SUPREME COURT OF QUEENSLAND

CITATION:	*Ant Projects Pty Ltd v Brooks & Ors* [2019] QCA 259
PARTIES:	**ANT PROJECTS PTY LTD ACN 089 585 642 as trustee for YEUNG INVESTMENTS** ABN 90 121 074 228 (respondent/applicant) **v** **MORGAN ASHLEIGH BROOKS** (not a party to the appeal/not a party to the application) **RICHARD WILLIAM AULSEBROOK** (second appellant/second respondent) **MORGAN BROOKS DIRECT PTY LTD** ACN 112 625 288 (third appellant/third respondent)
FILE NO/S:	Appeal No 6492 of 2019 Appeal No 6494 of 2019 DC No 767 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application to Strike Out Application for Security for Costs
ORIGINATING COURT:	District Court at Brisbane – [2019] QDC 81 (Andrews SC DCJ)
DELIVERED ON:	20 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2019
JUDGE:	Morrison JA
ORDERS:	**1. Grounds 1-20 and 22-25 of the Notice of Appeal filed 1 October 2019 are struck out.** **2. The appellants may not file an amended Notice of Appeal except with the prior leave of a judge of the Supreme Court.** **3. The respondents to the application to strike out pay the applicant's costs of the application.** **4. The application for security for costs is refused.** **5. The applicant is to pay the respondent's costs of the application for security for costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – OTHER MATTERS – where the first notice of appeal was struck out – where the orders were without

prejudice to another notice of appeal being filed – where a second notice of appeal was filed after the deadline they were given – where the applicant seeks to strike out the notice of appeal – whether the notice of appeal discloses an arguable error on the part of the primary judge – whether there is the potential of an abuse of process – whether the notice of appeal should be struck out

Doherty v Liverpool Hospital (1991) 22 NSWLR 284, followed
Johnson v Gore Wood & Co [2002] 2 AC 1; [2000] UKHL 65, cited
Robertson v Hollings and Ors [2009] QCA 303, cited

COUNSEL: R J Grealy (*sol*) for the applicant
No appearance for the first respondent
R Aulsebrook (*director*) appeared on his own behalf and for the third respondent

SOLICITORS: Anderssen Lawyers for the applicant
No appearance for the first respondent
R Aulsebrook (*director*) appeared on his own behalf and for the third respondent

[1] **MORRISON JA:** This is an application by the respondent to the appeal (**Ant Projects Pty Ltd**) to strike out the second and third appellants' notice of appeal.

[2] Ant Projects was the successful plaintiff in a District Court trial in which judgment was handed down on 27 May 2019.[1] The opening paragraph of the reasons below are sufficient for present purposes to indicate the nature of the dispute:

> "When there were about 32 months left in the term of a commercial lease for 5 years, the lessor alleges that its lessee repudiated the lease. The lessor purported to terminate and change the lock. The lessor alleges that there were two months arrears owing when the lease was terminated and that since termination it has been unable to relet most of the space and will continue to be unable until the end of the term. It claims substantial damages arising from that. The lessee alleges that it did not repudiate but that the lessor did."

[3] The lessor, Ant Projects Pty Ltd, claimed against both the lessee (Morgan Brooks Direct Pty Ltd) and the guarantors under the lease (Mr Aulsebrook and Ms Brooks; also directors of the lessee). The claim was for monies due and payable pursuant to the terms of the lease or under the guarantee, and for damages.

[4] The guarantors counterclaimed for various forms of relief, including a declaration that the lease was void and unenforceable, a declaration that the lease had been terminated in circumstances whereby Ant Projects had repudiated the lease, a declaration that the guarantee was void and unenforceable, and various money claims.

[5] The first appellant, Ms Brooks, takes no part in the appeal or the application. The protagonists are the lessor, Ant Projects Pty Ltd, and the second and third appellants

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1 *Ant Projects Pty Ltd v Morgan Brooks Direct Pty Ltd and Ors* [2019] QDC 81.

(the lessee and Mr Aulsebrook). Mr Aulsebrook appeared for himself and the lessee at the trial and on this application.

[6] The first notice of appeal was filed on 21 June 2019. That notice was struck out by Gotterson JA on 30 August 2019. Order No. 2 was that the appellants "have leave to file another notice of appeal, provided they do so by 4.00 pm on Monday, 30 September 2019 and that notice of appeal complies with r 747 of the *Uniform Civil Procedure Rules* 1999 (Qld)".

[7] The current Notice of Appeal was filed on 1 October 2019. It lists 25 grounds of appeal, grouped into subject headings. I intend to deal with them in the order in which they appear in the Notice of Appeal.

Legal Principles

[8] The appeal being from a decision of the District Court, s 118(3) of the *District Court of Queensland Act* 1967 (Qld) applies. It stipulates that leave is required for the appeal. Where that is the case the test is that the applicant must satisfy the court that there is a reasonable argument that the primary judge contains an error which requires correction, and that the appeal is necessary to correct a substantial injustice to the applicant.[2] On such an appeal this Court is not limited to errors of law.[3]

[9] Where a notice of appeal discloses no arguable error on the part of the primary judge that can constitute an abuse of process of the court, which this court, in its inherent jurisdiction, can prevent.[4] It has long been established that the court has power to ensure that its own processes are not abused, as part of its inherent jurisdiction.[5]

[10] *Robertson v Hollings & Ors*[6] provides another example of an appeal being struck out where it did not disclose an arguable error or provide a valid reason why the order sought should be made. In that case a notice of appeal was struck out because it failed to identify grounds of appeal in a comprehensible way which allowed a fair response.[7] This Court said:[8]

> "… litigation is not a learning experience. The courts do not permit litigants, even unrepresented litigants, to prosecute claims which cannot proceed fairly to the other parties. It is no doubt unfortunate for [the appellant] that she does not have the benefit of competent legal advice and representation; but her misfortune in this regard does not license her to proceed unconstrained by the rules according to which adversarial litigation is conducted."

