SUPREME COURT OF QUEENSLAND

CITATION:	*Hookey & Anor v Whitelaw & Ors* [2020] QSC 63
PARTIES:	**SCOTT GREGORY HOOKEY** (first plaintiff) **KIDS ACADEMY HOPE ISLAND PTY LTD ACN 164 852 475 AS TRUSTEE OF THE KIDS ACADEMY HOPE ISLAND UNIT TRUST** (second plaintiff) **v** **JOHN BRUCE WHITELAW** (first defendant) **KA ESTATES PTY LTD ACN 600 469 887 AS TRUSTEE OF THE KA ESTATES UNIT TRUST** (second defendant) **JBW ESTATES PTY LTD ACN 600 612 819 AS TRUSTEE OF THE JBW FAMILY TRUST** (third defendant)
FILE NO/S:	8477 of 2018
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 April 2020
DELIVERED AT:	Brisbane
HEARING DATES:	22, 23, 24, 25, 28 and 31 October 2019 Further submissions 5 November 2019 and 15 November 2019
JUDGE:	Flanagan J
ORDER:	**1. The plaintiffs' second further amended originating application is dismissed.** **2. The plaintiffs' claim for damages in para 82A(c) of the fourth further amended statement of claim is dismissed.** **3. The plaintiffs' claim in para 85(m) of the fourth further amended statement of claim for a declaration that the notice served by the second defendant as lessor and Kids Academy as lessee in purporting to terminate the lease registered at the Queensland Department of Natural Resources with dealing**

number 717067584 is invalid is dismissed.

4. **The plaintiffs' claim in para 82C of the fourth further amended statement of claim for a declaration that the termination of the registered lease was invalid is dismissed.**

5. **The Court declares that registered lease number 717067584 was lawfully terminated by KA Estates by the filing of its defence and counterclaim on 11 September 2018.**

6. **Kids Academy be granted relief against forfeiture as claimed in para 84D of the fourth further amended statement of claim.**

7. **I will hear the parties further as to the terms of the grant of relief against forfeiture.**

8. **I will hear the parties as to costs.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – CONTRACT IMPLIED FROM CONDUCT OF PARTIES – where the parties were engaged in the ownership and operation of a childcare centre – where the plaintiffs alleged the existence of an oral joint venture agreement, breach of which entitled the plaintiffs to relief – where the defendants denied that any such agreement was entered into – whether the parties had entered into an oral joint venture agreement – whether the conduct of the parties otherwise gave rise to estoppel or fiduciary duties

LANDLORD AND TENANT – TERMINATION OF THE TENANCY – FORFEITURE – NOTICE AND DEMAND BEFORE RE-ENTRY – where the plaintiff argued that the rent demanded was excessive – where the plaintiff argued that the notice did not allow a reasonable time to remedy the breach – whether the notice was valid

LANDLORD AND TENANT – TERMINATION OF THE TENANCY – FORFEITURE – RELIEF AGAINST FORFEITURE – RELIEF UNDER STATUTE – GENERALLY – where the plaintiff had paid all arrears of rent and continued to pay rent – where the defendant argued that the plaintiff had delayed in paying the arrears – where the defendants argued that the plaintiff's use of the premises was unlawful – where the defendants argued that the plaintiff's defaults were wilful – whether the plaintiff was entitled to relief against forfeiture

Property Law Act 1974 (Qld) s 124, s 124(2)
Working with Children (Risk Management and Screening) Act 2000 (Qld) s 166, s 197

Casquash Pty Ltd v New South Wales Squash Ltd (No 2) [2012] NSWSC 522, distinguished
Equuscorp Pty Ltd & Anor v Glengallan Investments Pty Ltd & Ors [2006] QCA 194, cited
Equuscorp Pty Ltd v Glengallan Investments Pty Ltd (2004) 218 CLR 471; [2004] HCA 55, cited
Gill v Lewis [1956] 2 QB 1, cited
Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Aust) Pty Ltd (1988) 5 BPR 11,110, cited
King Tide Pty Ltd v Arawak Holdings Pty Ltd [2017] QCA 251, cited
Shiloh Spinners v Harding [1973] AC 691, cited
Whittet v State Bank of New South Wales (1991) 24 NSWLR 146, cited

COUNSEL: P A Hastie QC for the plaintiffs
M M Stewart QC, with Dr D C Clarry for the defendants

SOLICITORS: Van de Graaff Lawyers for the plaintiffs
Russells for the defendants

[1] This case concerns a determination of the respective rights of the parties as to the ownership and operation of a childcare centre at Hope Island. The plaintiffs allege that these rights are governed by a joint venture agreement made orally by the first plaintiff, Mr Hookey, and the first defendant, Mr Whitelaw, prior to 1 July 2014.

[2] The defendants deny that any such agreement was entered into and allege that the parties' rights are to be determined by reference to a lease executed on 16 July 2014 and registered on 12 February 2016.

[3] While the pleadings raise many sub-issues, the primary issues for determination are as follows:

(a) Did Mr Hookey and Mr Whitelaw enter into an oral joint venture agreement by 1 July 2014, the breach of which entitles the plaintiffs to the pleaded relief? ("**the First Issue**")

(b) Are the defendants estopped from acting other than in accordance with the terms of the oral joint venture agreement, and are they otherwise estopped from enforcing compliance with the registered lease except with the consent of Mr Hookey? ("**the Second Issue**")

(c) Was the second defendant, KA Estates Pty Ltd ("KA Estates"), in a fiduciary relationship with the second plaintiff, Kids Academy Hope Island Pty Ltd ("Kids Academy"), and Mr Hookey? If yes, did KA Estates breach any fiduciary duty so as to entitle the plaintiffs to equitable compensation? ("**the Third Issue**")

(d) If the rights of the parties are governed by the registered lease, has the lease been lawfully terminated so as to entitle KA Estates to possession? If so, is Kids Academy entitled to relief against forfeiture? ("**the Fourth Issue**")

The First Issue

[4] The resolution of the First Issue requires a chronological analysis of the relevant events and conversations. In arriving at my findings of fact I have primarily relied on the contemporaneous documents. Further, for reasons outlined below, I generally prefer the evidence of Mr Whitelaw to that of Mr Hookey.

[5] I consider the chronology of events under the following headings:

(a) Mr Hookey and Mr Whitelaw's background and friendship;

(b) Mr Hookey's original contract to purchase the Hope Island land;

(c) initial discussions between Mr Hookey and Mr Whitelaw and the involvement of Mr Sayers;

(d) the discussions and dealings with Westpac;

(e) the lease;

(f) the draft heads of agreement;

(g) the further draft agreement; and

(h) subsequent events.

[6] Before I discuss the evidence it is important to identify the parties' pleaded cases in respect of the First Issue.

[7] The primary relief sought by the plaintiffs is a declaration that on or about 1 July 2014, the plaintiffs and the defendants had entered into a joint venture agreement in relation to the acquisition of land at Hope Island and the development of that land for the purpose of a childcare centre and the operation of a childcare business.[1] The additional declarations and orders sought by the plaintiffs are ancillary to and flow from the existence of the joint venture agreement.

[8] The plaintiffs' case is that the alleged agreement was an oral agreement made prior to 1 July 2014 in the course of discussions between Mr Hookey and Mr Whitelaw.[2] The plaintiffs plead that the agreement had 22 express terms[3] and 13 implied terms.[4] It is alleged that the agreement was varied in about May 2016[5] and that in performance of the agreement as varied, the parties performed a number of the express and implied terms of the agreement.[6]

[9] The defendants deny that Mr Hookey and Mr Whitelaw made the joint venture agreement because no such agreement was made.[7]

(a) Mr Hookey and Mr Whitelaw's background and friendship

[10] As at January 2013, Mr Hookey had been involved in the development and operation of childcare centres for approximately 20 years. He owned nine childcare

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1 Second Further Amended Originating Application, para 2.
2 Fourth Further Amended Statement of Claim, para 18.
3 Fourth Further Amended Statement of Claim, para 21.
4 Fourth Further Amended Statement of Claim, paras 24-27.
5 Fourth Further Amended Statement of Claim, paras 33 and 34.
6 Fourth Further Amended Statement of Claim, para 35.
7 Fourth Further Amended Defence, para 6(a).

centres in New South Wales and one in Queensland. He owned six parcels of land on which seven of the Kids Academy Centres were located. He did not own the land on which the Kids Academy Childcare Centres at Hornsby, Spring Hill and Wadalba were situated.[8]

[11] As at April 2014, Mr Hookey considered Mr Whitelaw to be a close friend.[9] Mr Hookey had heard Mr Whitelaw refer to themselves as "best friends". Mr Hookey agreed with this description.[10] They both lived in houses at Sanctuary Cove and were both members of the Sanctuary Cove Golf and Country Club. They would ordinarily meet at the club five or six times per week and would have morning coffee about four times each week. They were regular golf partners.[11]

[12] Mr Whitelaw was born in Australia. After leaving school, he undertook a number of jobs which included managing shops, selling insurance and tennis coaching. He moved to London in 1987 and traded cars for approximately three years. In 1990, he started a property venture in central London which proved successful and profitable. He undertook a number of developments over a 17-year period and still has interests in the property market in central London. He returned to Australia in 2007 and as at 2014 was semi-retired.[12]

[13] Mr Whitelaw first met Mr Hookey at Sanctuary Cove in or about 2008 or 2009. He spent a lot of time socially with Mr Hookey and also playing golf with him. He describes their relationship as "good friends".[13] Mr Hookey had informed Mr Whitelaw that he owned and operated several childcare centres in New South Wales.[14]

(b) Mr Hookey's original contract to purchase the Hope Island land

[14] On or about 2 April 2013, Mr Hookey entered into a contract for the purchase of land at Hope Island. On 8 July 2013, he obtained an approval from the Gold Coast City Council to construct a childcare centre on the land. On or about 17 July 2013, he caused Kids Academy to be incorporated. On 20 August 2013, Mr Hookey and Kids Academy caused the Kids Academy Hope Island Unit Trust ("KAHI Unit Trust") to be established with the intent that this unit trust would own and operate the childcare business to be established on the land.

[15] On or about 8 October 2013, Mr Hookey and the vendor under the original purchase contract entered into a deed by which, *inter alia,* completion of the original purchase contract was made conditional upon Mr Hookey obtaining finance by 31 March 2014, and the date for completion was varied to the twenty-first day after the date on which the finance condition was satisfied.

[16] On 25 March 2014, Mr Hookey gave notice to the vendor that he had obtained finance subject to the date for completion of the original purchase contract being

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8 Exhibit 1, affidavit of Scott Gregory Hookey sworn 1 August 2019, para 5 ("First Hookey affidavit").
9 First Hookey affidavit, para 62.
10 T 1-39, lines 10-12.
11 First Hookey affidavit, paras 63-64.
12 Exhibit 1, affidavit of John Whitelaw sworn 11 September 2019, paras 7-10 ("Whitelaw affidavit").
13 Whitelaw affidavit, para 16.
14 Whitelaw affidavit, para 17.

varied to 30 May 2014. Mr Hookey did not complete the original purchase contract as varied by the deed of 8 October 2013 on or before 30 May 2014. On 20 May 2014, a variation agreement was executed by Mr Hookey and the vendor to extend the settlement date to 30 June 2014.[15] As at 30 June 2014, the vendor had not terminated the original purchase contract as varied. Also as at 30 June 2014, Mr Hookey had expended about $500,000 in relation to his purchase of the land and the proposed development of the land for the childcare business.[16]

[17] In relation to the financing of the purchase of the land and the construction of the childcare centre, Mr Hookey was dealing with Dot Pienaar from Westpac Bank. Mr Hookey met with Ms Pienaar on 14 February 2014 in relation to his application for a loan from Westpac to enable him to complete the purchase of the land. In the course of this meeting, Mr Hookey informed Ms Pienaar of a prospective sale of the Kids Academy Centres to Kids Academy Operations Pty Ltd, which was an entity related to Sterling Early Education Holdings Pty Ltd.[17] At this time, Mr Hookey was confident that he would be able to sell the other childcare centres to the Sterling entity for approximately $23 million.

