commission, were originally party to a Head Lease dated 20 May 1993. The plaintiff Sub-Lessees are bound by the provisions of a Sub-Lease which provides that they will observe all and every obligation imposed on Thurau, as Lessee, under the Head Lease.

3 Critically, the Head Lease contains a covenant that where any Managed Apartment is not being "used" by the Lessee, it shall make that accommodation available to the general public during the Snow Season.

4 The notices of default allege that the sub-tenants are in breach of the Sub-Lease because they failed to make their apartments available to the public in circumstances where they were not using them.

5 The plaintiffs, relying on clause 12.3.3(b) of the Head Lease, submit that the question as to their use of the land should be determined by the head Lessor, and that, in the absence of any determination, then no breach can have accrued.

6 In the alternative, the plaintiffs maintain that they have relevantly been "using" the land by setting up the apartments for their own use and with their own belongings and notwithstanding that they have not been physically present during the whole of the Snow Seasons.

7 Finally, they submit that the notices of default are defective in any event.

8 There are therefore three issues:

- Whether any breach can accrue in the absence of a determination by the head Lessor;
- Whether there was "use" in any event;
- Whether the notices comply with s146 of the *Property Law Act* 1958.

9 The matter proceeded by way of affidavit with no cross examination.

10 The parties also agreed that the matter could proceed on the basis that these three issues were resolved, with the parties then providing a draft form of order to give effect to the court's reasons.

Background

Head Lease

11 By a Head Lease dated 20 May 1993 between the Alpine Resorts Commission and Thurau, the Commission gave a lease of lot 2 of site 36 on the plan of subdivision of the Falls Creek Alpine Resort for a term of 50 years pursuant to the authority conferred by the *Alpine Resorts Act* 1983 and the *Alpine Resorts (Leasing) Regulations* 1985.

12 Section 8 (1) of *The Alpine Resorts Act* recited the objects of the Commission as including-

a) to plan the proper establishment, development, promotion and use of alpine resorts having regard to environmental ecological and safety considerations and so as to encourage their use in all seasons of the year;

b) to undertake the orderly establishment, continuation and development of –

i. alpine resorts;

ii. a range of tourist accommodation and other facilities and services for tourists *which will encourage all persons irrespective of their income to use and enjoy alpine resorts*; and

iii. facilities and services for persons who live or work in alpine resorts; and

c) to control and manage alpine resorts and their use. (emphasis added)

13 Pursuant to s 9 (b), the Commission had power to do all things necessary or convenient to be done for or in connexion with carrying out its objects under the Act, including to control by the issue of leases and permits the nature and extent of development in alpine resorts and the conduct of business undertakings therein.

14 Clause 5 of the Head Lease contained covenants governing the use of the demised land and included covenants:

- that the Lessee shall not use or permit the use of the demised land for any purpose other than for providing a business undertaking consisting of 27 managed apartments and a licenced restaurant without the Lessor's consent (clause 5.1);

- that the Lessee was not to sub-lease without the consent of the Lessor (clause 5.2.1);

- that the Lessee shall not accommodate nor provide nor permit the provision of sleeping accommodation ("beds") on the land for more than the number of beds set out in the First Schedule (clause 5.19);

- that the Lessee should generally allow the public to have access

to all part of the demised land (clause 5.23).

15 Clause 10 made provision for termination of the Lease and provided that the Lease was generally subject to the provisions of the *Alpine Resorts Act* (clause 10.1). Clause 10.4 also provided that if the land was reasonably required by the Lessor for the improvement of the Alpine Resorts the Lessor could give appropriate notice in writing.

16 The critical provisions are then contained in Clause 12 relating to "Managed Apartments."

17 Pursuant to clause 12.2.1 the Lessee was to immediately enter into a Management Agreement with a Management Company approved by the Lessor to provide "Management Services" (said to be in the Second Schedule but which are apparently set out in the Third Schedule to the Lease) and which include, "maintenance of the register of accommodation referred to in clause 12.3.1" and, subject to the rights of the Lessee, "to make the accommodation available to the general public under clause 12.3.2..."