[11] All the grounds in the Notice of Appeal were attacked as failing to disclose reasonable grounds of appeal and being embarrassing, vexatious or an abuse of process.

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2 *Pickering v McArthur* [2005] QCA 294; *Sproats & Anor v North Queensland Training Services Pty Ltd* [2019] QCA 102 at [2].
3 *McDonald v Queensland Police Service* [2017] QCA 255 at [39].
4 *von Risefer v Permanent Trustee Co Pty Ltd* [2005] QCA 109 at [11], *Burgess v Stafford Hotel Ltd* [1990] 3 All ER 222, at 225-228.
5 *von Risefer v Permanent Trustee Co Pty Ltd* [2005] QCA 109 at [14]-[16].
6 [2009] QCA 303.
7 *Robertson* at [10]-[13].
8 *Robertson* at [11].

The section 124 Notice

[12] Grounds 1-5 concern the findings below with respect to a notice pursuant to s 124 of the *Property Law Act* 1974 (Qld) issued by the lessor and served on the lessee and the guarantors. The grounds concern whether the notice was properly served, whether it could be understood because it made a global demand for the payment of money without a detailed breakdown, and whether the lessee had repudiated the lease by failing to pay the amount in the notice by the stipulated date.

[13] The relevant findings at trial were as follows:

(a) on 1 October 2016 the lessor's agent provided a tax invoice for $18,353.64 to the lessee; that amount comprised stipulated items for rent, GST, outgoings and GST on outgoings, for the period ended 25 October 2016;[9]

(b) the agent provided another tax invoice on 1 November 2016 for the same amount with the same stipulated components, this time in respect of the period ending 25 November 2016;[10]

(c) on 19 December 2016 the lessor's appointed agent issued a tax invoice to the lessee for the same amount; Mr Aulsebrook accepted that the demand for $18,353.64 which was made in December was for an amount identical with the amounts which had been demanded by the agent in November and October;[11] the stipulated items were, in fact, identical to those in the previous two notices, but this time for the period ended 25 January 2017;

(d) on 29 December 2016 the agent emailed Mr Aulsebrook a tax invoice addressed to the lessee and dated 26 December 2016; it was in substantially the same terms as the invoice sent 10 days earlier, the only difference being a request for payment to a different bank account; the agent asked Mr Aulsebrook to give him "an update in relation to your rent that was due on the 26/12/2016";[12]

(e) the lessee did not pay the $18,353.64 demanded by the lessor's agent, or any of it;[13]

(f) on 5 January 2017 the lessor's agent sent a letter of demand in respect of the $18,353.64, with an additional figure for rent; the learned trial judge rejected Mr Aulsebrook's evidence that he was confused by the demand, because he had seen the tax invoices for the identical monthly sum for each of October, November and December 2016;[14]

(g) on 26 January 2017 the next payment for rent, outgoings and GST became due and owing, but was not paid;[15]

(h) on 27 January letters were sent to the lessee, and another to Mr Aulsebrook and Ms Brooks, each in substantially the same terms with adjustments only to reflect that one was directed to the lessee and the other to the guarantors; the letters were sent by express post and also emailed to Mr Aulsebrook's email account; receipt of the letters by post was admitted, but receipt by email was

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9 Reasons below at [37].
10 Reasons below at [40].
11 Reasons below at [48].
12 Reasons below at [53] and [54].
13 Reasons below at [55].
14 Reasons below at [56]-[57].
15 Reasons below at [60].

denied; the letters were notices under s 124 of the *Property Law Act*, that is to say each was a Notice to Remedy Breach of Covenant;[16] and

(i) the learned trial judge found that the letters were emailed to Mr Aulsebrook's email address, and no notification was received that the emails had gone astray; the email address was one which Mr Aulsebrook had long used for personal and professional email correspondence, and was the only email address he used; Mr Aulsebrook's habit was to check for emails regularly, and at least 10 times every day; there was no evidence of any malfunction with respect to his email account on 27 January 2017; referring to other pieces of evidence the learned trial judge was satisfied that the emails were received by Mr Aulsebrook and he saw them on 27 January 2017.[17]

[14] Grounds 1 and 2 of the Notice of Appeal concern a contention that the learned trial judge was wrong to find that the s 124 Notice was validly served by email or actually received by the defendants by email. Given that learned trial judge found that the notice was served by post, and that fact was admitted, and there is no challenge to those findings, these grounds are pointless. Even if they succeeded it would not affect the fact that the notice was validly served by post, and there is no challenge to that. These grounds should be struck out.

[15] Grounds 3, 4 and 5 concern the content of the s 124 Notice and attack the finding that the notice complied with s 124 of the *Property Law Act*. One contention is that the notices contained a "global demand for the payment of an amount without providing a detailed breakdown of the amounts claimed". A second is that the notice demanded payment in respect of electricity, even though there was no sum relevant to that supply. The third contention is that the demand for a global sum "created a situation where it could not logically be asserted that [Mr Aulsebrook] must (or should have) known that the global sum claimed merely related to the rent, outgoings and GST previously invoiced/demanded".

[16] Ground 5 of the Notice of Appeal merely contains an argument in support of grounds 3 and 4. It does not articulate a separate ground of appeal. It should be struck out.

[17] Grounds 3 and 4 confront the findings of fact to which I have referred above. Those findings are not challenged in the Notice of Appeal. The learned trial judge's findings in respect of this argument were summarised:[18]

> "In fact, the sum of $18,353.64 compensation demanded was an amount appropriate for breach of the covenants to pay rent, outgoings and GST. That sum included nothing under covenants about electricity charges or legal costs. The amount was identical with the three consecutive monthly invoices for rent, outgoings and GST which Mr Aulsebrook had received in October, November and December. The history of those invoices and the demand for an identical amount created an objective appearance that the amount claimed was for the rent, outgoings and GST which had been the subject of the Retailspace invoice delivered in December and the Beacon Invoice delivered in December each of which were for the rent, outgoings and GST payable in advance on 26 December 2016.