[18] Following this meeting, Westpac wrote to Mr Hookey on 18 February 2014 with a proposal for a facility of $15 million for the purchase of the land and the construction of the childcare centre at Hope Island. Westpac's proposal was, however, made subject to the sale of the other childcare centres to the Sterling entity.[18] Despite Mr Hookey's confidence, the sale to the Sterling entity did not eventuate. Mr Hookey was informed of this fact on 31 March 2014.[19] As a result of this sale not eventuating, Mr Hookey was not able to satisfy the Westpac condition nor able to obtain the loan as offered by Westpac on 18 February 2014.[20]

(c) Initial discussions between Mr Hookey and Mr Whitelaw and the involvement of Mr Sayers

[19] Mr Whitelaw accepts that he had many discussions with Mr Hookey from April to June 2014 about how they might cooperate in relation to a new childcare centre at Hope Island.[21] The topic was first raised during February 2014 when Mr Hookey mentioned to Mr Whitelaw that he was interested in a new childcare site at Hope Island.[22] The discussion caused Mr Whitelaw to send an email to his accountant, Mr Sayer, on 7 April 2014.[23] This email relevantly stated:

> "On the Aussie front there is opportunity that may come my way with a long-term friend in the child care field. The preliminary discussions concern a site in hope island where he has already obtained consent for a large bells and whistles new centre . I've mentioned our chat re super etc which he is also very interested in.

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15 Exhibit 7.
16 Fourth Further Amended Statement of Claim, paras 13-17A; Fourth Further Amended Defence, paras 2-5.
17 First Hookey affidavit, paras 45 and 49.
18 Exhibit 2, Trial Bundle, Vol 1, p 265.
19 First Hookey affidavit, para 55.
20 First Hookey affidavit, para 60.
21 Whitelaw affidavit, para 22.
22 Whitelaw affidavit, para 18.
23 Exhibit 2, Trial Bundle, Vol 1, p 303.

> Ideally a meet with you and I and he and his accountant would be great ."

[20] Mr Hookey's recollection of his discussions with Mr Whitelaw in April 2014 is that he informed Mr Whitelaw that it looked like the sale of his childcare centres was not going ahead. He required the sale to proceed in order to obtain funding from Westpac to buy the land for the Hope Island childcare centre. This was one of Westpac's conditions. Mr Hookey was therefore required to obtain funding elsewhere.[24]

[21] According to Mr Hookey, on or before 15 April 2014, he held further discussions with Mr Whitelaw in which Mr Whitelaw offered "unexpectedly"[25] to lend Mr Hookey approximately $4 million. Mr Hookey replied that he would only need $3 million to purchase the land.

[22] According to Mr Hookey, a further conversation took place prior to 15 April 2014:

> "Hookey: Rather than just lend me the money, why don't you be my partner in the whole development?
>
> Hookey: If you come in as my partner, we will go 50-50 in both the land and the business.
>
> Hookey: We would each get 50% of the profit from selling the land, and from running and selling the business.
>
> Hookey: The approvals have cost me about $500,000 so far. I have worked out I need another $9.5 million to get the centre up and running. That includes everything. The price for the land is $2.1 million, stamp duty and infrastructure contributions are about $500,000 and the build cost will be about $5.3 million, then the balance is to pay for the furniture, computers, play equipment and toys, consultants, holding costs, and for the prepayment of the first 18 months of interest to allow time for the centre to be built and to get the occupancy of the centre to where we need it to be.
>
> Hookey: Westpac told me they would lend me up to 65% of the completed value of the land and centre. I got a valuation on that basis last year which valued the land and centre at about $12 million.
>
> Hookey: So if you came in as my partner, with your $4 million, we'll easily be able to borrow the balance of what we need from a bank.
>
> Whitelaw: I am happy to look at it. Can you send me information to consider?

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24 First Hookey affidavit, para 65.

25 T 1-61, line 26; Mr Whitelaw's recollection is that it was Mr Hookey who approached him in early 2014 stating that he needed money as he had a property under contract which he could not settle. Hookey asked Whitelaw to lend him $2 million so that he could settle on the contract (Whitelaw affidavit, para 19).

Hookey: Yes."[26]

[23] Subsequently, on 15 April 2014, Mr Hookey sent Mr Whitelaw two emails with attachments which contained information about the development.

[24] There are a number of matters that should be noted in relation to this conversation. First, it is Mr Hookey who suggests a 50/50 partnership. Mr Hookey refers to the approvals having already cost him $500,000 and indicates that a further $9.5 million is required to get the centre up and running, which includes the price for the land. What Mr Hookey is suggesting in this conversation is a capital contribution from Mr Whitelaw of $4 million with the rest of the moneys to be borrowed by both of them from Westpac. There can be no suggestion that this conversation between Mr Hookey and Mr Whitelaw resulted in any concluded oral agreement. Mr Whitelaw indicated that he was "happy to look at it". Mr Hookey subsequently sent further information about the proposed development to Mr Whitelaw. At the time this conversation took place, Mr Hookey knew that the date for settlement of the land contract was approaching.

[25] Mr Sayers recalls coming to Sanctuary Cove and meeting with Mr Hookey and Mr Whitelaw, as foreshadowed in the email of 7 April 2014. Mr Sayers' recollection of this meeting is as follows:

> "One of them (or both) – I do not recall which, said to me words to the effect that they intended to do a 50/50 joint venture together. One or both of them told me that they had identified or found some land and that the plan was to develop a child care centre on the land.
>
> I do not now recall any discussion at this meeting as to the identity of the party which would own the land. I said to them words to the effect that I recommended a unit trust structure. I said words to the effect, 'You'll both probably have a unit trust but you need to have a joint venture agreement. A unit trust deed does not deal with the joint venture agreement'. I said words to the effect that a Joint Venture Agreement needs to deal with the deal from conception to death."[27]

[26] Mr Sayers recalls that after this meeting he met with Mr Whitelaw privately and informed him that it was very important to have a joint venture agreement in writing before he agreed to any such thing. He advised Mr Whitelaw not to agree to anything until it was in writing.[28] In oral evidence, Mr Sayers referred to a number of discussions with Mr Whitelaw in which he reminded him that there would be no deal until "we've got properly signed [up] Joint Venture Agreements".[29]

[27] The advice given by Mr Sayers to Mr Whitelaw is consistent with Mr Whitelaw's understanding of the many discussions he had with Mr Hookey from April to June 2014:

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26 First Hookey affidavit, para 67.

27 Exhibit 1, supplementary affidavit of John Michael Sayers sworn 23 October 2019, paras 3-4 ("Supplementary affidavit of John Michael Sayers").

28 Supplementary affidavit of John Michael Sayers, para 5.

29 T 4-59, lines 7-11.

> "… The purpose of these discussions was to come up with a basic arrangement that we were happy with; that we would then take financial and legal advice on the arrangement and see whether it would work. … I relied on Michael Sayers for advice and wanted to run any proposed deal with Mr Hookey by Mr Sayers formalising any agreement with Mr Hookey. Until I took advice from Mr Sayers on any proposed deal and that deal was reduced to writing by lawyers for me to sign, I felt free to discuss a possible arrangement with Mr Hookey to see what we could come up with – to see if we could reach agreement in principle on all essential matters."[30]

[28] As matters unfolded, any initial arrangements as discussed between Mr Hookey and Mr Whitelaw did not eventuate primarily because, as discussed below, Westpac was only willing to deal with Mr Whitelaw and not with Mr Hookey.

[29] Mr Hookey was overseas from 16 May 2014 to 20 June 2014. There is no evidence that Mr Hookey had any oral discussions with Mr Whitelaw regarding the proposed joint venture while he was overseas. Mr Hookey sent the proposed budget for the childcare business to Mr Whitelaw on 17 June 2014.[31]

[30] While Mr Hookey accepts that he was overseas from 16 May 2014 to 20 June 2014, he asserts that in the period from about 15 April 2014 to 30 June 2014 the following statements were made as between himself and Mr Whitelaw:[32]

> "I was overseas in the period from about 16 May 2014 to about 20 June 2014. In the period from about 15 April, 2014 to 30 June, 2014, when Whitelaw and I were both in Sanctuary Cove, Whitelaw and I made statements to the following effect to each other in the course of our several meetings in that period, but not necessarily in the following order–
>
> Whitelaw I am willing to come in as your partner.
>
> Whitelaw However, I will need to be paid interest on the money I put in as I will be relying upon that interest to pay my living expenses.
>
> Scott That's fair enough. I have already paid out about $500,000 so I should also get interest on that and any other amount I put in.
>
> Whitelaw Okay
>
> Scott I have already set up a unit trust, the Kids Academy Hope Island Unit Trust, to operate the business. We will each hold 50% of the units in that trust.
>
> Scott We would need to establish another unit trust to own the land and build the centre, and we would own the units in that trust equally. This is the structure I discussed with

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30 Whitelaw affidavit, paras 22 and 24.
31 Exhibit 2, Trial Bundle, Vol 2, p 516.
32 First Hookey affidavit, para 69.

my accountant last year when I was previously looking at trying to bring in an investor in on the development.

Scott My units in both of these trusts will be held in my family trust, and you should talk with your accountant about doing the same.

Scott We need about $9.5 million. The new unit trust would borrow $6 million from Westpac or another bank, and that you to put in about $3.5 million, and we will have some room to move either way if we are short for any reason.

Whitelaw Okay.

Whitelaw The broker who I used to borrow money for my house was good. I will ask her if she can get the funds for us.

Scott What rate of interest were you wanting? I was thinking 6 or 7%

Whitelaw I will be relying on the interest for my living expenses, so I need 9%. As long as I get that, I will be happy.

Scott Okay. I have already spent about $500,000, so I should also be paid 9% interest on that money at the same rate.

Whitelaw That's fair. I will need to be paid interest on the money I put in from the start, but it is going to take time to set up the business.

Scott I will lend money to the business so that it can pay you your interest until the business is able to do so itself.

Whitelaw I don't think you should be paid interest on the money you put in to cover my interest while the business is being set up.

Scott: Yeah, okay.

Scott You will be putting cash in and getting 9% from the start. I have put cash in without interest to date and put a lot of time and my knowhow into buying land getting development consent, what do I get for doing all of that?

Whitelaw When we sell the business, you can get the first $1 million from the sale.

Scott So I would be paid the $1 million from the sale of the business and we would split the balance 50-50?

Whitelaw Yes.

Whitelaw As I am not involved in your other centres, I would want the Hope Island centre to be run separately to your other centres.

Scott That's okay, I will make sure everything is kept separate.

Whitelaw I don't want to be involved in any admin.

Scott I have staff who look after my other child care centres and the land that I own. They will look after the Hope Island centre also and anything in that has to be done in relation to the land. Once it is set up, you and I will not have to do anything.

Scott We can run everything through the business. All monies will come into the business, and all payments can be made by the business, including interest to you on your loans, interest to me on my loans, interest to the bank on its loan, and the rates and taxes and anything else that has to be paid in relation to the land. Whatever is left over we will split 50-50.

Scott My management company charges each of my centres a management fee of a $1,000 per week, which covers the salaries of its employees, and I would need to charge a management fee for the new centre also. Given it is much bigger, the management fee will need to be higher to reflect that.

Whitelaw I am happy with all of that. As long as I get my 9% I will be happy. Whatever I get over that is a bonus.

