SUPREME COURT OF QUEENSLAND

CITATION:	*Grist & Ors v Lenan & Anor* [2019] QSC 325
PARTIES:	**GARY PATRICK GRIST** (first plaintiff) and **MARGARET IRENE GRIST** (second plaintiff) and **ALISTAIR GARY GRIST** (third plaintiff) **v** **ANTHONY LENAN** (first defendant) and **FRANK MESIANO** (second defendant)
FILE NO:	11981 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	20 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	20 December 2019
JUDGE:	Ryan J
ORDERS:	**1. Judgment for the defendants;** **2. The plaintiffs pay the defendants' costs of the application on the standard basis.**
COUNSEL:	Mr G Grist for the plaintiffs Mr N J Derrington for the defendants
SOLICITORS:	Mr G Grist for the plaintiffs MBA Lawyers for the defendants

[1] This is an application by the defendants for summary judgment of the plaintiffs' claim, or in the alternative, an application to strike out the plaintiffs' statement of claim.

[2] The context for this application is as follows. A company called Boldmount was, until November 2016, the lessee, under a written lease, of retail premises in Carrara owned by Firestar Convenience Retail Developments Pty Ltd. The first and third plaintiff guaranteed the company's obligations under the lease. The company operated a "Foodworks" store in the premises.

[3] Boldmount failed to pay rent as required under the lease. Ultimately, in November 2016, Firestar exercised its rights of termination under the lease by way re-entering and taking possession of the leased premises. It was one of Firestar's directors who, after receiving a telephone call that the Foodworks operation had been closed, and having found the premises in what he considered to be an abandoned state, padlocked them.

[4] In February 2017, Firestar commenced proceedings in the Magistrates Court against Boldmount, and Gary and Alistair Grist, for the recovery of amounts due under the lease.

[5] On 16 June 2007, Magistrate Sinclair delivered his reasons in an application for summary judgment of those proceedings, brought by Firestar against Boldmount and Gary and Alistair Grist.

[6] In considering the application for summary judgment, the learned magistrate identified two real issues to be tried. One of those issues was whether Boldmount had abandoned the lease, and Firestar had therefore lawfully terminated it, or whether Firestar was in breach of the lease agreement for terminating it when it did.

[7] The learned magistrate dismissed the application for summary judgment. He could not conclude that the defendants had no real prospect of defending any or all of the claim. In particular, he said, at [22] of his reasons, that he found himself unable to find that the premises were abandoned by the defendant. He continued:

> "The plaintiff could have validly taken possession on 29 November 2016 for non payment of rent but until that time had no right to exclude the defendant

> from the premises or prevent it from taking those fixtures and fittings it wanted to."

[8] However, his Honour's reasons, read in context, explain that he was unable to give summary judgment on the basis that the premises were abandoned because evidence on that issue was required. He said:

> "While the plaintiff was entitled to take possession of the premises after 29 November if the rent was not paid and to secure it from 25 November, it was not entitled at that time to exclude the defendant from taking its fixtures and fittings. While the defendant filed no material for the application, the plaintiffs' own material shows an issue to be tried at fact and law about whether the premises and the fixtures and fittings were abandoned, and whether the plaintiffs' actions in denying access to them meant it is entitled to them. The defendant may struggle to prove an intention to return and take those items, but that is a matter for evidence at trial."

[9] Thus whilst the magistrate identified that there was an issue to be tried over whether the premises had been abandoned by the present plaintiffs, he did not find that there had *in fact* been unlawful re-entry by the lessor. That is related to, but not the same as, the claim by the plaintiffs in the matter before me.

[10] The plaintiffs have brought proceedings against Anthony Lenan and Frank Mesiano.

[11] Mr Lenan and Mr Mesiano are directors of Firestar.

[12] By their claim, the plaintiffs allege that, on two occasions, Mr Lenan unlawfully, and in breach of contract, locked the three plaintiffs out of the premises in Carrara and prevented them from earning salaries and other entitlements to the end of the lease period (31 December 2022). The plaintiffs claim damages in excess of $800,000.

[13] The plaintiffs are unrepresented. Mr Gary Grist acts on behalf of them all.

[14] The plaintiffs' pleadings do not comply with the rules but it is plain from them, and acknowledged by the defendants, that they attempt to make claims for breach of contract and the tort of procuring a breach of contract.

[15] The defendants' primary position is that the plaintiffs' causes of action are bound to fail.

[16] The defendants submit that the claim for breach of contract is not sustainable against the defendants. While two of the plaintiffs were a party to the lease as guarantors, the defendants were not parties to the contract – the company was. Any claim for breach of contract must be brought against the company Firestar. It follows that the plaintiffs do not have a cause of action in contract against the directors.

[17] The elements of the tort of procuring breach of contract were summarised by the Full Court in *Daebo Shipping Co Ltd v Ship Co Star* (2012) 207 FCR 220 at [88] as follows:

1. There must be a contract between the plaintiff and a third party;

2. The defendant must know that such a contract exists;

3. The defendant must know that if the third party does, or fails to do, a particular act, that conduct of the third party would be a breach of the contract;

4. The defendant must intend to induce or procure the third party to breach the contract by doing or failing to do that particular, and

5. The breach must cause loss or damage to the plaintiff.

[18] The defendants submit that the claim for the tort of procuring breach of contract requires the eligible plaintiffs to prove at trial that the defendants, acting *in excess* of their authority as directors of Firestar, *knowingly caused* Firestar to *breach the lease*, and that they have no prospects of so proving.