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16 Reasons below at [61]-[66].
17 Reasons below at [68]-[76].
18 Reasons below at [172].

> Mr Aulsebrook accepted that when he received the notice he knew the amount stated in the Notice to Remedy was the same as the amount that had been claimed in those invoices. Mr Aulsebrook gave evidence that his issue with the notice was whether for rent, outgoings and GST the lessee then owed $18,353.64. The plaintiff adverted to these matters in its submissions and I accept the accuracy of them. But section 124 describes what is to be in a notice as opposed to what a lessee must know. The contents of the notice, rather than the state of mind of Mr Aulsebrook as the lessee's director, are to be analysed."

[18] Following that the learned trial judge found that s 124 did not require that a notice set out component parts which would permit the lessee to determine how the amount was calculated by reference to the breach of each covenant. Further, the notice correctly specified the three covenants, the breaches of which were the subject of complaint, and specified the compensation.[19]

[19] The learned trial judge's findings in this respect are underpinned by his findings that Mr Aulsebrook admitted that he knew what the figure represented. Section 124 of the *Property Law Act* provides that the notice must: (i) specify the particular breach complained of; (ii) if the breach is capable of remedy, require the lessee to remedy it; and (iii) if the lessor claims compensation, require the lessee to pay that compensation. The notice in question did all three things. Even though it specified two covenants beyond those for rent, outgoings and GST, those three covenants were specified. The compensation was specified in the sum of $18,353.64, a figure which Mr Aulsebrook knew matched the invoices for the three months prior to the notice. In those circumstances these grounds cannot succeed. They should be struck out.

[20] Ground 6 contends for an error in finding that the lessee repudiated its lease by failing to pay $18,353.64 by 5.00 pm on 10 February 2017. Some short explanation is required in relation to that finding, and the date.

[21] When the s 124 notices were sent, each of them was accompanied by a letter stating that the lessor considered that a period of 14 days from the date of the notice was a reasonable period for the purposes of paying the outstanding sum of $18,353.64. Each letter then went on:

> "Therefore, you have until close of business on 10 February 2017 to make a payment of the amount specified in the Notice to Remedy Breach of Covenant, failing which, the landlord will be able to terminate [the lease] without further notice to you."

[22] The date of the notice was 27 January, and therefore 14 days ran to 10 February 2017. The lessee admitted receipt of the letter of demand on 30 January. That left 11 days within which to pay the outstanding money. At trial it was contended that 10 February 2017 was not a reasonable time to pay.

[23] The following findings were made as to the period between receipt of the notice and 10 February 2017:

(a) Mr Aulsebrook emailed copies of the letters and their attachments to his solicitor;[20]

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19 Reasons below at [173]-[175].

20 Reasons below at [79].

(b) on 7 February a large removal van was seen at the premises, being loaded with items from the lessee's part of the building;[21] according to Mr Aulsebrook, his former partner and director, Ms Brooks, wanted "everything out"; that evidence was accepted;

(c) on 9 February Origin Energy provided a final gas bill for the period up to 7 February 2017; that was requested by someone on behalf of the lessee;[22]

(d) at 11.21 am on 10 February 2017 the lessor emailed Mr Aulsebrook with a letter and a notice to quit; the notice to quit was dated 10 February 2017;[23] and

(e) at 5.00 pm on 10 February 2017 an agent for the lessor returned to the premises and noted that the lessee's premises were empty of furniture save for a few items; the locks were changed and a notice was posted saying that the lease was terminated;[24] the agent spoke to Mr Aulsebrook and asked him to leave, which he did.[25]

[24] The learned sentencing judge held that there was a reasonable time to remedy the breach whether service occurred on 27 January 2017 (which his Honour found) or whether it was on 30 January 2017 (the date the notices were received by post).[26] That finding is not challenged on the appeal.

[25] Further, as will appear the rent was due and payable on 1 December 2016, or 26 December 2016 at the latest. It was not paid on time, and it was not paid in the time required by the s 124 notice. That meant the lessee was in fundamental breach of its obligations as at 1 December or 26 December, and the default provisions of the lease were engaged 30 days later. That meant the lessor was entitled to re-take possession subject to giving the s 124 notice.

[26] In light of the findings set out in paragraphs [17] to [19] and [21] to [24] above, and the admitted failure on the part of the lessee or the guarantors to pay the outstanding $18,353.64, the finding that the failure to pay by 5.00 pm on 10 February 2017 entitled the lessor to terminate the lease[27] is unassailable. The failure to pay was probably also a repudiation, as his Honour held.[28] But even if it was not, that does not alter the fact that the non-payment of the rent due, and the failure to comply with the s 124 notice, entitled the lessor to terminate the lease. Therefore, success on this ground would not affect the outcome and to permit it to proceed would be vexatious and an abuse. It should be struck out.

[27] Ground 7 challenges the learned trial judge's finding that Mr Aulsebrook was not confused by the figures in a letter of demand dated 5 January 2017. This refers to the matters set out in paragraphs [13], [17] and [19] above. Notably Mr

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21 Reasons below at [81]. The photographic exhibit showed this to be a large van.
22 Reasons below at [83].
23 Reasons below at [90].
24 Reasons below at [93].
25 Reasons below at [95].
26 Reasons below at [176].
27 Reasons below at [96].
28 That sort of persistent breach could support a conclusion that the lessee thereby evinced an intention to no longer be bound by the lease, or conveyed the renunciation of a fundamental obligation under the lease: *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61 at [44]; *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 659.