[31] I have a number of difficulties with this evidence of Mr Hookey. First, Mr Hookey relies on statements allegedly made over a lengthy period, namely between 15 April 2014 and 30 June 2014. This includes the period when he was overseas. Secondly, the statements must be viewed as preliminary only given that, as discussed below, Westpac had not approved finance prior to 1 July 2014. Thirdly, the statements made by Mr Hookey and Mr Whitelaw suggest that finance would be obtained from Westpac through an entity under their joint control. Fourthly, Mr Hookey was cross-examined in relation to this evidence. He could not identify when any agreement was reached either by reference to a date or a particular event.[33] The only event Mr Hookey could identify was an alleged handshake between himself and Mr Whitelaw:

> "There was no handshake, was there?--- Yes, there was.
>
> There was no physical handshake …?--- Yes, there was.
>
> … between the two of you?--- Because John has a very distinctive weak, limped, funny angled handshake and I remember distinctly shaking his hand in the place that we sat and had coffee each morning.
>
> If I put to you that there was no shaking of the hands at any stage throughout those negotiations?--- Were you there.

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33 T 1-75, lines 9-15.

> You disagree …?--- I was there.
>
> …with my proposition?--- I was there.
>
> Tell me when the crux of the agreement was reached?--- When we shook hands.
>
> When did you shake hands?--- I don't know."[34]

[32] The above passage of transcript does not, in my view, reflect well on Mr Hookey's credit. I do not accept that Mr Hookey and Mr Whitelaw shook hands on a concluded agreement prior to 1 July 2014. In suggesting there was a handshake, Mr Hookey revealed a number of characteristics which infected his evidence. In describing the alleged handshake he was demeaning of Mr Whitelaw. This was a recurring theme in his evidence. In stark contrast to Mr Whitelaw who did not seek to criticise Mr Hookey, Mr Hookey referred to Mr Whitelaw on a number of occasions as both "greedy" and "opportunistic".[35] By asking Senior Counsel for the defendants in the course of the exchange "Were you there?", Mr Hookey showed that he was unnecessarily argumentative. Mr Hookey was cross-examined extensively over the course of approximately three days. Not only was he critical of Mr Whitelaw and argumentative, he was also evasive and avoided answering questions directly. He demonstrated limited recollection of dates and was unable to recall the actual oral terms of the alleged agreement. As discussed below, there are a number of inconsistencies between the terms said to arise from the conversations between Mr Hookey and Mr Whitelaw, the draft memorandum of agreement and the pleaded terms of the alleged oral agreement.

[33] On 26 June 2014, Mr Whitelaw sent an email to Mr Sayer. The email commences with the following words:

> "As discussed the other day ill try and give you the gist of what i / we are trying to do . Acquire a site for a new child care centre , construct the building and operate the facility. Globally the numbers are in the region of $10m."

[34] Mr Whitelaw's evidence in relation to this email is that at this time, he did not believe he had entered into any agreement with Mr Hookey. Mr Whitelaw was seeking advice from Mr Sayers as to how such a deal could be structured and what issues would be involved:

> "I was confident of being able to lend money for the development but I understood that any arrangement might also be affected by the requirements of the bank. That is why I said in my email of 26 June 2014 'Once we have an agreement in principle with a bank that will dictate how we do it'. I said I was 'obviously very focussed on the budget re the build and setting up' because it was a large initial investment from me as I was required to buy the land and construct the buildings. I wanted to ensure that my investment was secure. Timing was also important because, whatever the arrangement was going to be between me and Mr Hookey (and the respective entities

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34 T 1-75, lines 21-39.

35 T 2-84, line 35; T 3-25, lines 20, 23 and 24; T 3-44, line 3; T 3-25, line 3; T 1-45, line 7; T 1-62, line 6; T 2-60, lines 7-8.

> we controlled), it had to be formalised before the end of July as I understood that Mr Hookey had already obtained extensions to the settlement date from the vendor."[36]

[35] As at 30 June 2014, Mr Whitelaw's understanding of the essence of the proposed arrangement as discussed with Mr Hookey was as follows:

> "(a) I would buy the land, construct the child care centre, borrow money for the purpose of constructing the building on the Land and I would become the sole owner of the Land and the Landlord under a lease.
>
> (b) Mr Hookey would own and operate the Business and be responsible for all income and the payment of all ongoing costs and expenses including rent from the Business income.
>
> (c) My capital would receive a return on investment of 9% per annum, to be paid by Mr Hookey or Kids Academy from the Business.
>
> (d) I would reimburse Mr Hookey for the preliminary development costs he had incurred (which I understand were around $500,000 – I referred to these as a white paper costs) and in the meantime I would receive payments at 9% per annum.
>
> (e) Upon a sale of the Business, Mr Hookey would receive $1 million, for his skill and expertise in setting up, running and operating a successful Business.
>
> (f) If either the Land or the Business was sold, we would share equally in the profit or uplift."[37]

[36] According to Mr Whitelaw, at no point did he or Mr Hookey exchange words to the effect that they had an agreement, nor did they shake hands on such an agreement.[38]

(d) The discussions and dealings with Westpac

[37] On or about 1 July 2014, Mr Whitelaw and Mr Hookey met with Brett McGrath, a senior relationship manager for Westpac at Sanctuary Cove. Mr Whitelaw was not a customer of Westpac at the time. Prior to this meeting, Mr Whitelaw had been informed by Mr Hookey that Westpac would not lend Mr Hookey the money for the development.[39] Mr Hookey could not recall the reason why Westpac was only willing to advance funds to Mr Whitelaw. He recalls, however, a conversation with Mr Whitelaw. In this conversation, Mr Hookey stated that he would have to stay as a sole director, shareholder and unit holder of the KAHI Unit Trust and that Mr Whitelaw would have to be the sole director, shareholder and unit holder of the new trust. This ownership arrangement would be changed at an appropriate point to reflect their 50/50 agreement.[40] Mr Hookey, however, accepted that whether or not

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36 Whitelaw affidavit, para 26.
37 Whitelaw affidavit, para 28.
38 Whitelaw affidavit, para 30.
39 Whitelaw affidavit, para 34.
40 First Hookey affidavit, para 90.

there could be any agreement at all depended upon whether finance could be obtained "by one or the other or both" of him and Mr Whitelaw.[41]

[38] It is not at all clear from the evidence what would trigger the ownership arrangements changing to reflect the proposed "50/50 agreement".[42] Maurice Watson has been Mr Hookey's accountant since 1997. Mr Watson recalled a telephone conversation with Mr Sayers on 2 July 2014 where a possible "trigger" was discussed:

> "Sayers: John Whitelaw has agreed to invest in a child care centre which your client Scott Hookey is developing at Hope Island.
>
> Sayers: John is debt free, and Westpac want John to be the borrower and own the property.
>
> Sayers: John has told me however that their deal is that Scott and John will each be 50:50 in the property and the business. Scott will own 50% of the land and John will own 50% of the business.
>
> Sayers: I understand the proposal is for separate unit trusts to own the property and the business, and that the units in each will be owned respectively by discretionary trusts, in the case of the property it will be John's discretionary trust and in the case of the business it will be Scott's discretionary trust.
>
> Sayers: Because of Westpac's requirement, John and Scott will each have to give the other an option to be allotted units in the other's trust at an appropriate time in the future to change the ownership to 50:50.
>
> Sayers: We will also need to examine the stamp duty and capital gains tax implications.
>
> Sayers: These option documents could incur stamp duty if lodged for stamping.
>
> Sayers: We also need to consider the trigger for exercising the option. It probably should be when Scott has the funds to contribute 50% of the capital."[43]

[39] As matters unfolded, the "trigger" identified by Mr Sayers never eventuated. Apart from his initial outlay of $500,000, Mr Hookey did not provide 50% of the capital for the purchase of the land and the construction of the childcare centre. For his initial outlays and his further contributions including supervising the building works, KA Estates paid $500,000 to Mr Hookey on 30 March 2016 and a further $500,000 on 11 May 2016.[44] The circumstances in which these two payments were made to Mr Hookey are discussed below.

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41 T 2-14, lines 10-14.

42 First Hookey affidavit, para 90.

43 Exhibit 1, affidavit of Maurice John Watson sworn 25 July 2019, para 9.

44 Fourth Further Amended Defence, para 17(g)(i); Reply to Fourth Further Amended Defence, para 9.

[40] On 2 July 2014, Westpac sent an indicative term sheet addressed to Mr Whitelaw.[45] The letter and indicative terms and conditions from Westpac did not constitute a formal offer by Westpac to provide finance to Mr Whitelaw or any other entity. The facility was to be for an amount of $6 million interest only. Conditions precedent to the loan included a copy of a lease to be provided to the bank for legal review. This requirement had been previously explained to Mr Hookey by the person he dealt with at Westpac, Dot Pienaar. She told him that Westpac would only advance funds to Mr Whitelaw. Westpac required that Mr Whitelaw or his entity own 100% of the land and develop the land for a childcare centre, and that Mr Hookey's entity leased the childcare centre.[46] In oral evidence, Mr Hookey went beyond what is contained in his affidavit, suggesting that in spite of Westpac requiring Mr Whitelaw's entities to own 100% of the land and development and that there be a lease in place, Ms Pienaar was willing to allow Mr Whitelaw and Mr Hookey to structure their partnership as they saw fit. Mr Hookey's evidence was that he asked Ms Pienaar to facilitate a joint venture arrangement. Her response was as follows:

> "'And John [Whitelaw], having not put a tax return in in Australia for 20 years, we'll just stick him in as landlord. Now, obviously, you two have a partnership. Obviously, what you do in and behind the structure that Westpac would like to see, because that's the way that we do it, it's totally up to you.' I said, 'Okay. That's fine. I'm sure John will be fine with that.'"[47]

[41] I do not accept Mr Hookey's recollection of this conversation with Ms Pienaar. First, it is inconsistent with the conversation with Ms Pienaar, as recounted in Mr Hookey's affidavit.[48] Secondly, the indicative terms of finance to Mr Whitelaw required Mr Whitelaw's and Mr Hookey's entities to enter into a lease, a copy of which was required to be provided to Westpac for legal review. Such a requirement is inconsistent with Mr Hookey's evidence that Ms Pienaar was willing to facilitate a joint venture arrangement not reflected in the relationship of landlord and tenant.

(e) The lease

[42] On the same day as the meeting with Mr McGrath of Westpac, Mr Hookey took steps to have a lease drafted. A lease was prepared by the solicitors for Mr Hookey in Sydney and then subsequently in Queensland.[49]

[43] As part of his instructions to his solicitors for the drafting of the lease, Mr Hookey requested that the position under the draft lease be altered to reflect his wish that the landlord be responsible for fitting out the premises for the permitted use under the lease as a childcare centre.[50] The final registered form of the lease contained clause 17.6 which provides:

> "The Landlord agrees to construct the Building to the specifications and in accordance with the plans delivered to the Landlord by the

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45 Exhibit 2, Trial Bundle, Vol 2, p 634 and Vol 8, p 2281.
46 First Hookey affidavit, para 89(b)(i).
47 T 1-80, lines 29-33.
48 First Hookey affidavit, para 89.
49 Exhibit 2, Trial Bundle, Vol 2, p 648.
50 Exhibit 2, Trial Bundle, Vol 8, p 2431.

> Lessee prior to entering into this Lease. The Landlord's works must be completed and include all fixtures, fittings and chattels to the extent required for the Lessee to comply with all State licensing and regulations relating to the operation of a childcare centre. The Lessee may submit amendments to the chattels and fittings needed for the Landlord to comply with this clause prior to taking possession."[51]

[44] In oral evidence, Mr Hookey accepted that the amendments sought by him benefitted the lessee under the lease.[52]

[45] On 1 July 2014, KA Estates was incorporated and the KA Estates Unit Trust was established. On the same day, Mr Whitelaw emailed Mr Hookey informing him of the name of the new entity. Thereafter Mr Hookey informed his solicitor, Mr Fraser, as to the relevant parties to the lease.