18 Clause 12.3.1 of the Head Lease further provides:

> "The Lessee shall keep upon the demised land a register of names and address of *all persons accommodated for one night and upwards* in the demised land and shall afford to the Lessor or its agent free access to such register for the purpose of perusing or taking extracts of entries made therein AND will upon request supply to the Lessor a certified copy of such register together with such information and details of the letting arrangements for the managed apartments as the Lessor may require *for the purpose of establishing that the Lessee is complying with the requirements of this clause.* (emphasis added)

19 The critical clause 12.3.2 immediately follows and reads:

> "Where any Managed Apartment is not being used by the Lessee or any members of or sub-lessee of the Lessee the Lessee shall make that accommodation available to the general public during the Snow Season on reasonable terms and conditions for holiday lettings in

accordance with clause 12.3.4 PROVIDED THAT for the purposes of this covenant and the provisions of clause 12.3.4 the Lessee shall be deemed to have made the Managed Apartment available on reasonable terms and conditions for holiday lettings to members of the public if it has placed the same in the hands of the Management Company."

20 "Snow Season" is defined in clause 1 and turns on whether a period had been declared by the Commission. However, although there was no declaration in evidence, the parties ran the case on the basis that the Snow Season was constituted by the period from the Queens Birthday weekend until the Grand Final weekend.

21 Clause 12.3.3 makes further provision "for the purposes of clause 12.3.2" and will be referred to, below.

22 Clause 12.3.4 makes provision for the Lessee to make Managed Apartments available to the general public on reasonable terms.

23 Clause 12.3.6 then makes provision for the Lessor to "step in" and make the Managed Apartments available to the public itself in a case of default by the Lessee of clause 12.3.2 or 12.3.4.

Sub- Lease with First Plaintiff, Mr Terry Denis Evans

24 By a Contract of Sale in 2002, Mr Evans purchased Thurau's leasehold interest in apartment 19 of the Alpine View Apartments for a contract price of $175,000.

25 By a Sub-Lease between Thurau and Terry Denis Evans dated 7 May 2002, Thurau agreed to sub-lease apartment 19 to Mr Evans, which lease terminates on 30 October, 2040.

26 Pursuant to clause 3(b) of the Sub-Lease the Sub-Lessee covenants with the Sub-Lessor:

> "that it will to the extent to which they apply to the demised premises perform and observe all and every obligation, covenant, proviso and stipulation imposed upon the Sub-Lessor as Sub-Lessee under the Head Lease and shall be bound by the indemnities and acknowledgments on the part of the Sub-Lessor therein as fully as if the same covenants provisos and stipulations indemnities and acknowledgments had been repeated herein in full and the Sub-Lessor and Sub-Lessee hereunder had respectively been the Lessor and Lessee thereunder... "

27 A rental of $10.00 per annum was also payable.

28 The landlord, Falls Creek Alpine Resort Management Board[1], (FCARM) provided a consent in writing to the Sub-Lease dated 29 April, 2002.

29 Then by a Deed of Acknowledgment executed by Mr Evans, Thurau and Falls Creek Management and Reservation Pty Ltd (FCM&R) on 7 May, 2002, Mr Evans as Sub-Lessee "affirmed" the appointment of the Manager to manage apartment 19.

30 A Management Agreement is annexed which is between Thurau and FCM&R.

31 The Management Agreement makes provision for the appointment of the Manager to undertake various services, including "management services" set out in the First Schedule. These include an obligation to maintain the register of accommodation and make the apartment available to the general public under clauses 12.3.1 and 12.3.2 of the Head Lease.

32 The Management Agreement provides for two main sources of income for the Management Company: an annual management fee of $1414.21 under clause 4 and a letting fee based on a percentage of rental yields.

[1] Pursuant to the provisions of the *Alpine Resorts Management Act* 1997 (Vic) rights and obligations of the Alpine Resorts Commission devolved to the Falls Creek Alpine Resort Management Board.