Aulsebrook, on behalf of the lessee, had paid identical amounts demanded in October and November 2016, and had seen the identical amount demanded for the month commencing 26 December 2017. Given that the findings of fact are based on Mr Aulsebrook's admissions to the effect that he knew that the demanded amount was identical with that which had been demanded in October, November and December, there is no reasonable prospect of success on this ground. This ground should be struck out.

[28] Ground 8 concerns the finding[29] that the sum demanded in the s 124 notice "was 32 days overdue when the notice was served by email". The underlying contention is that at the time the notice was served by email the lessee was only two days overdue. As argument on the application progressed, it became apparent that the contention is based on when the amount had to be paid, as opposed to when the amount became due. The contention misunderstands the obligations under the lease. Clause 2.1 of the lease required the lessee to pay the monthly rental in advance on the first day of each month.[30] The rent for October and November 2016 had been paid. The next rent due under the terms of the lease was due to be paid in advance on 1 December 2016. That was the subject of the tax invoice issued on 26 December 2016. Even if, as seems to have been the case at trial, the parties acted on the basis that the rent was due and payable on 26 December 2016, the result is the same. By the time of the s 124 notice, 32 days had passed since the money was payable.

[29] Further, even if this ground succeeded it would have no effect on the outcome of the proceedings. The acknowledged rent and outgoings were not paid, even after the s 124 notice was served. The contention that the lessee was only two days overdue is a false issue, and in any event, untenable. This ground should be struck out.

[30] Grounds 9-15 all concern contentions relating to the *Residential Tenancies and Rooming Accommodation Regulation* 2009 (Qld).[31] As best can be gathered this concerns the proposition that part of the leased premises were to be occupied as a caretaker's residence and therefore the *RTRAR* should have been taken into account when assessing the validity of the s 124 notice and questions of whether the lease was void for uncertainty.

[31] The lease permitted the lessee to use the premises for the purpose specified in Item 4 of the schedule: "Shop/Office, Commercial Office, Warehouse/Showroom, Caretaker's Residence". The plans attached to the lease when it was lodged were requisitioned by the Department of Natural Resources and Mines because they were not to scale, did not show any measurements, were for illustration purposes only, and were not related to any boundary of the parcel of land.[32]

[32] That requisition required that the deficient sketches had to be marked as "cancelled", initialled by all parties, and replaced with properly surveyed plans. But the cancelled plans had to be but re-lodged as part of the lease document. That is what happened. The consequence was that the only plans referring to a caretaker's

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29 Reasons below at [176].

30 The rent was to be paid on the "Rent Day" which was defined as the first day of each calendar month.

31 I shall refer to this Regulation as the *RTRAR*.

32 Reasons below at [21] and [22].

residence were marked as cancelled, and not replaced.[33] Notwithstanding that circumstance Mr Aulsebrook and his partner, Ms Brooks, resided in an area designated as "Caretaker's Residence" in the cancelled sketch plans. In October 2016 Ms Brooks and Mr Aulsebrook became estranged and Mr Aulsebrook moved to live elsewhere.[34]

[33] The foundation of this contention might be found in Exhibit 38, a letter from solicitors then acting for the lessee, dated 10 February 2017. It contended that the terms of the lease permitted the lessee to use the area defined as the caretaker's residence as a residence and, to that extent, the lease constituted a "Residential Tenancy Agreement" for the purpose of the *Residential Tenancies and Rooming Accommodation Act* 2009 (Qld).[35] For that contention, reference was made to s 12(1) of the *RTRA Act*. That section gives the definition of a "Residential Tenancy Agreement", as being "an agreement under which a person gives someone else a right to occupy residential premises as a residence". Section 10 of that Act defines "residential premises" as being "premises used, or intended to be used, as a place of residence or mainly as a place of residence". As can be seen, the definition in s 10 contrasts two alternatives. One is where the entirety of the premises are used as a place of residence, and the other is where the premises are "mainly" used as a place of residence. The first alternative does not apply here as the entirety of Lease A was never going to be residential. The caretaker's residence was only the lesser part of the first floor and that part of the second floor which did not constitute the roof. As indicated above, the caretaker residence occupied one-third of the total area of Lease A. The balance of the area consisted of commercial use. Therefore Lease A did not consist of premises used or intended to be used **mainly** as a place of residence. It follows, in my view, that this commercial lease did not constitute a Residential Tenancy Agreement for the purpose of the *RTRA Act*.

[34] The question of the *RTRAR* was first raised in submissions in relation to the s 124 notice.[36] However, having been raised by the parties for whom Mr Aulsebrook appeared, the point was not sustained. His Honour explained why:[37]

> "The defendants' submission that the plaintiff failed to consider the RTRAR when issuing the notice was not explained. I am not satisfied that a failure to consider the RTRAR invalidated the notice to remedy breach. If there is a factual premise for legal arguments about the RTRAR, I assume it is that the premises were intended to be used mainly as a place of residence. The defendants would bear the onus of proof of that fact. I am not satisfied of this fact. I am not satisfied that the lessee was obliged to use the premises as a residence, for the reasons explained above. If the lessee elected to use part of the premises as a residence, its liberty to do so was a liberty to use less than a third of the area of the building as a residence. That proportion of the area of the building makes it difficult to support the argument that the building was used mainly as a place of residence. Save for evidence of the area of the caretaker's

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33 Reasons below at [28].
34 Reasons below at [38].
35 The *RTRA Act*.
36 Reasons below at [163].
37 Reasons below at [169].

> residence, there was no exploration by either side of the factual premise that the building was mainly used for residential purposes."