[46] The lease between KA Estates and Kids Academy was not simply a requirement of Westpac and was used by Mr Hookey in other ways. The lease, which was signed by Mr Hookey for Kids Academy, was used by him to obtain approvals from the Department of Education for Kids Academy to run a childcare business. Amanda Grassby has worked for Mr Hookey in his childcare businesses since 2005. As early as 31 July 2014, she informed him that Kids Academy would require a lease to be in place to prove to the Department that it had the right to occupy the land so as to obtain the service approval.[53] Mr Hookey requested a copy of the signed lease from Radcliff Taylor Lawyers on 18 September 2014 for the purposes of obtaining these approvals.

[47] The lease was also mortgaged by Kids Academy to Westpac on or about 16 February 2015.[54]

[48] On 7 July 2014, Mr Hookey and Mr Whitelaw signed the building contract for the construction of the childcare centre. Mr Hookey, given his experience in childcare centres, oversaw the buildings works with the centre being completed by February 2015.

[49] On 8 July 2014, a request was made by Mr Hookey's accountant that Mr Hookey be issued with five per cent of the units in KA Estates Unit Trust, which was said to assist in "obtaining an exemption from stamp duty at a later time when Scott seeks to increase his equity up to or just below 50%".[55] The request for five per cent of the units was not met. In an email to Mr Whitelaw, Mr Sayers advised him as follows:

> "Before we head down this path I strongly urge you to formalise an agreement with Scott. I will not act on the attached email until we have a firm agreement in place."[56]

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51 Exhibit 2, Trial Bundle, Vol 5, p 1339.
52 T 2-79, lines 33-47 to T 2-80, lines 1-9.
53 Exhibit 1, affidavit of Amanda Louise Grassby sworn 26 July 2019 ("Grassby affidavit"), para 15.
54 Exhibit 2, Trial Bundle, Vol 5, p 1357.
55 Exhibit 2, Trial Bundle, Vol 2, p 750.
56 Exhibit 2, Trial Bundle, Vol 2, p 641.

[50] Mr Sayers not only communicated the need for a written agreement to Mr Whitelaw, but also to Maurice Watson:

> "Maurice, having just spoken to Johno, a proper agreement is required prior to us issuing any units to Scott. I understand the haste in completing a signed contract of land, however we really need a signed agreement as to how Johno and Scott are to proceed with this matter, such agreement being crafted in the next few days. So we shall 'hasten slowly'."[57]

[51] On 8 July 2014, a Deed of Rescission was entered into between Mr Hookey and the vendor in respect of the purchase of the land. On the same day, KA Estates as trustee for KA Estates Unit Trust entered into a contract for the purchase of the land.

(f) The draft heads of agreement

[52] On 10 July 2014, Mr Hookey emailed a document entitled "Heads of Agreement – Hope Island Childcare Centre" and dated "1st July 2014" to Mr Whitelaw, Mr Watson and Corey Radcliff of Radcliff Taylor Lawyers, who had acted for Mr Hookey in relation to his proposed purchase of the land under the original purchase contract up until 8 July 2014 and who, as at 10 July 2014, was acting for KA Estates in relation to its purchase of the land.[58]

[53] The draft heads of agreement stated as follows:[59]

> "a. [Mr Whitelaw] and [Mr Hookey] will own KAE equally.
>
> b. Mr Whitelaw and Mr Hookey will own KAHI equally.
>
> c. KAE is the entity that will own and build the child care centre.
>
> d. KAHI is the entity that will run the child care centre.
>
> e. No formal lease will need to be in place as KAHI will be the trading entity responsible for all moneys in and out as well as all other payments including bank interest and interest payable to both [Mr Whitelaw] and [Mr Hookey].
>
> f. [Mr Hookey] has contributed approximately $500K(to be substantiated) cash towards KAE and has been granted $1M contribution for his IP towards KAHI. The $1M is to receive no interest however it will be considered as a debt on the sale of the business.
>
> g. [Mr Whitelaw] is to invest sufficient capital to acquire the site and facilitate the construction and set up of the centre circa $3.5M.
>
> h. [Mr Hookey] and [Mr Whitelaw] will be paid 9% interest on their cash input. [Mr Hookey] $500K interest will accrue from the date of the settlement of the land.

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57 Exhibit 2, Trial Bundle, Vol 2, p 750.
58 Fourth Further Amended Statement of Claim, para 23; Fourth Further Amended Defence, para 9.
59 Exhibit 2, Trial Bundle, Vol 2, pp 754-755.

i. [Mr Whitelaw]'s interest on capital will be met by [Mr Hookey] from private funds again from the date of settlement. When the business can afford to meet these payments the amount of money paid to [Mr Whitelaw] by [Mr Hookey] will be collated and become a debt of the business, to be returned to [Mr Hookey] as soon as viable. This amount owed to [Mr Hookey] will not attract interest.

j. KAE is to secure finance from a bank to construct the building. This loan will be circa $6M. Although KAE may be in [Mr Whitelaw]'s name, [Mr Hookey] guarantees 50% of this loan personally.

k. KAHI is to be operated as a completely separate entity to all the other Kids Academy businesses. However shared staff will need to be paid for by way of a management fee.

The agreement between [Mr Hookey] and [Mr Whitelaw] is that both parties will own equally the KAE and KAHI entities.

The initial structure/entities will be put in place to accommodate the financing of the construction. These entities/structures are to revert to the initial shareholdings as in points a and b as soon as financing is in place. The entities/structures that are put in place now should be done so as not to incur further stamp duties at a later date."

[54] According to the plaintiffs' pleaded case, the heads of agreement were jointly drafted by Mr Hookey and Mr Whitelaw on or about 10 July 2014. It is further pleaded that the heads of agreement contain some of the express terms of the joint venture agreement, including the express terms pleaded in subparagraphs 21(b) to (r) of the fourth further amended statement of claim.[60] I do not accept that the document was jointly drafted by Mr Hookey and Mr Whitelaw on 10 July 2014. Nor do I accept that the document contains the express terms of the joint venture agreement as pleaded in subparagraphs 21(b) to (r) of the fourth further amended statement of claim.

[55] Mr Hookey's evidence is that at about 8.00am on 10 July 2014, he met at his house with Mr Whitelaw and in the course of this meeting Mr Hookey typed the heads of agreement. He states that Mr Whitelaw and he sat beside each other while he typed the document. According to Mr Hookey:

> "The heads of agreement contained what I understood to be terms agreed to by Whitelaw and me in the course of the discussions we had before 30 June 2014 …"[61]

[56] Mr Whitelaw does not recall meeting with Mr Hookey on the morning of 10 July 2014. He accepts that he received the email from Mr Hookey containing the heads of agreement. He attempted to send the document to Mr Sayers later that day. In that email Mr Whitelaw refers to he and Mr Hookey making "good progress this morning".[62] Mr Whitelaw accepts that he must have spoken with Mr Hookey

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60 Fourth Further Amended Statement of Claim, para 22.
61 First Hookey affidavit, para 98.
62 Exhibit 2, Trial Bundle, Vol 2, p 756.

sometime that morning but he denies that he jointly drafted the document with him.[63] Mr Whitelaw regarded the draft heads of agreement as a discussion paper in relation to a summary of a proposed arrangement that was prepared by Mr Hookey of how they might proceed in relation to the childcare business and the land.[64] Mr Whitelaw's evidence, which I accept, was that while some of the terms of the heads of agreement were discussed, he did not agree these terms with Mr Hookey.[65] Mr Whitelaw accepted that he and Mr Hookey were trying to do "a fifty-fifty" deal but it had not been agreed.[66] After 1 July 2014, he considered that he and Mr Hookey continued to negotiate but did not reach an agreement which, in Mr Whitelaw's mind, "had to be a written documented agreement".[67]

[57] I accept that the terms of the draft heads of agreement were discussed by Mr Hookey and Mr Whitelaw on 10 July 2014. The document, however, bears the date "1st July 2014". The date of the document was the subject of cross-examination of Mr Hookey:

> "Why did you date this document the 1st of July?--- I believe it's a typo, or I began making some points by – we were Johnno's sort of saying, you know, 'Well, mate, we're talking about all this stuff. You know, we better start getting it down on paper.'---
>
> When did you draw it up?--- If you let me finish before I would have got to that. I believe that I either got the date wrong, or I began to – with the encouragement of John – to start putting a few points together."[68]

[58] Mr Hookey's evidence that the date "1st July 2014" was a "typo" was unconvincing. This is evident from the following exchange:

> "HIS HONOUR: Can I just go back to you saying that you got the date wrong. It's not 1 July 2014. It's 1st of July 2014?--- Yeah.
>
> As opposed to 10th July 2014?--- Yeah, that's what's bothered me too, judge.
>
> Can you explain to me how it's a typo in that sense?--- No, that's what bothered me as well. That's why I thought it can't be a typo. I think that because everything was from the 1st when we went with Brett, once Brett left Johnno said, 'Well, I think we better start putting a bit of this on paper so that we can try to get it fixed up'. So it may well be that I went home that night and just started to type a couple of things in and work out what was – what was our little agreement, which sat in behind the – the formal agreement."[69]

[59] There are a number of matters that flow from the above exchange. First, it is more probable than not that Mr Hookey drafted the heads of agreement on or about 1 July

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63 Whitelaw affidavit, para 58.
64 Whitelaw affidavit, para 59.
65 T 5-16, lines 25-30; T 5-17, lines 1-6.
66 T 5-24, lines 27-36.
67 T 5-25, lines 20-31.
68 T 2-8, lines 16-19 and 30-33.
69 T 2-85, lines 40-47 and T 2-86, lines 1-4.

2014. Secondly, on his own admission, Mr Hookey appreciated that Mr Whitelaw required any joint venture agreement to be reduced to writing.[70] Thirdly, the fact that Mr Hookey was drafting the heads of agreement by himself on 1 July 2014 supports a finding that the parties had not entered into any oral joint venture agreement by 1 July 2014. Fourthly, Mr Hookey knew that each of the parties were obtaining independent legal and/or accounting advice.[71] Mr Hookey, in his email of 10 July 2014 enclosing the heads of agreement, copied it to both Corey Radcliff (his lawyer) and Maurice Watson (his accountant). Mr Hookey also presumed that Mr Whitelaw would wish to send the draft heads of agreement to Mr Sayers.[72] Mr Hookey initially explained that he sent the draft heads of agreement to Mr Radcliff and Mr Watson because "both of those people were aware of the fact that John and I were trying to finalise this agreement. So it was important they saw what John and I had agreed on."[73]

[60] A comparison of the terms of the draft heads of agreement with the pleaded express terms of the agreement further evidences the fact that no concluded agreement had been reached by 1 July 2014. Before I undertake this comparison, there are some preliminary observations that should be made in relation to the heads of agreement. As to clause (a) of the heads of agreement, at no time did Mr Whitelaw and Mr Hookey own KA Estates equally. Nor did they at any time own the KAHI Unit Trust equally. Clause (e), which states that no formal lease would be required, contradicts Westpac's specific requirement for a lease which was communicated on 2 July 2014.[74] As to clause (g), this envisaged that Mr Whitelaw would provide all the capital for the project except for the $500,000 that Mr Hookey had already contributed. This is in stark contrast to what had been discussed, namely that Mr Whitelaw would make a cash contribution but that bank borrowings would be obtained by both Mr Whitelaw and Mr Hookey through an entity which they equally controlled. This change is, in my view, significant. It is reflected in clause (j) of the heads of agreement, which contemplated KA Estates securing finance in the order of $6 million from Westpac to construct the childcare centre. Clause (j) thereafter provides: "Although KAE may be in Mr Whitelaw's name, Mr Hookey guarantees 50% of this loan personally". No such guarantee was ever forthcoming from Mr Hookey. Nor was there any mention of Mr Hookey providing a personal guarantee for 50% of any bank loan in any of the conversations between Mr Hookey and Mr Whitelaw prior to 1 July 2014. The requirement for Mr Hookey to give a personal guarantee in respect of 50% of the bank loan is nevertheless pleaded as an express term.[75]