33 From 26 May, 2006 Mr David Etherton and Mrs Karen Etherton were directors of Thurau. Mr Etherton says that he and his wife also acquired the management business of Alpine View Apartments from FCM&R by an assignment of the management rights to the Etherton Family Trust. He and his wife are trustees of that trust.[2]

34 By letter from Aitken Partners to Mr Evans dated 17 August, 2011 a notice of default was delivered to Mr Evans, the full terms of which will be referred to, below.

35 By notice of 8 September, 2011 Aitken Partners also served a notice of re-entry.

Second and Third Plaintiffs, Mary Ann Tapsall and Johannes Gerard Van Veen

36 By a Sub-Lease dated 12 July 1996, Thurau agreed to give a sub-lease to Ivo Bianchi as trustee of the Ivo Bianchi family trust and Giuseppe Romano as trustee for the Romano family trust in relation to apartment 14C which lease expires in 2040.

37 Clause 3(b) of that Sub-Lease was in similar terms to clause 3(b) contained in the Sub-Lease given to Mr Evans, above, and no material point of difference was raised by the parties.

38 By Contract of Sale of 8 January 2002, Ivo Bianchi as trustee of the Bianchi family trust and Giuseppe Romano as trustee for the Romano family trust sold their leasehold interest in apartment 14C to Ms Tapsall and Mr Van Veen for a contract price of $164,000.

39 By special condition 2 of that Contract the purchasers acknowledged that

[2] Affidavit of David Etherton of 22 November, 2011 para 4.

they purchased the property with notice of, and subject to, the restrictions contained in and the rights and obligations conferred by the Crown Lease, the Sub-Lease and the relevant Management Agreement.

40 By an assignment dated 12 March 2002, Ivo Bianchi as trustee of the Bianchi family trust and Giuseppe Romano as trustee for the Romano family trust then assigned their estate and interest in the Sub-Lease to Mary Ann Tapsall and Johannes Gerard van Veen.

41 On 12 March, 2002, Mary Ann Tapsall and Johannes Gerard van Veen also entered into a Deed of Acknowledgment affirming the appointment of the Manager to manage apartment 14C and annexing the relevant Management Agreement. (The defendant described this as "materially similar" to the Management Agreement for apartment 19 and the plaintiff did not contend otherwise).

42 A notice under s146 was later served on Mary Ann Tapsall and Johannes Gerard van Veen dated 17 August, in similar terms to the notice served on Mr Evans.

43 By notice of 8 September, 2011 Aitken Partners also served a notice of re-entry on the second and third plaintiffs.

Whether breach can accrue absent a determination by the head Lessor

Plaintiffs' submission

44 The plaintiffs accepted that the covenant in the Head Lease set out in clause 12.3.2 was imported into the Sub-Leases by virtue of clause 3(b) in each case.[3]

[3] Outline of Argument of the Plaintiffs dated 7 December, 2011 para 19.

45 However, the plaintiffs relied on clause 12.3.3 (b) of the Head Lease which provided:

> "should there be any doubt as to the nature of occupation or use of any Managed Apartment the Lessor shall in its absolute discretion determine the nature of use or occupation of any such Managed Apartment and whether it should forthwith be made available to the general public and thereupon the Lessee shall forthwith make such Managed Apartment available to the public in accordance with the provisions of this clause."

46 The plaintiffs cited the decision in *Dobbs* v *National Bank of Australasia*[4] and submitted that it is only once the "doubt" is resolved by the FCARM Board that Thurau could ascertain whether or not the plaintiffs' use contravened clause 12.3.2. In the absence of a determination, it was impossible for Thurau to assert that the covenant under clause 12.3.2 had been breached.

47 In *Dobbs*, the High Court was concerned with a clause in a bank guarantee, which provided that a certificate signed by a bank manager should be "conclusive evidence" of a customer's indebtedness at a particular date.

48 The Court held that the clause was not contrary to public policy in ousting the jurisdiction of the Court and therefore was not void.

49 The plaintiff placed particular reliance on a passage in the joint judgment of Rich, Dixon, Evatt and McTiernan JJ as follows[5]:

> "A clear distinction has always been maintained between negative restrictions upon the right to invoke the jurisdiction of the Courts and positive provisions giving efficacy to the award of an arbitrator when made or to some analogous definition or ascertainment of private rights upon which otherwise the Courts might have been required to adjudicate. It has never been the policy of the law to discourage the latter. The former have always been invalid."