[35] Given the learned trial judge's finding that whilst the *RTRAR* point was raised in submissions, the point was not elucidated sufficiently to satisfy him that the lessee or guarantors discharged their onus on that point, agitating it on appeal faces considerable hurdles. In addition, little was said on this application to defend this point beyond the written outline. It states, in respect of grounds 9, 12 and 13 of the notice of appeal:[38]

> "[Paragraphs 9, 12, 13 of the Notice of Appeal] Speak for themselves and go to the prima facie fact that there was at a minimum, a clause in the lease allowing the tenants to occupy a portion of the building as their residence, inclusive the right to have a pet; or as mentioned in the Judgment 'a Residential Tenancy Agreement affording the first and second appellants the unfettered right to occupy approx. 60% of the whole of the building as a residence'."

[36] That submission is misconceived. The lessee under the lease was Morgan Brooks Direct Pty Ltd. Plans were annexed to the lease when it was lodged but they were rejected because they were for illustration purposes only and not to scale. The department required proper plans to be lodged with the lease, but the cancelled plans also had to be lodged with the lease. The only plans on which the caretaker's residence was identified were the cancelled plans. However, the learned trial judge was, in my respectful view, quite correct in his approach to construe the entirety of the lease including the cancelled plans, for the purpose of identifying the bounds of the caretaker's residence. It was shown on Annexure A and entitled "Caretaker's Residence" in a particular area on the first and second floor of the building. That area matches the description in clause 5.3(g) which provided that the lessee must not use the "Premises" (that being "Lease A") as a residence, "other than that area to be shaded blue on the plan attached in annexure 'A' and otherwise referred to as the 'Caretaker's Residence'". That area is plainly identifiable on the certified plans which replaced the cancelled plans. When one goes to the certified plans and calculates the area of Lease A, the consequence is this: Lease A occupies a total area of 444 square metres; the caretaker's residence occupies 145.94 square metres; as a percentage of the total area of Lease A, the caretaker's residence accounted for 32.86 per cent. The lessee had the right to live in those premises[39] as a caretaker's residence.

[37] On the face of the lease there was no need for any of the forms of agreement under the *RTRA Act* or the *RTRAR*. In any event Mr Aulsebrook referred to a General Tenancy Agreement (Form 18a) under the *RTRA Act*, as having been entered into between Ms Brooks and Mr Aulsebrook on the one hand, and the lessor on the other. If there were any rights under such an agreement, they would not affect the lessee (Morgan Brooks Direct Pty Ltd) as it was not a party to such an agreement. It is the lessee who defaulted in the payment of rent, and that default led to the s 124 notice and termination of the lease. As guarantors Mr Aulsebrook and Ms Brooks were obliged to indemnify the lessor in respect of that breach. They did not do so. In fact, as the findings by the learned trial judge demonstrate, Ms Brooks had vacated

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38 Respondent's outline, para 15.

39 And, being a company, plainly that right would be exercised by individuals, almost certainly its directors, Mr Aulsebrook and Ms Brooks.

the premises by 10 February 2017, and Mr Aulsebrook was in the process of doing the same.

[38] Insofar as grounds 12 and 13 refer to a General Tenancy Agreement, that document was not admitted into evidence. It is not referred to in the Reasons below. That by itself would be sufficient to indicate that grounds 12 and 13 have no reasonable prospects of success, but they suffer also because they rely on the general argument about the *RTRA Act* and Regulation.

[39] In the circumstances, grounds 9, 12 and 13 have no reasonable prospect of success. The parties for whom Mr Aulsebrook appears failed to discharge the onus on them to make the point good at trial, and it has not been shown to have any validity on this application. In my view, those grounds of the Notice of Appeal should be struck out.

[40] Ground 10 concerns an alleged error by the learned trial judge in construing the lease by reference to the cancelled plans, at least insofar as it defined the location of the caretaker's residence. As mentioned above, his Honour adopted an orthodox approach to construction. This ground has no prospects of success. It should be struck out.

[41] Ground 11 contends that there was an error in finding the lease was not void for uncertainty as regards the car parks where the lease allowed the lessee to sublease the car parks.

[42] The definition of "car park" in clause 1.1 of the lease is "4 onsite car parks, 3 x BCC Building allocated offsite (residential caretaker's car parking permits) and 2 x BCC visitor short term parking permits allocated for use with the Building". Clause 8.1 made provision about the car park and common area:

> "The Tenant has the exclusive right to occupy the Car Park (or arrange for the occupation by a 3rd party on whatever terms the Tenant considers reasonable and is not required to obtain the Landlord's consent to any such 3rd party occupation)."

[43] The car park plan attached to the lease was one of those which had been cancelled because the requisition from the Department of Natural Resources and Mines. No alternative plan was attached as was done with other parts of Lease A. The cancelled plan showed six designated onsite car parks. One of those was situated within an area designated for "2 min pull in Bay".

[44] It is apparent that there was a tension between the definition of car park, which referred to four onsite car parks and other offsite car parks, and the cancelled plan which showed six onsite parking bays.

[45] At the trial the parties for whom Mr Aulsebrook appears contended[40] that the car parks had not been identified with reasonable certainty and as a consequence the lease was void for uncertainty. As his Honour pointed out,[41] that submission was not maintained in the arguments advanced at the end of the trial. His Honour noted that, to the contrary, "the defendants submit that the plaintiff knew which of the four onsite car parks the lessee was entitled to use", and their submission was consistent with the proposition that the rights under the lease were identifiable.

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40 Para 8 of the amended defence.

41 Reasons below at [150].

[46] Under clause 8.1 of the lease the lessee was given the "exclusive right to occupy" the car park, and under the definition of car park, that meant four onsite car parks. In my respectful view, the learned trial judge was right to construe those two clauses as meaning that the lessee had an entitlement to use four onsite car parks, and it did not matter which. Those two clauses do not render the lease void for uncertainty.