[61] Mr Whitelaw accepts that there would have been discussion generally in relation to clauses (a), (b), (c), (d), (f), (g), (h) and (i) of the heads of agreement. Mr Whitelaw, however, does not accept that Mr Hookey ever offered a personal guarantee for 50% of the bank loan. Mr Whitelaw knew as at 10 July 2014 that Westpac was not interested in lending money to Mr Hookey. Mr Whitelaw's belief and understanding was that until any agreement between he and Mr Hookey was

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70 See also T 2-24, line 23.
71 T 2-24, lines 10-14.
72 T 3-4, lines 6-7.
73 T 3-4, lines 12-14.
74 See [40] above.
75 Fourth Further Amended Statement of Claim, para 21(d) (Term 4).

finalised, KA Estates owned the land and the buildings and Kids Academy was to operate a childcare business under a lease from KA Estates.[76]

[62] On 10 July 2014, Mr Whitelaw sent an email to Mr Sayers seeking his advice in relation to the further discussions he had with Mr Hookey. He did not initially forward the actual draft heads of agreement as he could not open the document. On 15 July 2014, Mr Sayers sent the following email to Mr Whitelaw:

> "Hi Johno,
>
> - The heads states that each of KAE and KAHI will be owned equally by both yourself and Scott. I don't agree with this position now. It maybe the case in the future but as you are providing all the funds for the development I don't believe we can start with this situation. Effectively you and the bank are providing all the capital for the development.
> - It is critical that a commercial lease be established between the entities as initially I see you owning and developing the property and borrowing funds apart from your cash contribution. I am sure that the bank will want to see such an agreement. Without it there is a security issue if the child care centre were to fail and the landlord has no rights.
> - Any funds that Scott has invested in the project to date has to be substantiated.
> - If you are to embark on this venture on a 50/50 basis, which I dod not advise, then you need to rank behind the bank to secure your interest. This could be achieved via a second mortgage and also a registered charge over KA Estates P/L.
> - In relation to interest payments on funds advanced there is no issue, however how can Scott be paid interest after settlement of the land when all funds will be committed to the development and I assume interest accruing on the draw down of bank facilities. Interest can be calculated and accrued until there is a viable cashflow.
> - There is a suggestion of Scott guarantee the loan to 50%. How can this be when the bank on my understanding is only willing to lend Johno?
>
> The above are my reservations/suggestions.
>
> It is critical that the HoA be settled prior to settlement of the land.
>
> Can you update me as to progress."

[63] As I have already observed, Mr Hookey was aware that Mr Whitelaw would take advice from Mr Sayers in relation to the heads of agreement. The advice offered by Mr Sayers reflects the preliminary nature of the discussions between the parties concerning any proposal. Mr Sayers' consistent advice was that a written

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76 Whitelaw affidavit, para 61.

agreement was required. On 8 July 2014, he had communicated this requirement to Mr Watson. Mr Whitelaw had also communicated the requirement for any agreement to be in writing to Mr Hookey.[77] The need for any agreement to be in writing is further reflected by the fact that as early as 1 July 2014, Mr Hookey was drafting the heads of agreement document.

[64] A comparison of the terms in the heads of agreement with the pleaded terms reveals, in my view, two important differences.

[65] Clause (e) of the heads of agreement states that "no formal lease will need to be in place as [Kids Academy] will be the trading entity responsible for all moneys in and out as well as all other payments including bank interest and interest payable to both [Mr Whitelaw] and [Mr Hookey]". Clause (e) of the heads of agreement was generally in the same terms as identified in the affidavit of Mr Fraser, the solicitor for Mr Hookey.[78] The present proceedings were initially commenced by an application for interim injunctive relief to restrain the defendants taking any steps to recover possession of the land the subject of the registered lease. In support of that application, Mr Fraser swore an affidavit on instructions from Mr Hookey. Mr Hookey later swore that the contents of Mr Fraser's affidavit were true and correct. Mr Fraser's affidavit identified Term 7 of the joint venture agreement as being "g. the unit trust and [Kids Academy] would not enter into a formal lease". In the first version of the statement of claim the plaintiffs pleaded in paragraph 21 the following express term:[79]

> "(g) As between the Land Trustee and Kids Academy, no formal lease document was necessary, and notwithstanding the terms of the formal lease which the Land Trustee and Kids Academy may need to put in place to satisfy a precondition to the advance of the bank loan, the terms of that formal lease would not be enforced by Estates against Kids Academy."

[66] This term is now pleaded as follows:

> "(o) The Land Trustee would permit Kids Academy to occupy the Land for the purpose of establishing and of conducting the Child Care Business and up until such time as Kids Academy sold the Child Care Business (**Term 17**).
>
> (p) The payments made by Kids Academy pursuant to Terms 9, 10 and 11 were taken to be payments by Kids Academy to or on behalf of the Land Trustee of rent, outgoings and GST payable by Kids Academy to the Land Trustee in relation to its occupation of the land (**Term 18**).
>
> …
>
> (r) Whitelaw would not do any act or thing to cause the Land Trustee to terminate Kids Academy's occupation of the Land without the prior consent of Hookey (**Term 19A**)."[80]

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77 See [58] and [59] above.
78 Exhibit 15, Tab 3, affidavit of Mark Anthony Fraser, sworn 7 August 2018, para 11(g).
79 Exhibit 15, Tab 1.
80 Fourth Further Amended Statement of Claim, para 21(o), (p) and (r).

[67] The shift in the plaintiffs' case is that the express terms as now pleaded implicitly recognise that Kids Academy's occupation of the improved land would be governed by a lease and that Mr Whitelaw would not terminate Kids Academy's occupation of the land pursuant to the lease without the consent of Mr Hookey. There is no evidence that Term 19A was discussed by Mr Hookey and Mr Whitelaw, let alone agreed prior to 1 July 2014[81] and I make those findings. Similarly, in respect of pleaded Term 17, Mr Hookey accepted in cross-examination that he never discussed such a term with Mr Whitelaw.[82]

[68] The second difference concerns the mechanism which would trigger each party receiving their 50% interest. Under both the heads of agreement and the pleaded terms, Mr Hookey was to give a personal guarantee in respect of 50% of the borrowings from the bank. Mr Hookey never provided this personal guarantee. As to the timing, however, the heads of agreement provided that Mr Whitelaw and Mr Hookey would own KA Estates and the KAHI [Unit Trust] equally "as soon as financing is in place". This is to be contrasted with the pleaded Terms 14 and 15. Term 14 acknowledged that Hookey or his nominee on the one hand, or Whitelaw or his nominee on the other hand, were equal beneficial owners of the relevant entities. Term 15 provided that notwithstanding Term 14, Hookey or his nominee was to be the sole director and sole legal owner of all the issued shares in Kids Academy and of all the issued units in the KAHI Unit Trust. Similarly, Whitelaw or his nominee was to be the sole director and sole legal owner of all the issued shares in the Land Trustee (KA Estates) as well as the issued units in the land trust. Clause 15, however, permitted either Hookey or Whitelaw "at any time" to request the transfer of 50% of the shares and units in the relevant entities.[83]

[69] Neither the terms of the heads of agreement nor Terms 14 and 15 accord with Mr Sayers' understanding of the proposed arrangement as communicated to Mr Watson on 2 July 2014. Mr Sayers believed that the trigger for exercising the option should be when Mr Hookey contributed 50% of the capital.[84] In oral submissions, Senior Counsel for the plaintiffs suggested that the "trigger" for the option was to be the sale of the improved land and the business. There is, however, no evidence that this "trigger" was either discussed or agreed as between Mr Hookey and Mr Whitelaw prior to 1 July 2014.

[70] There is no evidence that Mr Hookey agreed Terms 14 and 15 with Mr Whitelaw prior to 1 July 2014 or at all. As I have previously observed, Mr Hookey had very little recollection of either the date or the content of conversations with Mr Whitelaw. Mr Hookey's recollection of conversations concerning the actual terms of the alleged agreement was both vague and lacking in detail.[85] Mr Hookey's evidence cannot be relied upon for the purposes of determining, on the balance of probability, whether the parties had concluded an agreement by 1 July 2014.

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81 T 2-48, lines 10-47; T 2-51, lines 1-12.
82 T 2-37, lines 4-25.
83 Fourth Further Amended Statement of Claim, para 21(l) and (m).
84 See [38] above.
85 See for example T 2-37, lines 29-47 and T 2-38, lines 1-31.

(g) Further draft agreement

[71] Mr Radcliff met with Mr Hookey and Mr Whitelaw on 27 November 2014. He made a diary note of this meeting. Mr Hookey and Mr Whitelaw requested Mr Radcliff to prepare an agreement which would record certain scenarios:

> "… what you would call uplift or profit to be realised from the sale of the business or the land after their relevant contributions and cost and borrowings had been covered and returned to them and then whatever the profit from any of those sales, they would share in that profit."[86]

[72] It was discussed that if the childcare business was sold, Mr Hookey was to receive a $1,000,000 payment as the first distribution from the sale proceeds of that asset.[87]

[73] Following on from that meeting, Mr Radcliff's office prepared a document entitled "Co-operation Agreement".[88] In spite of Mr Radcliff following up with Mr Hookey and Mr Whitelaw via emails in February and May 2015, the draft Co-operation Agreement was never finalised or signed.[89] In his email to Mr Whitelaw on 25 February 2015,[90] Mr Radcliff referred to the Co-operation Agreement as "a working draft of an agreement between you and Scott as previously discussed". Mr Radcliff accepted in evidence that this description was an accurate record of the status of the document as at 25 February 2015.[91] He considered that there was work to be done on the agreement before it could be finalised.[92] He also accepted that there were a number of gaps in the agreement that required further instructions.[93] For example, clause 6.2 of the draft Co-operation Agreement dealt with the sharing of profits. Clause 6.2.3 in the draft provided:

> "Sell both the Site and the Business
>
> In the event the parties elect to sell both the Site and the Business, [how are they sharing this?]"

[74] According to Mr Whitelaw, after 16 July 2014, Mr Hookey refused to sit down with him in order to discuss any deal and how it might be formalised.[94] Mr Hookey does not recall Mr Whitelaw asking him during late 2014 to meet with a view to discussing the terms of any joint venture. Consequently, Mr Hookey does not accept that he ever refused to discuss those terms with Mr Whitelaw.[95]

[75] It is the plaintiffs' pleaded case that Mr Hookey and Mr Whitelaw attended upon Mr Radcliff in November 2014 to give him instructions to draft a written agreement

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86 T 3-52, lines 1-6.
87 T 3-52, line 42.
88 Exhibit 2, Trial Bundle, Vol 4, pp 1121-278 to 1121-299.
89 Hookey affidavit, para 106.
90 Exhibit 2, Trial Bundle, Vol 5, p 1126-1127.
91 T 3-55, line 37.
92 T 3-55, lines 45-47.
93 T 3-56, lines 17-21.
94 Whitelaw affidavit, para 75.
95 Exhibit 1, affidavit of Scott Gregory Hookey sworn 14 October 2019, para 31.

to record the express terms of the oral joint venture agreement.[96] According to Mr Whitelaw, as no agreement had been reached or drafted between himself and Mr Hookey in July 2014, the draft Co-operation Agreement was a later attempt to form an agreement.[97] He rejected the suggestion that the purpose of attending the meeting with Mr Radcliff was to record the express terms of the alleged oral joint venture agreement.[98]

[76] I do not accept that the purpose of the consultation with Mr Radcliff was for the parties to record what had already been orally agreed prior to 1 July 2014. Mr Radcliff described the Co-operation Agreement as a "working draft" which required further instructions before it could be finalised. Mr Hookey also accepted that "there was certainly work to be done" to finalise the agreement.[99]

[77] Further, the terms of the draft Co-operation Agreement do not record the pleaded express terms of the oral joint venture agreement. The background detailed in the draft Co-operation Agreement refers to KA Estates as the "developer of certain land and commercial premises". Reference is then made to KAHI [Kids Academy] having entered into a lease agreement with KA Estates to lease the site for the purposes of KAHI [Kids Academy] operating a child care centre "Kids Academy Hope Island".[100] The draft Co-operation Agreement continues:

> "It is anticipated that co-operation between the parties will realise a suitable financial exit strategy for both parties upon formalisation of an appropriate exit from the Project, the Site or the Business."