50 The plaintiffs also cited a later passage (on the same page) wherein their

[4] (1935) 53 CLR 643.
[5] (1935) 53 CLR 643 at 652.

Honours cite the decision in *Scott v Avery*[6] and note that parties may also contract so as to make the acquisition of rights under contract dependent on the arbitration or discretionary judgment of an ascertained person. Then no cause of action can accrue prior to the exercise by that person of the functions committed to her/him.

51 The plaintiffs relied on this passage and submitted that, similarly, no cause of action for default accrued in the absence of a determination by the FCARM Board. The defendant's remedy was therefore against the FCARM in this case, for specific performance of the lease and/or mandamus.

Resolution

52 Firstly, the plaintiff submitted that the FCARM Board had "consistently refused to make a determination".... notwithstanding the defendant had been attempting to obtain one since about November, 2007. [7]

53 This appears an appropriate description of the evidence and was not challenged by the defendant. Thus, in the correspondence of 8 May, 2009 the FCARM stated that it did "not believe it appropriate to unilaterally impose a directive", although its preferred position was "to see actual occupation of beds and apartments."[8] (see also correspondence of 21 September, 2009[9] and 29 April, 2011[10]).

54 However, even accepting that no determination has been made, clause 12.3.3 (b) does not prevent the defendant from asserting and relying on a default on the basis of clause 12.3.2.

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[6] (1856) 5 HL Cas 811; 10 ER 1121.
[7] Outline of Argument of the Plaintiffs dated 7 December, 2011at para 32.
[8] Exhibit DWE-45 of Affidavit of David Etherton of 22 November, 2011.
[9] Exhibit DWE-38 of Affidavit of David Etherton of 22 November, 2011.
[10] Exhibit HvV20 of Affidavit of Hans van Veen of 4 November, 2011.

55 Thus, I do not regard clause 12.3.3(b) as making the acquisition of rights dependent on the discretionary judgment of the Lessor. Rather, all it does is provide a mechanism, in cases of "doubt", as to the nature of "use or occupation" pursuant to the *pre-existing* rights and obligations under the Head Lease. In particular, the clause does not extinguish any right to complain on the basis of use or occupation. It merely provides for the Lessor to make a determination for itself. In the case of a default, the Lessor can also then "step in" and make the apartments available under clause 12.3.6.

56 In this way, the situation was similar to that considered in *Dobbs*. Thus, in an earlier passage of the joint judgment,[11] their Honours note that the relevant certificate clause did not purport to impose on the Bank the necessity of obtaining a certificate which was not a qualification of the undertaking to pay. A certificate was not, therefore, a "condition precedent to recovery", as the promise remained a promise to pay the amount owing and the Bank could recover without the production of a certificate if, by ordinary evidence, it proved the actual indebtedness of the customer.

57 The clause here is similarly designed so the Lessor may ascertain the existence and measure of a pre-existing obligation; namely the obligation to make the apartments available if they were not being used. Such obligation remains and the existence of clause 12.3.3(b) does not affect the jurisdiction of this court in determining the question of use or occupation under the Lease.

58 It follows that clause 12.3.3(b) does not make it "impossible" for Thurau to assert that the covenant under clause 12.3.2 had been breached.

59 There are also other reasons why the plaintiffs' submissions should be rejected.

[11](1935) 53 CLR 643 at 651.

60 Firstly, even if clause 12.3.3(b) is seen as a species of arbitration clause, the majority judgment in *Dobbs* makes clear that a contract for arbitration does not generally "prevent the institution of an action or suit, even although an actionable breach of contract was committed by the refusal to refer."[12] Rather the court has a jurisdiction to stay the proceeding. (If necessary to determine I can state that a stay would not be granted as a matter of discretion in this case, given the series of attempts the defendant has already made in an effort to obtain a determination).