[47] On this application Mr Aulsebrook submitted[42] that those two clauses created, or were intended to create, a lease rather than a licence of the car parks. That proposition is unsustainable. The rights are contained within the lease and express to be an "exclusive right to occupy". That is the wording of a licence. That the parties intended that to be the case seems plain on the face of the car park plan (albeit one of the cancelled plans) which was still attached to registered lease. It designated the car park area as "licensed areas".

[48] Ground 11 has no prospects of success and should be struck out.

[49] Ground 14 asserts that "There is available evidence additional to the evidence before his Honour which, whilst technically available to the Appellants at the Trial, could not have been contemplated in disputing his Honour's finding…" That part of the ground is sufficient to demonstrate that it relies upon evidence which could have been, but was not, adduced at the trial. No support was offered for ground 14 beyond the statement in the appellants' outline, that the ground "speaks for itself". I agree, and it should be struck out.

[50] Ground 15 takes matters no further in this area. Since it depends upon grounds that have no prospects of success, it should be struck out.

[51] Grounds 16-18 are grouped under the heading "Inadmissible Evidence". Summarised, they contend:

(a) Ground 16 – there was an error in not admitting into evidence a spreadsheet and attached invoices, receipts and credit notes, that supported the fact that as at 27 January 2017 the lessee was in default for less than one month's rent; the applicant attacks that ground on the basis that it was not pleaded or raised below and is therefore not a proper appeal point;

(b) Ground 17 – that there was an error in the learned trial judge relying on the plaintiff's version of the lease[43] as it was not proven to be a facsimile of the actual registered lease; the applicant attacks this as being pointless because there was no evidence of any discrepancy; and

(c) Ground 18 – that there was an error in finding that a notice was given on 29 September 2016 that the vendor of the real property had been transferred to the lessor; the applicant attacks this ground as being pointless, as it concerns only an error in the date of the document which is irrelevant to the rights under the lease.

[52] Mr Aulsebrook did not mount any particular defence of these three grounds. It seems right to say that the matter in ground 16 was not pleaded below, and in any event, the contention relates to a date subsequent to when the December rent

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42 Respondent's outline, para 14.

43 Exhibit 5.

became due and payable, and subsequent to the s 124 notice. On the face of it the ground is untenable.

[53] In the course of argument Mr Aulsebrook accepted that there was no difference between Exhibit 5 and the registered lease. Ground 17 is therefore vexatious and should be struck out.

[54] Ground 18 is also vexatious, as it concerns a point which is irrelevant to the rights between the parties. It should be struck out.

[55] Grounds 19 and 20 are gathered under the heading of "Apprehended Bias". Ground 19 contends that the learned trial judge was "dismissive, mocking, lacked impartiality and generally failed to afford the Appellants, as self-represented defendants, procedural fairness". Ground 20 refers to undue intervention in the cross-examination of witnesses, preventing the appellants from being properly heard or fully representing their case. This also is a contention of lack of procedural fairness, or as it has been referred to in a court setting, a denial of natural justice.

[56] When it is contended that there was apprehended bias on the part of a judicial officer the test is whether a fair-minded lay observer with knowledge of the material objective facts might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to a consideration of the issues.[44] These grounds, face a substantial hurdle to the extent that they contend there was apprehended bias. On Day 4 (29 October 2018) the learned trial judge referred to the fact that a "respectful complaint" about the conduct of the trial had been brought to his attention.[45] It was by Ms Brooks, not Mr Aulsebrook or the lessee. His Honour invited the appellants, if they wished to press a complaint about apprehended bias, to make an application for his Honour to recuse himself.[46] The appellants declined to do so, and the trial continued. Ms Brooks disavowed any suggestion of partiality.[47]

[57] A denial of natural justice is different from, though allied to, questions of bias. Natural justice traditionally involves the requirement that a decision-maker afford a person an opportunity to be heard before making a decision affecting their interests. That will usually include, in a trial setting, a reasonable opportunity to present a case.

[58] As Mr Aulsebrook made clear in the hearing, both of these grounds really concern his efforts of Mr Aulsebrook to cross-examine Mr Yeung, Mr O'Brien and Mr Deane. His contention was that he was prevented from doing so by the interventions of the learned trial judge.

[59] I have examined the trial transcripts for each of Mr Yeung,[48] Mr Deane[49] and Mr O'Brien.[50] Interventions by the learned trial judge were to: (i) make sure cross-

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44 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344-345; *von Risefer and Ors v Permanent Trustee Co Pty Ltd* [2005] QCA 109 at [10].

45 It was by Ms Brooks and concerned: general and gender-based discourtesy to Ms Brooks; inappropriate criticism of Porter DCJ; inappropriate courtroom cordiality with Counsel for the lessor; and refusal to accept a medical report about Ms Brooks: Day 4, T1-2 lines 8-12.

46 Day 4, T1-2 line 41 to 1-3 line 28.

47 Day 4, T1-26 lines 31-45.

48 Day 1, T1-72 to 1-99; Day 2, T2-3 to 2-51 and 2-116 to 2-120 and Day 3, T3-34 to 3-116.

49 Day 2, T2-51 to 2-98.

50 Day 2, T1-99 to 2-115.

examination questions were in proper form and focussed; (ii) explore the relevance of questions; (iii) clarify questions; (iv) explain the trial process; and (v) deal with objections to questions or evidence. There is not the slightest suggestion of Mr Aulsebrook or Ms Brooks (who conducted some of the cross-examination) being prevented from developing their case. There is no basis to conclude that the learned trial judge was "dismissive, mocking, lacked impartiality and generally failed to afford the Appellants, as self-represented defendants, procedural fairness". I have also scanned a fair proportion of the balance of the transcript, and the same comments apply.

[60] Grounds 19 and 20 are without merit, and vexatious. They should be struck out.