[78] The terms of the draft Co-operation Agreement reflect discussions between the parties about possible exit strategies. Importantly, the draft Co-operation Agreement expressly acknowledges the existence of the lease. This is to be contrasted with the draft heads of agreement in which clause (e) provided that "no formal lease will need to be in place as KAHI will be the trading entity responsible for all monies in and out as well as all other payments including bank interest and interest payable to both Mr Whitelaw and Mr Hookey."

[79] Another fundamental difference is that the draft Co-operation Agreement makes no mention of Mr Whitelaw and Mr Hookey equally owning KA Estates or KAHI [Kids Academy]. Nor does the draft Co-operation Agreement make any reference to a trigger whereby 50% of the interest in KA Estates or 50% of the interest in KAHI [Kids Academy] would be transferred to either Mr Whitelaw or Mr Hookey.

[80] The fact that the parties as late as November 2014 were still attempting to agree essential terms of any joint venture agreement supports a conclusion that the parties had not at that stage reached a consensus upon the terms of any agreement. Mr Whitelaw had consistently been advised by Mr Sayers that any agreement had to be reduced to writing. That requirement had been communicated by Mr Sayers to Mr Watson. The fact that the parties were still negotiating the Co-operation Agreement in November 2014 supports a finding that they had not made any oral

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96 Second Further Amended Statement of Claim, para 23A.
97 Whitelaw affidavit, para 76.
98 Whitelaw affidavit, para 88.
99 T 3-19, lines 31-33.
100 Exhibit 2, Trial Bundle, Vol 4, p 1121-280.

joint venture agreement by 1 July 2014 by which they intended immediately to be bound.

Subsequent events

[81] Both the plaintiffs and the defendants rely on subsequent conduct of Mr Whitelaw and Mr Hookey as either supporting or not supporting a finding that an oral joint venture agreement was formed prior to 1 July 2014.

[82] While the parties' subsequent conduct cannot be used "as an aid in the construction of [a] contract"[101], such conduct is admissible on the question of whether an agreement has been formed as alleged.[102]

[83] In *King Tide Pty Ltd v Arawak Holdings Pty Ltd* Bond J identified three relevant propositions of legal principle:[103]

> "First, where the question of contract formation involves determining whether acceptance of an offer can be inferred in the absence of express consent, acceptance of the offer may be inferred if an objective bystander would conclude from the offeree's conduct, including its silence, that the offeree has accepted the offer and has signalled that acceptance to the offeror.
>
> Second, a similar objective approach is to be taken where the question of contract formation involves determining whether a contract may be inferred from conduct, even where no distinct offer and distinct acceptance can be identified. An enforceable contract may be inferred when the manifest intention of the parties, objectively ascertained, evinces a tacit agreement with sufficiently clear terms.
>
> Third, in both cases, care must be taken to ensure that the objective assessment of the relevant conduct in all the circumstances unequivocally points to the existence of the contract in the terms alleged by the party seeking to prove the contract. It is not enough that the conduct is merely consistent with the terms of the alleged binding agreement, the evidence must positively indicate that both parties considered themselves bound by that agreement." (citations omitted).

[84] Bond J referred to the decision of McHugh JA (with whom Hope and Mahoney JJA agreed) in *Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Aust) Pty Ltd*[104] where his Honour observed:

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101 *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 603 per Lord Reid; *Agricultural and Rural Finance Pty Ltd v Gardiner & Another* (2008) 238 CLR 570 at 582, [35] per Gummow, Hayne and Kiefel JJ.

102 *King Tide Company Pty Ltd v Arawak Holdings Pty Ltd* [2017] QCA 251 at [15] per Bond J (Fraser and Gotterson JJA agreeing) citing *Feldman v GNM Australia Ltd* [2017] NSWCA 107 per Beazley P (with whom McColl and Macfarlan JJA agreed) at [90]-[91].

103 [2017] QCA 251 at [19]-[21].

104 (1988) 5 BPR 11,110 at 11,117-11,118.

> "It is often difficult to fit a commercial arrangement into the common lawyers' analysis of a contractual arrangement. Commercial discussions are often too unrefined to fit easily into the slots of 'offer', 'acceptance', 'consideration' and 'intention to create a legal relationship' which are the benchmarks of the contract of classical theory. In classical theory, the typical contract is a bilateral one and consists of an exchange of promises by means of an offer and its acceptance together with an intention to create a binding legal relationship … A bilateral contract of this type exists independently of and indeed precedes what the parties do. Consequently, it is an error 'to suppose that merely because something has been done then there is therefore some contract in existence which has thereby been executed' … Nevertheless, a contract may be inferred from the acts and conduct of parties as well as or in the absence of their words: … The question in this class of case is whether the conduct of the parties viewed in the light of the surrounding circumstances shows a tacit understanding or agreement. The conduct of the parties, however, must be capable of proving all the essential elements of an express contract: … Care must also be taken not to infer anterior promises from conduct which represents no more than an adjustment of their relationship in the light of changing circumstances."

[85] It is important to observe that the plaintiffs' pleaded case is that Mr Hookey and Mr Whitelaw orally agreed the essential terms of the alleged joint venture agreement prior to 1 July 2014. The plaintiffs have not pleaded a case that the agreement is to be inferred from the parties' subsequent conduct. It follows that the primary analysis of whether a contract was formed is by reference to the oral conversations conducted between Mr Hookey and Mr Whitelaw prior to 1 July 2014.

[86] Bond J observed that care must be taken to ensure that the objective assessment of the relevant conduct in all the circumstances unequivocally points to the existence of the contract in the terms alleged by the party seeking to prove the contract. Conduct that is merely consistent with the terms of the alleged agreement is not enough.

[87] The plaintiffs identify a number of admissions and declarations made by Mr Whitelaw after 1 July 2014. According to Ms Grassby, she met with Mr Hookey and Mr Whitelaw on about 24 July 2014. This was the first time she met Mr Whitelaw. Her recollection of the conversation is as follows:

> "Scott: Johnno will be putting in about $3.5 million and will be paid 9% interest on that contribution, and I will get the first $1 million from the sale of the centre for my input in finding and developing the land and establishing the centre. After that, everything will be split 50:50.
>
> John: I currently own the company that owns the land, which is KA Estates, and Scott currently owns the company that will run the centre, which is Kids Academy Hope Island. We have set the companies up this way as this

was the best way for us to manage and finance the construction and set up.

John: Once the centre is up and running we will look at reorganising the ownership so we are equal owners in each company.

John: Once the centre is up and running I would like you to share information with both Scott and me equally.

John: KA Estates is paying for everything that has to be purchased to set up the centre.

John: I will arrange a debit card on the loan account for you to pay for things as you need to, with a $10,000 daily limit."[105]

[88] On 31 July 2014, Ms Grassby again met with Mr Hookey and Mr Whitelaw. She recalls the following conversation:

"Scott: John will be a 'silent partner' as far as running the centre is concerned.

Scott: John has experience in construction, so he will have some involvement in the building process.

Amanda: I will need a lease to be in place to prove to the department that Kids Academy has the right to occupy the land so I can get the service approval.

Scott: The lease has drawn up, so it will be ready for when you need it. The lease is only a formality, as the arrangement is that Kids Academy will pay off KA Estates loan, and will pay John 9% interest on the money he has put in, which is a generous interest rate, and then the profits after that will be shared 50:50."[106]

[89] Ms Grassby recalls a further conversation at which Mr Hookey, Mr Whitelaw and Robyn Webb were present in October 2014. She recalls that Mr Whitelaw explained that he and Mr Hookey were "essentially 50:50 partners in the centre, however, to make it work we have had to structure it so that I have the ownership of KA Estates, the landlord, and Scott has ownership of Kids Academy Hope Island, as the business owner".[107]

[90] As late as 1 February 2018, Mr Whitelaw in a conversation with Jodi Maree Luff, who was the chief operating officer of the Hookey Group, informed her that he and Mr Hookey were 50/50 in Kids Academy and KA Estates. Ms Luff diarised this conversation.[108]

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105 Grassby affidavit, para 13.
106 Grassby affidavit, para 15.
107 Grassby affidavit, para 25.
108 Exhibit 1, affidavit Jodi Maree Luff sworn 26 July 2019, para 13.

[91] Robyn Elizabeth Webb has worked for Mr Hookey for 26 years primarily as a bookkeeper. In a conversation with Mr Whitelaw in October 2014, reference was again made to he and Mr Hookey being "50:50 partners in the land and centre".[109]

[92] Peter McLaren has known Mr Hookey and Mr Whitelaw for over five years. He considers both of them to be close friends. Mr Whitelaw, in Mr Hookey's presence, said to Mr McLaren, "I am going into partnership with Scott on his child care centre here at Hope Island". Mr McLaren recalls Mr Whitelaw making statements to the effect, "Scott is supplying the knowhow to build the centre and to establish and manage the business", "I will be a silent partner", and "I am providing the capital".[110]

[93] Marshall Leigh has been friends with both Mr Hookey and Mr Whitelaw for over six years. He noticed they had a falling out in the second half of 2017.[111] Mr Leigh recalls Mr Whitelaw in the course of a number of discussions saying words to the effect, "If we get the number of children enrolled as we think we will in time, this will be the best business partnership I have entered into in my life". Mr Leigh was present when either Mr Hookey or Mr Whitelaw would introduce each other using words to the effect of, "This is Johnno, he is my partner in the Hope Island Childcare Centre" and, "This is Hook, he is my partner in the Hope Island child care centre".[112]

[94] In an article in the Gold Coast Bulletin published on 1 November 2014,[113] Mr Hookey and Mr Whitelaw were referred to as "partners".

[95] The evidence identified above is, in my view, equivocal and does not establish that any agreement was formed prior to 1 July 2014. References to Mr Hookey and Mr Whitelaw being "50:50" are general references which do not identify the essential terms of any such arrangement. For example, none of these conversations make reference to Mr Hookey personally guaranteeing 50% of any bank loan. Nor do such general statements identify the nature of the partnership. For example, there is no specificity as to whether the 50/50 partnership relates to the ownership of the land and improvements together with the business, or whether what is contemplated is a sharing of profits ("uplift") upon sale. Further, these general statements should be viewed in the context that Mr Whitelaw and Mr Hookey were still negotiating the written terms of any agreement. No such written agreement was in place as at 2 February 2015, which was the commencement date of the lease and the opening of Kids Academy's operations as a childcare business. When these operations commenced, the situation remained that Mr Whitelaw through his entities had provided, either in cash or borrowings, all the capital for the purchase of the land and the construction of the childcare centre. Kids Academy occupied the improved land pursuant to the lease.

[96] According to Mr Whitelaw, in May 2016, he paid $1 million to Mr Hookey by way of reimbursement for his preliminary expenses which had been estimated at around

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109 Exhibit 1, affidavit of Robyn Elizabeth Webb sworn 25 July 2019, para 10.
110 Exhibit 1, affidavit of Peter Edward John McLaren sworn 31 July 2019, paras 4 and 5.
111 Exhibit 1, affidavit of Marshall Allan Leigh sworn 1 August 2019, para 1; this falling out was confirmed by Mr Hookey in oral evidence (T 3-25, lines 10-20).
112 Exhibit 1, affidavit of Marshall Allan Leigh sworn 1 August 2019, paras 3 and 5.
113 Exhibit 2, Trial Bundle, Vol 4, 1121-142.