61 Secondly, if, contrary to my views above, the clause provides for some mandatory form of resolution of the "use" question by the Head Lessor, it would very likely be set aside as void on grounds of public policy, given such a question would involve questions of law reserved to a court. Thus, as the Court states in *Dobbs*: "what no contract can do is to take from a party to whom a right actually accrues.... his power of invoking the jurisdiction of the Courts to enforce it."[13]

62 Given my views already expressed, however, no such finding need be considered.

63 Counsel for the defendant also suggested that clause 12.3.3(b) only applied to the resolution of a dispute between Thurau and the Landlord, given it might otherwise follow that Thurau itself could make a determination given the terms of clause 3(b) of each Sub-Lease.

64 However, in my view the Sub-Lease only generally imports *obligations* pursuant to clause 3, given it concerns covenants by the Sub-Lessee. Accordingly, the defendants do not have the *benefit* of being able to make a

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[12] *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 653; and see also *Straits Exploration (Australia) Pty Ltd v Murchison United NL* [2005] WASCA 241at [15].
[13] *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 652.

determination under clause 12.3.3.

65 In my view, then, clause 12.3.3(b) provides a non-exhaustive mechanism for resolution of the matter between the parties in a case of "doubt." A default may thereby accrue under clause 12.3.2 even without a determination by the FCARM Board.

Whether use in any event

Meaning of "use"

66 The plaintiffs accepted that clause 12.3.2 had to be understood in the context of the Head Lease[14], but claimed that "use" was not to be equated to physical presence.

67 In supporting this construction, the plaintiffs cited the provisions of 12.3.3(a) and the decisions, inter alia, of *Royal*[15]and *Ryde*[16] and *Minister* v *NSW Aboriginal Land Council*[17].

68 The defendant submitted that "use" meant occupation, in the sense of physically "staying there."

69 In terms of the plaintiff's reliance on clause 12.3.3(a), it provided that "for the purposes of clause 12.3.2:

> occupation of the Managed Apartments by the spouse or any descendant, parent, brother, sister or any descendant of the brother or sister of the Lessee or where the Lessee is a company by a director thereof or a shareholder therein or any descendant, parent, brother or sister of the director or shareholder or any person authorised by the Lessee shall be deemed to be occupation by the Lessee."

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[14] Outline of Argument of the Plaintiffs dated 7 December, 2011 para 21.
[15] *Newcastle City Council v Royal Newcastle Hospital* (1957) 96 CLR 493, *Newcastle City Council v Royal Newcastle Hospital* (1959) 100 CLR 1.
[16] *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633.
[17] *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285.

70 I do not regard this clause as assisting the plaintiffs. Although it makes provision for a very broad range of persons to be in "occupation" it is consistent with the defendant's submissions that the word "use" was intended to connote physical "occupation" in clause 12.3.2.

71 The cases referred to by the plaintiff also provide only limited assistance to them. Thus, although Taylor J in *Royal* suggests that the word "use" is a word of wide import, His Honour also states that its meaning in a particular case will depend to a great extent upon the context in which it is employed.[18] Each of the cases cited were concerned with a very different context to the obligations of lessees of Managed Apartments on an alpine resort.

72 The word "use" is to be determined having regard to what a reasonable person would have understood it to mean. That normally requires consideration not only of the context, but also of the surrounding circumstances known to the parties and the purpose and object of the transaction.[19]

73 Both parties accepted that clause 12.3.2 was imported into the Sub-Leases by virtue of clause 3(a) in each case. The meaning of clause 12.3.2, and particularly the word "use," then needed to be considered in the context in which it appeared, namely in context of the other provisions of the Head Lease.[20]

74 In my view, considered in this light, the word "use" was intended to equate with physical occupation in the particular context in which it appears.

75 I say this having regard to the entire context in which the word is used, but

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[18] *Newcastle City Council v Royal Newcastle Hospital* (1957) 96 CLR 493 at 515.
[19] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179.
[20] See also *Histon Pty Ltd v Thurau Pty Ltd* [2011] VCC at [42].

particularly because:

- Clause 12.3.1 makes specific provision for the Lessee to keep a register of names and addresses of all persons "*accommodated* for one night and upwards..."such register to be used for the purpose of establishing that the Lessee is complying with the requirements of clause 12.3;

- The words "use" and "occupation" are used interchangeably in the Head Lease. For example, and as highlighted already, a definition of "occupation" is provided in clause 12.3.3(a) "for the purposes of clause 12.3.2" while clause 12.3.3(b) also refers to "occupation or use."