[61] Grounds 21-24 are grouped under the heading "Quantum of Damages – Mitigation of Loss". Ground 21 is simply expressed: "That his Honour erred in finding the Plaintiff did not fail to mitigate its loss". As a ground of appeal it is clearly articulated, albeit that it does not descend to particulars. However, grounds of appeal are not required to descend the particulars, but merely must state "briefly and specifically the grounds of appeal".[51] Ground 21 complies with that requirement. It does not, in my view, offend in the way the grounds of appeal did in *Robertson v Hollings and Ors*.[52] An effective response can be made in support of the findings on mitigation below.

[62] Ground 22 contends that there is "available evidence additional to the evidence before [the learned trial judge] which was not available to the Appellants at the Trial and which justifies the setting aside of [the] judgment, specifically as it relates to the quantum of damages". It then refers to three types of evidence. The first is a video tape of how many Airbnb guests were present on 21 September 2018, which is said to be contrary to M Yeung's evidence at the trial. I pause to observe that this refers to a date in the middle of hearing the trial. There is therefore no reason to think that this was evidence which was not available at the trial, if it was otherwise relevant. Since it goes only to contradict part of Mr Yeung's evidence, and principally to credit, it is not likely to be admitted on appeal. It is not fresh evidence.

[63] The second refers to Google searches of lessees of the ground floor of the building, to show that the ground floor was re-leased. However, the Google searches relate to a period subsequent to the trial, although it was before judgment was delivered. Had it been sought to adduce the evidence as attacking the question of quantum of damages or mitigation of loss, that could have been done prior to the judgment by way of an application to reopen. That was not done.

[64] There is no suggestion that this evidence would falsify evidence given at the trial. As to the future loss, that seemed to come principally from Mr Deane, a property agent and property developer with considerable history in leasing commercial buildings. As concerns the post-trial loss through to September 2020[53] the learned trial judge said:[54]

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51 *Uniform Civil Procedure Rules* 1999 (Qld), r 747(1)(b).
52 [2009] QCA 303.
53 The end of the first term of the lease.
54 Reasons below at [103].

> "Mr Deane's opinion at trial was that it would be very challenging for the plaintiff to find a tenant for the part of the building occupied by the lessee at any time between trial and September 2020. He explained that it was a tenant's market because of an oversupply of space similar to the space at the building. He had regard to the disadvantages that the three-level building did not have a lift, that it had a limited frontage and that the electricity was not apportioned across the different levels correctly. He gave the example of the space occupied by the sub-tenant, Alchemy on the top level which did not have its own electricity meter. I accept his opinion."

[65] As for the period between retaking possession and the trial, the evidence was thoroughly canvassed by his Honour.[55] No challenge is made to that evidence in the appeal, nor is there any suggestion that every reasonable effort were not made to obtain alternative tenants, without success.

[66] The loss of rent to the end of the trial totalled $305,430.84.[56] The post-trial loss was in the sum of $396,280.48.[57] As his Honour acknowledged,[58] the total loss included losses to September 2020, and therefore there had to be deductions to account for any rents and outgoings which would be received in the future, and for the accelerated receipt of such sums. Analysing those matters, and looking at the possibilities and probabilities that existing tenants might leave and therefore a discount that should be allowed for that, the learned trial judge said:[59]

> "The plaintiff submitted that the damages should be assessed on the assumption that the plaintiff would receive rent and outgoings from Alchemy at the same rate for 43 months but that the amount notionally to be received from Alchemy should be discounted by 30% for vicissitudes. Such a discount would increase the plaintiff's damages. I assume the submission implies that there is a risk that Alchemy will leave. There are also the possibilities that Alchemy will leave. There are also the possibilities that Alchemy will stay for the entire term or that another tenant will take its place or the vacant space on the first floor or rent the entire building. I call those matters possibilities because past history and the opinion of Mr Deane each support the probability that the space unlet at trial will remain unlet until September 2020. I propose to reduce the damages on the assumption that the space let at the date of the hearing will continue to be let at much the same rates. The plaintiff also received, after expenses, $1,000 from using space for Airbnb letting. It follows that in calculating the amount of rent and outgoings which the plaintiff has failed to receive and will fail to receive because of the lessee's repudiation, the total will be reduced by $73,137.35 to an amount of $628,573.97."

[67] To that the learned trial judge added a discount for accelerated receipt.[60]

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55 Reasons below [104]-[123].
56 Reasons below at [192].
57 Reasons below at [192].
58 Reasons below at [196].
59 Reasons below at [198].
60 Reasons below at [200].

[68] The contention underlying the evidence of lettings is that subsequent events have now shown Mr Deane's opinion to be wrong, and consequently the damages were too high. The substantial hurdle that confronts is that it relies on evidence subsequent to the trial. By definition that evidence could not have been called at the trial so as to affect the assessment of Mr Deane's opinion.

[69] It is a fundamental tenet of the judicial system that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances.[61] It applies to civil cases and in the context where issues have been litigated but one party later wished to have a chance to litigate another issue.[62] In the civil context the principle is that there should be finality in litigation and a party should not be twice vexed in the same matter.[63] In *Johnson v Gore Wood & Co* Lord Bingham quoted with approval an earlier Court of Appeal judgment in which it was said:[64]

> "The rule in *Henderson v Henderson* … requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward before decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

[70] In *Doherty v Liverpool District Hospital*[65] the court refused to admit evidence of the death of a man who had been injured at work, and then after the trial and the damages were awarded, had died unexpected from another cause. The award of damages had been based on the assumption of normal life expectancy. The court pointed out that so much of what is involved in medical evidence about the future of an injured plaintiff consists of uncertain prognostication that it is probably the rule, rather than the exception, that something happens after a trial which, if it had happened before the trial, would have altered the assessment of damages. The interest in finality in this context is not merely an influence; it is an integral part of the system by which the plaintiff's rights are to be determined. The same principle applies to an award of damages. Awards of future financial loss are routinely based on assumptions about future matters and expectations which may later be found not to accord with what happens. Even so, the principle of finality prevents re-litigation of the issue.