$500,000 back in June 2014.[114] Mr Whitelaw describes the circumstances as follows:

> "Mr Hookey became quite agitated around March 2016 when he asked me to pay him for all his preliminary expenses. He said to me that he could validate around $900,000 including interest. To avoid any questions or concerns that I would underpay him, I agreed to pay him $1 million cash and that I would give him a Ford motor car worth $75,000. As part of the arrangement we both agreed that I would continue to receive 9% on all my capital and that from 13 May 2016 my weekly payment of $6,200 would be increased to $7,300 per week. This payment of $1 million was a 'square up' that took care of all his preliminary costs and other expenses and ensured I received a return of 9% on my capital."[115]

[97] The $1 million was paid by Mr Whitelaw to Mr Hookey in two instalments: $500,000 on 30 March 2016 and $500,000 on 13 May 2016. The plaintiffs refer to this payment of $1 million as constituting a variation of the joint venture agreement.[116] The lease that was in place had an annual rental of $815,000. Kids Academy was to pay $30,000 per month to KA Estates' bank account for its loan from Westpac, as well as $6,000 per week to Mr Whitelaw, being 9% on his initial capital contribution of approximately $3.5 million. Kids Academy was also responsible for all outgoings on the land. After Mr Whitelaw had paid Mr Hookey the additional $1 million, the amount of $6,000 per week payable to Mr Whitelaw increased to $7,300 per week.

[98] The defendants submit that the conduct of Mr Whitelaw paying $1 million to Mr Hookey is inconsistent with the parties being in a joint venture.[117] The plaintiffs, however, rely on the same conduct as evidencing that the situation did not reflect that of a normal landlord/tenant relationship.[118] While the lease required payment of rent of $815,000 per annum, no invoices were sent until July 2016 and no payment expressly on account of rent was made until September 2018.[119] Rent was, however, accounted for as income in the financial statements of KA Estates. There were corresponding entries made in the accounts of Kids Academy for rent as an expense. These entries occurred in the financial statements and tax returns for 2015 to 2018.

[99] Mr Watson's recollection is that it was not until 22 April 2016 that he first discussed the issue of rent with Mr Balfour from Mr Sayers' office. Mr Watson appreciated that KA Estates had to earn rental income to be able to claim tax deductions for its costs, including interest and depreciation. Mr Balfour spoke with Mr Whitelaw on 18 May 2016 concerning the treatment of rent. Following this discussion Mr Balfour sent to Mr Whitelaw an email that in part states:

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114 Whitelaw affidavit, para 98.
115 Whitelaw affidavit, para 99; T 5-32, lines 1-19.
116 Fourth Further Amended Statement of Claim, paras 33 and 34.
117 Defendants' Outline of Argument, para 148.
118 Submissions on Behalf of the Plaintiffs, paras 65-67.
119 Exhibit 1, affidavit of Robyn Elizabeth Webb sworn 8 October 2019, para 4.

> "We need to address the rent situation with a complete understanding/agreement of how this whole venture is intended to work. From our discussions I have the following understanding:
>
> - Business Profit is split 50/50 between Scott and yourself
> - Any capital gain on the sale of the business is split 50/50
> - Any capital gain on the sale of the property is split 50/50
> - Rental profit in KA Estates – is this to be split 50/50 also?
>
> Things to do:
>
> - Official lease agreement needs to be put into place between KA Estates Unit Trust and KA Hope Island Unit Trust."[120]

[100] Mr Whitelaw replied to this email as follows:

> "Re the business, your first 3 points are correct , re profits to be split in KA Estates not sure how this is to be addressed . The first point is that my $7300.00 per week is totally separate issue as that is a return on capital invested . If it assists the global picture by having profit in KA estates then i guess those profits can be split ,the next problem may be how does that money get back to Scott without him being taxed again??"[121]

[101] The plaintiffs rely on this email exchange as constituting, in effect, an admission by Mr Whitelaw as to the existence of an agreement. This cannot be accepted. Nowhere in the email exchange does Mr Whitelaw confirm that he had an agreement with Mr Hookey in terms of the first three dot points of Mr Balfour's email. Mr Whitelaw's response must be understood in the context that Mr Balfour was enquiring of him "how this whole venture is intended to work". Each of the party's tax returns identified that the relationship was one of landlord and tenant and not a partnership or joint venture. Mr Whitelaw readily agreed that the first three dot points had been discussed with Mr Hookey. No agreement, however, had been formalised.[122] The mere fact that Mr Whitelaw considered the payment from Kids Academy to be 9% interest payments on his capital rather than rental payments does not in itself support a finding that an agreement had been concluded prior to 1 July 2014. Further, the fact that Mr Hookey and Mr Whitelaw agreed that Mr Whitelaw was to receive a 9% return on his capital does not permit a finding, in the absence of agreed essential terms, that the parties had concluded an agreement by July 2014.

[102] The defendants identify conduct on the part of Mr Hookey after 1 July 2014, which they submit is inconsistent with the existence of any agreement. This conduct includes:

(a) Mr Hookey participating in discussions with Mr Whitelaw and Mr Radcliff in November 2014 when terms inconsistent with the pleaded terms of the oral agreement were discussed without his protest;

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120 Exhibit 2, Trial Bundle, Vol 5, pp 1411-1-1411-2.
121 Exhibit 2, Trial Bundle, Vol 5, p 1411-1.
122 T 5-51, lines 6-11.

(b) Mr Hookey causing the lease to be registered on 12 February 2016;[123]

(c) Mr Hookey causing the lease to be mortgaged on 12 February 2016;

(d) Mr Hookey accepting the sum of $1 million from Mr Whitelaw in May 2016 in circumstances where neither the improved land or the business had been sold;

(e) in its 2016 tax return,[124] Kids Academy returned a taxable income of $4,782 and, contrary to the alleged agreement, those profits were distributed entirely to Mr Hookey's trust, the Hookey Enterprises Trust and were not shared 50/50;

(f) Mr Hookey's freewheeling use of Kids Academy's Westpac accounts. On 21 September 2017, for example, Mr Hookey was sent a general ledger by Ms Webb with two attachments, one of which was "Scott's drawings.xlsx".[125] The withdrawals from Kids Academy's bank accounts totalled $497,699.16 and deposits of $449,451.88, leaving a shortfall of $48,247.28;

(g) Mr Hookey used the Kids Academy's superannuation and tax bank account for payments of personal expenses;[126] and

(h) Mr Hookey's freewheeling use of Kids Academy's bank accounts is to be contrasted with the refusal to give Mr Whitelaw access to those same bank accounts.

[103] Neither the conduct of Mr Whitelaw nor that of Mr Hookey after 1 July 2014 is conduct which is "capable of proving all the essential elements of an express contract".[127] The conduct of the parties after 1 July 2014 "represents no more than an adjustment of their relationship in the light of changing circumstances".[128] Those changing circumstances were many and varied. They include the fact that Westpac would lend only to Mr Whitelaw, and that it required Mr Hookey's entity to conduct the childcare business and enter into a lease with Mr Whitelaw's landholding entity. Another changing circumstance was that through the draft heads of agreement and the draft cooperation agreement, the parties continued to attempt to negotiate a written agreement.

First issue – conclusion

[104] The plaintiffs' case that there was a concluded oral joint venture agreement by 1 July 2014 fails at the threshold.

[105] Central to the plaintiffs' case is pleaded Term 19A, namely that Mr Whitelaw would not do any act or thing to cause KA Estates to terminate Kids Academy's occupation of the land without the prior consent of Mr Hookey. I have found in [67] above that there is no evidence that Term 19A was discussed by Mr Hookey

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123 Exhibit 2, Trial Bundle, Vol 5, p 1317.
124 Exhibit 10, p 47.
125 Exhibit 2, Trial Bundle, Vol 6, p 1896.
126 Defendants' Outline of Argument, para 155.
127 *Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Aust) Pty Ltd* (1988) 5 BPR 11,110 at 11,117-11,118.
128 *Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Aust) Pty Ltd* (1988) 5 BPR 11,110 at 11,117-11,118.

and Mr Whitelaw, let alone agreed prior to 1 July 2014. The plaintiffs do not submit that the registered lease was a sham. They could not do so, because Mr Hookey treated the lease as having legal effect both for the purposes of amending the document and subsequently mortgaging it to Westpac.

[106] That Term 19A is central to the plaintiffs' case is evident from the pleaded breach of the alleged joint venture agreement. Paragraph 37 of the fourth further amended statement of claim pleads that on 11 June 2018, in breach of a number of terms including Term 19A and in reliance upon the registered lease, Mr Whitelaw (without the consent of Mr Hookey) caused KA Estates to serve, and KA Estates served, a notice pursuant to s 124 of the *Property Law Act* 1974. This notice required Kids Academy to pay the sum of $1,043,529.57 to KA Estates by 12 August 2018 on account of outstanding rent payable pursuant to clause 7 of the registered lease and GST, and to deliver to KA Estates a Bank Guarantee in favour of KA Estates for the sum of $524,389.10 pursuant to clause 36 of the registered lease.

[107] Paragraph 38 pleads that on or about 13 July 2018, Mr Whitelaw and KA Estates asserted that neither of them was bound by the joint venture agreement and that the only relationship which existed between Mr Hookey, Kids Academy, Mr Whitelaw and KA Estates was the relationship between KA Estates as lessor and Kids Academy as lessee pursuant to the registered lease. Paragraph 39 pleads that this conduct of KA Estates constituted a repudiation by Mr Whitelaw and KA Estates of the joint venture agreement. Mr Hookey and Kids Academy have not accepted the repudiation by Mr Whitelaw and KA Estates of the joint venture agreement and they remain ready, willing and able to perform the joint venture agreement in accordance with its terms.[129]

[108] The pleaded breach relies not only on Term 19A but also Term 17 and four implied terms. Like Term 19A, there is no evidence that Term 17 was ever discussed, let alone agreed, as between Mr Hookey and Mr Whitelaw prior to 1 July 2014. Senior Counsel for the plaintiffs correctly conceded in oral submissions that if a finding was made that there was no concluded agreement, it follows that no terms could be implied.[130] The plaintiffs have therefore failed to establish any of the express or implied terms of the alleged agreement that could fetter the exercise of the rights of KA Estates under the registered lease.

[109] The oral conversations between Mr Hookey and Mr Whitelaw prior to 1 July 2014 do not establish a concluded agreement. The parties had not reached consensus upon the terms of the alleged agreement, nor had any agreement been made by which they intended immediately to be bound. There were too many uncertainties as at 1 July 2014. Finance had not been approved and it was not known that Westpac would only lend to Mr Whitelaw. Nor was it known until after 2 July 2014 that Westpac required a lease to be in place. Clause (e) of the draft heads of agreement contemplated that no formal lease would need to be in place. Further, there are a number of inconsistencies between the terms said to arise from the conversations between Mr Hookey and Mr Whitelaw, the terms in the draft heads of agreement and the draft Cooperation agreement. The evidence does not reveal what would trigger the ownership arrangements changing so as to reflect the proposed

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129 Fourth Further Amended Statement of Claim, paras 40-43.

130 T 6-46, lines 25-30.

50/50 joint venture. As matters eventuated, the ownership arrangements never altered, nor did Mr Hookey ever provide a personal guarantee of 50% for the bank loan.

[110] Mr Whitelaw, on the consistent advice of Mr Sayers, did not intend to become legally bound until an agreement was reduced to writing. Attempts were made to do so after 1 July 2014. The requirement for any agreement to be in writing was raised by Mr Sayers with Mr Whitelaw as early as April 2014. Such a requirement was also communicated by Mr Sayers to Mr Watson. Mr Hookey was aware of this requirement.[131] I find that it was the intention of the parties not to make a concluded bargain unless and until they had executed a formal written agreement.[132] The only written agreement which governed the parties' relationship was the registered lease. In *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*[133] the High Court observed:

> "Having executed the document, and not having been induced to do so by fraud, mistake or misrepresentation, the respondents cannot now be heard to say that they are not bound by the agreement recorded in it. The parol evidence rule, the limited operation of the defence of non est factum and the development of the equitable remedy of rectification, all proceed from the premise that a party executing a written agreement is bound by it. Yet fundamental to the respondents' case that the operative agreements between the parties were wholly oral, and reached earlier than the execution of the written agreements, was the proposition that the written agreements subsequently executed not only *may* be ignored, they *must* be. That is not so. Having executed the agreements each [party] is bound by it unless able to rely on a defence of non est factum, or able to have it rectified."