- The use of the word "accommodation" in clause 12.3.2 itself as well as elsewhere in the lease is consistent with the word "use" being equated to occupation; the Third Schedule also makes provision for *accommodation* to be generally made available to the public subject only to carving out the rights of the Lessee.

76 Considered in context, then, the clause is concerned with making accommodation available to the public save in circumstances where the Lessee or its agents were actually using the property by physically occupying it and staying there. Whether someone is occupying an apartment should also be evident from the accommodation register referred to in clause 12.3.1.

77 This is also consistent with the objects of the Commission under the Act which authorised entry into the lease and which included the encouragement of all persons in using and enjoying alpine resorts.

78 The plaintiffs also relied on the principles of *contra proferentem.* However, it is not clear that it is in the interests of Thurau, rather than members of the public generally, for the clause to be construed as I have. As highlighted by

the plaintiffs, it was the management company that suffered the real loss from the lack of public lettings, rather than Thurau itself. In any event, in the light of my findings earlier, the terms of the clause are clear and unambiguous when considered in context.

79 It follows that I accept the defendant's submission that "use" meant physical occupation of an apartment. This did not mean that someone needed to be sitting in their apartment all day rather than, for example, being on the ski slopes. However, being in Melbourne whilst having an apartment set up with a person's belongings, is not "use" within the meaning of clause 12.3.2.

Application to facts

80 The evidence was not satisfactory as to the precise way the plaintiffs had been using their apartments, with some disagreement as to the numbers of nights the two apartments had actually been occupied, and dispute over the accuracy of records of occupation.

81 Counsel for the plaintiffs accepted that they were not physically present during the whole time of the Snow Season. However, Mr Evans claimed that he was renovating and "using" apartment 19 himself, in the sense that the apartment was set up for his and his associates' personal use, and that ski passes were purchased. Mr Van Veen, similarly, stated that he had set up apartment 14C for the personal use of himself and his wife and purchased season ski passes.

82 As is apparent from my earlier finding, I do not regard these matters as establishing "use" pursuant to clause 12.3.2. Moreover, the table of dates attached to Mr Evans' affidavit of 4 November, 2011,[21] reveals that there was

[21] Exhibit TDE7 of Affidavit of Terry Evan of 4 November, 2011.

not continuous occupation of his apartment for the entire Snow Season in each of the years 2007-2011. Mr Van Veen, similarly, was not present during the entire Snow Seasons. Indeed, he provides a measure of presence in the Snow Seasons 2009-2011 as being only in the 30% range.[22]

83 Despite these periods of non-occupation, Mr Etherton states that there was no rental to members of the public for apartment 19 from and including Snow Season 2007.[23] In terms of apartment 14, there were no bookings for the public for the years 2009, 2010 and 2011[24] .

84 In these circumstances, the plaintiffs have been in default of their obligations in failing to make their apartments available to the public on days neither they, nor persons described in clause 12.3.3(a) , were accommodated in their apartments.

85 Beyond that, given the state of the evidence and absence of cross-examination, I am unable to make a finding as to precisely when such defaults under clause 12.3.2 arose.

Whether notices comply with s146

86 The notices of default served on Mr Evans each included the following:

> 5. The Sub-Tenant has repudiated the Sub-Lease by;
>
> a) Informing the Head Tenant that it would not be letting the Sub-Leased Land to the general public by, among others, emails of 1 February 2009 and 27 June 2010 to the Head Tenant;
>
> b) Failing to use the Sub-Leased Land throughout the Snow Season; and
>
> c) Failing to let the Sub-Leased Land or permit it to be let to the general public when not being used by the Sub-Tenant.