[19] Also, the defendants submit that the second plaintiff cannot bring a claim against the defendants for procuring a breach of the lease because she was not a party to the lease.

[20] The defendants make certain complaints about the plaintiff's pleading, including that the plaintiffs do not plead that the defendants *intended* to cause a breach of the lease.

[21] However, the defendants submit that, regardless of issues with the pleadings, there is no prospect of the plaintiffs establishing their tortious case at trial.

[22] On the evidence, it is only the first defendant, Mr Lenan, and not the second defendant, who caused Firestar to terminate the lease by re-entering the premises after the alleged abandonment. The evidence is that he had authority to cause Firestar to do so, and there is no real doubt about that.

[23] With respect to the element of intention, the defendants rely upon authority to the effect that it would be fatal to such a claim if a defendant had a bona fide belief, reasonably entertained, that what he induced or procured was not a breach of the contract: See *Flight Vision Pty Ltd v Onisforou* (1999) 47 NSWLR 473 at 509, quoting from *Short v Citibank of Sydney* (1912) 15 CLR 148.

[24] The Court in *Flight Vision* went on to say:

> "In summary, the defendant must know of the contract and sufficient of its terms to know that what the defendant induced or procured the party to the contract to do would be in breach of the contract. If the defendant knew of the existence of the contract but believed reasonably that what the defendant induced or procured the party to do was not a breach, or reasonably believed that the contract had been rescinded or performance waived, the defendant had now knowingly induced or procured the breach."

[25] The defendants submit that on the evidence, Mr Lenan had the authority to act as he did on behalf of the plaintiffs. They point to evidence of Mr Lenan's directorship and his being charged with the responsibility of managing the shopping centre in which the premises were located. It did not seem to me to be seriously contested that he did not have authority, although I note the plaintiffs' submissions about the existence of a property manager.

[26] The defendants also submit that the evidence is to the effect that Mr Lenan had a belief that he was entitled to re-enter the premises because he believed that the lease had been abandoned. The defendants submit that it was reasonable for Mr Lenan to believe that the premises had been abandoned by the lessee, thereby entitling the lessor to retake possession.

[27] In his affidavit sworn 5 December 2019, Mr Lenan sets out what he observed of the premises, first on 26 November 2016 and again on 29 November 2016.

[28] One of the things he observed on 26 November 2016 was a notice on the door of the premises thanking customers for their support over 23 years, and explaining, in effect, that because of the actions of Firestar, the plaintiffs had been destroyed financially; were personally devastated; and were unable to continue to trade.

[29] His affidavit explains that he observed fixtures in the premises, including branded fixtures, which he understood were owned by third parties such as the corporations who sell or distribute products branded "Coca Cola", "Solo", "Peters" etc. He observed other "well used" property like a mop, a bucket, chairs etc. His affidavit recites his other observations and explains why it was that he decided to padlock the premises on 26 November 2016.

[30] His affidavit explains that he returned a little later that day, after having padlocked the premises, to find forced entry to the premises. He re-secured the premises, using the padlock and chain, but explains, in paragraph 26 that he did this because he believed that although there had been some forced entry (probably by Boldmount), Boldmount had abandoned the premises and that Firestar was entitled to secure it.

[31] The plaintiffs submit that Mr Lenan could not have reasonably believed that the premises had been abandoned – particularly having regard to the fixtures present.

[32] Among the material relied on by the plaintiffs to assert that Mr Lenan's position was unreasonable are photographs of the premises. I have looked at the photographs provided by the defendants, as well as the photographs provided by the plaintiffs. In my view those photographs, coupled with the notice on the door, made it not unreasonable for Mr Lenan to believe that the premises had been abandoned.

[33] Mr Lenan may in fact have been wrong about that. But the question is not whether Mr Lenan was wrong; it is whether he *intentionally procured a breach* of the lease by causing the company to enter the premises when it did. I find no reasonable evidential basis for such a conclusion. It follows that I do not consider the plaintiffs to have prospects at trial on that issue.

[34] In summary, while I can understand the interpretation placed on the decision of the magistrate by the plaintiffs, their claim against Anthony Lenan, based on the tort of procuring a breach of contract, has no real prospects of success. Further, as mentioned above, the defendants were not parties to the lease contract and cannot be sued for its breach. Thus, even if the lease had been breached, there is no prospect of either of the defendants being held liable legally for any loss suffered as a result of the lease's termination. It follows that the defendants should have judgment on the whole of the claim and I make such an order.

[35] That brings me to the question of costs. The position the plaintiffs find themselves is a difficult one. One may well understand their distress over what has happened to their business. Nevertheless, with respect to this application, there was correspondence between the lawyers for the defendants and the plaintiffs, dated 27 November 2019, in which the plaintiffs were informed of the defendants position, namely that they had no viable cause of action.

[36] In that letter, the lawyers for the defendants set out an option in lieu of the present application which would have meant that the plaintiffs were not required to pay the defendants' costs if they did not succeed. The offer was repeated on 29 November 2019 and remained open until 5 December 2019. Obviously the offer was not accepted. In those circumstances I can see no reason why costs ought not to follow the event. However, I am not prepared to make an order that the plaintiffs pay the defendants' costs on an indemnity basis as sought. Rather, I order the plaintiffs pay the defendants' costs on the standard basis.