[71] The principle of finality to litigation prevents that issue in ground 22 from being reopened now.

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61 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [45]; [2005] HCA 12.
62 *Filmana Pty Ltd & Ors v Tynan & Anor* [2013] QCA 256 at [45].
63 *Johnson v Gore Wood & Co* [2002] 2 AC 1, at 27.
64 *Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257 at 260.
65 (1991) 22 NSWLR 284.

[72] The third aspect of ground 22 is a contention that illegal building works carried out in 2018 resulted in the Brisbane City Council issuing a show cause notice requiring petitioning to be removed and fire services upgraded. That prohibited the lessor from re-leasing the first and second floor for an extended period of time. It seems clear that this was not an issue raised at the trial. It could have been, as it concerns events which existed during the trial. Since it was not raised, it should not be allowed now.

[73] Ground 22 should therefore be struck out.

[74] Ground 23 contends that the learned trial judge "placed excessive reliance on the evidence provided by Mr O'Brien", in two respects. First, about the presence of cables hanging from the roof and walls when it is said that they were there because of the lessor's illegal renovations. Secondly, a particular invoice identified about $1,800 to remove cabling and to install light fittings, "commensurate with the illegal renovations" referred to.

[75] The question of cabling arose in the context of the evidence of efforts to ready the premises for re-letting.[66] The learned trial judge accepted the evidence of Mr O'Brien in that respect. It is difficult to understand how this ground can succeed. On the question of cabling, there is no hint in the Reasons below that it was tied to illegal renovations. The extent of the contest seemed to be whether a different sort of cabling should have been put in rather than that which Mr O'Brien referred to. However, the learned trial judge noted that no contrary evidence had been led as to that.

[76] This ground seems to go to one small point, and one small claim within the overall claim for damages, and seems unlikely to be so destructive of the credit of Mr O'Brien that error would be found on the part of the learned trial judge. Its lack of prospects mean it should be struck out.

[77] Ground 24 contends that there was an error in relying on the evidence of Mr Deane. It points to four matters:

(a) he said he was familiar with the premises when he had never inspected the rear of the ground floor, the toilets, the stairwell, the first/middle nor top floors of the building;

(b) he said that electricity supply was not apportioned when he had never enquired of the lessee how it was apportioned, nor inspected the four meters;

(c) he said it would be very challenging to find a tenant when he was never employed by the plaintiff to market the building for lease; and

(d) he suggested to a leasing agent that walls on the ground floor should be removed when those walls were in fact load bearing.

[78] The learned trial judge set out his reasons for accepting the evidence of Mr Deane in a general sense.[67] Prior to the trial Mr Deane had been involved in marketing the property, which necessitated meetings on site.[68] His evidence was supported by that or Mr O'Brien, a commercial real estate agent who was engaged as a letting agent

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66 Reasons below at [113].
67 Reasons below at [102]-[103].
68 Reasons below [104].

for this building.[69] The assessment of whether his evidence was credible and could be relied upon was a matter for the trial judge, who had the advantage of seeing and hearing him give evidence. Nothing raised in ground 24 brings the case into the category where and appellate court should interfere with factual findings by a trial judge.

[79] Ground 25 returns to points raised earlier in relation to the question of repudiation. It adds nothing to those that have been considered earlier in these reasons. However, it is a ground of appeal plainly articulated and therefore conforming with r 747 *UCPR*. If it depended only on the same matters as were concerned in grounds 6 and 8[70] it should suffer the same fate as those grounds. The respondent's outline reveals that to be so,[71] and this ground should also be struck out.

Conclusion

[80] For the reasons I have set out above grounds 1-20 and 22-25 should be struck out.

[81] The applicant has urged that there be an order restraining the appellants "from taking any further steps in any Queensland court in respect of, or concerning, any allegation made in these proceedings without the prior leave of a judge". That is akin to the sort of order made where a litigant has been classified as vexatious. That stage has not been reached. However, given that this is the second attempt to articulate grounds of appeal that accord with the *UCPR* and are not merely vexatious and oppressive, I am prepared to order that the appellants can only file an amended notice of appeal with the prior leave of a judge. With the benefit of these reasons it may be possible for some of the grounds struck out to be reformulated or justified in ways that are not presently apparent. I would not foreclose that opportunity, but it should be under court supervision.

Security for costs

[82] The applicant has applied for an order for security for costs. There is no question that Mr Aulsebrook is impecunious and the prospects of the appeal do not seem overly promising. There is no evidence upon which one could find that a security costs order would stultify the appeal. However, the application suffers because the only attempt at quantifying the costs appears in paragraph 44 of Mr Grealy's affidavit. It consists of the bald statement: "It is my opinion that, if the Respondent succeeds in opposing the appeal, it will incur costs and outlays (including Counsel's fees) of $75,000." That form of proof falls far short of what is required on an application for security for costs. It is not always necessary that the application be accompanied by evidence from a costs assessor, broken into components and over time periods, though that is often done. However, a bald assertion such as is made here, with the consequent inability to determine what might be incurred in what components, and when, leaves the court in a situation where it cannot be confident of the figure that ought to be ordered.

[83] I would therefore refuse the application, but without prejudice to the right to apply again.

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69 Reasons below at [112]-[113].
70 With which it is grouped in the respondent's outline.
71 Respondent's outline paras 10 and 11.

Orders

[84] I therefore order:

1. Grounds 1-20 and 22-25 of the Notice of Appeal filed 1 October 2019 are struck out.

2. The appellants may not file an amended Notice of Appeal except with the prior leave of a judge of the Supreme Court.

3. The respondents to the application to strike out pay the applicant's costs of the application.

4. The application for security for costs is refused.

5. The applicant is to pay the respondent's costs of the application for security for costs.