[22] Affidavit of Hans Van Veen of 4 November, 2011 at para 9.
[23] Affidavit of Wayne Etherton of 20 September, 2011 at para 24.
[24] Affidavit of Wayne Etherton of 20 September, 2011 at para 18(e).

> 6. Further or alternatively, the Sub-Tenant is in breach of the Sub-Lease because it failed to use the Sub-Leased Land and failed to make it available to the general public during the Snow Season.
>
> TAKE NOTICE that the Head Tenant requires the Sub-Tenant within 14 days of service of this Notice to remedy the aforesaid breaches of the Lease insofar as the same may be capable of remedy and to make reasonable compensation in money to the Head Tenant for the said breaches of the Sub-Lease.
>
> FURTHER, THE HEAD TENANT GIVES NOTICE that if this Notice is not complied with within 14 days of service of this Notice, the Head Tenant may exercise its right to accept the Sub-Tenant's repudiation of the Sub-Lease and re-enter and take possession of the Sub-Leased Land or any part of the Sub-Leased Land..."

87 A notice in similar terms was also served on Mr Van Veen and Ms Tapsall.

88 The plaintiffs alleged that the notices failed to provide details of the alleged breaches on a number of grounds, including by failing to define which Snow Season or Seasons were being relied upon.

89 Pursuant to s146(1)(a) of the *Property Law Act* 1958, the notice must "specify the particular breach complained of." In *Macquarie International Health Clinic Pty Ltd v Sydney South West Area*, Hodgson JA surveyed the authorities and stated that the notice must describe the particular acts or omissions constituting the alleged breach. [25]

90 The defendant submitted that the degree of specificity depends on the circumstances, including the sub-tenant's knowledge and that the plaintiffs were aware of their own "use" of their apartments.

91 However, although the matters alleged in the notice appear to affect several years in the past (as reflected in the references to communications of 2009 and 2010, "among others" in both cases), it is unclear precisely which periods are being relied upon.

[25] And see also *Macquarie International Health Clinic Pty Ltd* v *Sydney South West Area Health Service* [2010] NSWCA 268 at [323].

92 A comparison may also be made with a decision of *Fletcher* v *Nokes*[26] wherein a notice was held to be invalid in circumstances where the relevant lease was over six houses and the notice did not indicate in which of the houses the default was made.

93 By analogy, I consider that the notices are each defective in failing to describe the particular acts or omissions constituting the breach complained of given they fail to define which Snow Season or Snow Seasons are being relied upon.

94 The defendant also accepted that the notice in relation to Mr Van Veen was defective in giving only 14 days when 30 days was required pursuant to clause 6(a) of his Sub-Lease.

95 I am therefore satisfied that the s146 notices of default are both invalid.

Conclusion

96 My findings may be expressed as follows:

- clause 12.3.3(b) provides a non-exhaustive mechanism for resolution of the nature of occupation or use of the Managed Apartments in a case of "doubt" but a default may accrue under clause 12.3.2 even without a determination by the FCARM Board;

- that the concept of "use" in clause 12.3.2 means physical occupation of an apartment. This did not mean that someone needed to be sitting in their apartment all day rather than, for example, being on the ski slopes. However, being in Melbourne whilst having an apartment set up with a person's belongings, is not "use" within the meaning of clause 12.3.2;

[26] [1897] 1 Ch 271 referred to in *Macquarie International Health Clinic Pty Ltd* v *Sydney South West Area Health Service* [2010] NSWCA 268 at [310]

- the plaintiffs have been in default of their obligations in failing to make their apartments available to the public on days neither they, nor persons described in clause 12.3.3(a), were occupying their apartments. However, given the state of the evidence, I am unable to be more precise as to when such defaults under clause 12.3.2 arose;

- The notices of default dated 17 August 2011 are both invalid in failing to comply with s146 of the *Property Law Act* 1958.

97 The parties should produce a form of order to reflect these reasons.

SCHEDULE

TERRY DENIS EVANS	**First Plaintiff**
MARY ANNE TAPSALL	**Second Plaintiff**
JOHANNES GERARD VAN VEEN	**Third Plaintiff**
AND	
THURAU PTY LTD (ACN 006 319 642)	**Defendant**