[111] The plaintiffs are bound by the terms of the lease.

[112] In the result, the plaintiffs are not entitled to the relief claimed in paragraphs 2, 3, 4 and 4A to 4I of the second further amended originating application. Nor are the plaintiffs entitled to the relief sought in paragraph 82A of the fourth further amended statement of claim. This claim was for the plaintiffs' legal costs said to arise from Mr Whitelaw and KA Estates having breached the alleged oral agreement.

Second Issue – estoppel

[113] In light of my finding that there was no concluded oral joint venture agreement prior to 1 July 2014, the second issue may be dealt with briefly.

[114] The plaintiffs rely on both estoppel by convention[134] and equitable estoppel.[135] Central to both estoppel claims is the assertion that Mr Whitelaw and KA Estates would not do anything on their respective parts to enforce compliance by Kids

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131 See [59] above.
132 *Masters v Cameron* (1954) 91 CLR 353 at 360.
133 (2004) 218 CLR 471 at 483, [33].
134 Fourth Further Amended Statement of Claim, paras 48-57.
135 Fourth Further Amended Statement of Claim, paras 58-67.

Academy with the provisions of the registered lease without the consent of Mr Hookey.[136] There is, however, no evidence that it was ever discussed between Mr Hookey and Mr Whitelaw that the lease would not be enforced without the consent of Mr Hookey. Both estoppel claims are also based on the existence of the alleged oral agreement. As I have found that no such agreement was made, the claims based on estoppel by convention and equitable estoppel must fail.

[115] Senior Counsel for the plaintiffs submitted, however, that even if no oral joint venture agreement was formed prior to 1 July 2014, an estoppel by convention could otherwise arise by reference to the pre and post-contractual conduct. This conduct includes the fact that until mid-2018, the lease was neither performed nor enforced according to its terms.[137]

[116] In support of this submission, reference was made to the decision of Rolfe J in *Whittet v State Bank of New South Wales.*[138] In that case, his Honour concluded that in order to establish an estoppel by convention it is necessary that there should be clear and convincing proof and that material giving rise to such an estoppel can arise from pre-contract negotiations. His Honour observed:[139]

> "Against the background of these judgments it is necessary for me to consider the regard I should pay to evidence of pre-contract negotiations in considering the submissions in support of estoppel by convention. Whilst I appreciate the significance to be accorded to written contracts and, in general terms the undesirability of their terms being varied save in the case of clear and convincing evidence, it seems to me that it is this very factor, which has been regarded as the touchstone for ordering rectification, which, in the case of estoppel by convention, requires the court to have regard to pre-contractual negotiations. It would be strange, so it seems to me, if matters arising out of pre-contractual negotiations, which could be proved to the extent necessary to justify rectification, namely, by clear and convincing proof, could not be relied upon to found an estoppel by convention because of the source from which they arose."

[117] There are a number of difficulties with the plaintiffs' submission. First, as I have already observed, the estoppel by convention is pleaded by reference not only to Term 19A, but also to the terms of the alleged joint venture agreement.[140] The plaintiffs' pleaded case for estoppel by convention proceeds on the basis that the pleaded terms of the alleged joint venture agreement were in fact agreed.

[118] The second difficulty with the submission is that there is a written agreement in the present case, namely the registered lease. As observed by McPherson JA in *Equuscorp Pty Ltd & Anor v Glengallan Investments Pty Ltd & Ors*:[141]

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136 Fourth Further Amended Statement of Claim, para 48(b) and para 58(b).
137 Submissions on Behalf of the Plaintiffs, para 141(c).
138 (1991) 24 NSWLR 146.
139 (1991) 24 NSWLR 146 at 153.
140 Fourth Further Amended Statement of Claim, para 48(a).
141 [2006] QCA 194 at [30].

> "The defendants cannot assert a 'common assumption' falling short of a contract that is at odds with the express contract to which they agreed and into which they afterwards entered in the knowledge of its terms. That conclusion is supported by the decision of McLelland J in *Johnson Matthey Ltd v A C Rochester Overseas Corp* (1990) 23 NSWLR 190, which is referred to in the reasons of Holmes J in this appeal. Indeed, the word 'conventional' in this species of estoppel is used to connote an informal agreement or understanding between the parties."

[119] His Honour continued:[142]

> "I realise that under the doctrine of promissory estoppel, a plaintiff may be precluded from departing from a representation that has been acted upon by the defendant to his detriment. Modern authority, said McHugh J in *State Rail Authority of New South Wales v Health Outdoor Pty Ltd* (1986) 7 NSWLR 170, 189, 'establishes that the doctrine of estoppel is not confined to representations concerning existing facts', and a statement that a right under 'an existing contractual relationship' will not be enforced is capable under certain conditions of constituting an estoppel."

[120] Rolfe J in *Whittet* expressly acknowledged that his view did not accord with that of McLelland J in *Johnson Matthey Ltd,* which was the case cited with approval and followed by McPherson JA in *Equuscorp.*

[121] In circumstances where the parties' relationship is governed by a registered lease and in light of my findings that no oral joint venture agreement was formed and that Term 19A was not discussed, the plaintiffs' claims for both estoppel by convention and equitable estoppel must fail.

Third issue – fiduciary duties

[122] The plaintiffs' pleaded case is that Mr Whitelaw and KA Estates owe fiduciary duties to each of Kids Academy and Mr Hookey.[143] The same fiduciary duties are pleaded for KA Estates and Mr Whitelaw.[144] Those fiduciary duties include KA Estates and Mr Whitelaw:

- complying with the joint venture terms;
- acting in good faith and in the mutual interests of the plaintiffs and the defendants complying with the joint venture terms; and
- not acting so as to make it impossible for the joint venture terms or any of them to be performed.[145]

[123] The plaintiffs submit that Mr Whitelaw and KA Estates assumed fiduciary duties with respect to the plaintiffs as a result of the following:

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142 [31].
143 Fourth Further Amended Statement of Claim, paras 75 and 78.
144 Fourth Further Amended Statement of Claim, paras 76 and 79.
145 Fourth Further Amended Statement of Claim, para 76 and 79.

(a) Mr Hookey (through his nominee) was originally to be the purchaser of the land on which the childcare centre would operate.

(b) Mr Hookey rescinded that purchase contract in order to allow Mr Whitelaw's company, KA Estates, to become the purchaser. By doing so, Mr Hookey gave KA Estates (and its controller Mr Whitelaw) the power to control the land on which the childcare business would operate.

(c) Mr Whitelaw and Mr Hookey agreed that the childcare centre business would be operated as a joint venture relationship between them and not as a landlord/tenant relationship, and Mr Whitelaw made representations to third parties such as his accountant to that effect.[146]

[124] None of these matters, in my view, permit the relationship between the parties to be characterised as fiduciary. First, I have found that the parties did not enter into a joint venture agreement by 1 July 2014. Even if one accepts that fiduciary duties may arise in the context of a joint venture relationship, there was no such relationship in the present case.[147] Secondly, the suggested basis for the existence of a fiduciary relationship between the parties ignores the commercial reality of how Mr Whitelaw and KA Estates became involved. Mr Hookey, having entered into the contract for the purchase of the land, was not in a position to settle. As at 30 June 2014, he had already expended about $500,000 in relation to the purchase of the land and the proposed development of the land for the childcare business. The proposed Westpac facility of $15 million for Mr Hookey to purchase the land and construct the childcare centre was subject to the sale of his other childcare centres to the Sterling entity. This sale did not eventuate. Mr Hookey was unable to satisfy the Westpac condition. As matters eventuated, Westpac was only willing to lend to Mr Whitelaw. It was Mr Whitelaw who provided all the funds for the project. Thirdly, while the draft heads of agreement contemplated Mr Hookey giving a personal guarantee of 50% of the bank loan, this guarantee was never provided. Further, when Mr Hookey, for stamp duty purposes, requested the issuance of units to himself on 8 July 2014, this was rejected. In light of these considerations, the relationship between the parties does not give rise to any of the pleaded fiduciary duties.

[125] This is even more evident when one considers the alleged breach of the fiduciary duties pleaded by the plaintiffs.[148] Those breaches are that without the consent of Mr Hookey, KA Estates demanded rent under the registered lease and issued a notice pursuant to s 124 of the *Property Law Act* 1974. The further breach alleged is that on 13 July 2018, KA Estates asserted that it was not bound to perform and observe its obligations under the joint venture terms. As I have found that Term 19A was neither discussed nor agreed and that no joint venture agreement was entered into, even if it was thought that the pleaded fiduciary duties were owed, the plaintiffs have failed to establish any breach.

The fourth issue – termination of the lease and relief against forfeiture

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146 Submissions on Behalf of the Plaintiffs, para 152.

147 Joint venture relationships are not in any event automatically characterised as fiduciary: Dal Pont, *Equity and Trusts in Australia,* 6th Edition 4.215-4.230.

148 Fourth Further Amended Statement of Claim, para 80.

[126] Mr Whitelaw considered that his friendship with Mr Hookey came to an end on 30 March 2018 after he received an email from Mr Hookey.

[127] In May 2018, and without any prior notice to Mr Whitelaw, Kids Academy ceased making any payments to him or KA Estates. Mr Whitelaw received a text message from Mr Hookey dated 4 May 2018 which stated: "Mistake you got paid this week – it won't happen again".[149]

[128] On or about 11 May 2018, KA Estates appointed Ryder Commercial Pty Ltd to manage the lease.[150]

[129] On 11 June 2018, Russells, as solicitors for the lessor KA Estates, issued a Form 7 Notice to Remedy Breach of Covenant pursuant to s 124 of the *Property Law Act* 1974. This notified Kids Academy as lessee that it was in breach of a number of clauses of the lease, including clause 7.1 (rent), clause 9 (the tenant's proportion of outgoings), clause 11 (services consumed in the premises), clause 12.2 (goods and services tax) and clause 36.1 (financial security by way of a Bank Guarantee). The notice required remedy of the breaches by:

> "1. Paying the amount of $1,043,528.57 to the Lessor; and
>
> 2. delivering to the Lessor at its solicitor's office, Russells, Level 18, 300 Queen Street, Brisbane, Queensland a Bank Guarantee in favour of the Lessor, in the sum of $524,389.10:
>
> within a reasonable period of time from the date of service of this notice on you, namely on or before 12 August 2018."

A period of two months was therefore given for Kids Academy to remedy the breaches.

[130] On 11 September 2018, KA Estates filed its defence and counterclaim. As at that date, Kids Academy had not paid the outstanding rent nor given a bank guarantee.[151]

[131] KA Estates asserts that by the filing of its defence and counterclaim on 11 September 2018, it terminated the lease pursuant to clause 31.1.7(c), which provides that the lessor can terminate the lease by instituting proceedings for possession against the lessee.[152] Kids Academy, while admitting that it failed to pay the rent and provide a bank guarantee by 11 September 2018, challenges the validity of the s 124 notice issued on 11 June 2018 on two bases. The first is that the amount of rent in the notice was excessive because Kids Academy was only required to pay KA Estates those amounts agreed under the joint venture agreement and not the annual rent under the lease. This argument fails because of my finding that there was no oral joint venture agreement. The second basis on which Kids Academy challenges the validity of the notice is that it did not give Kids Academy a reasonable time, as required by s 124, within which to remedy the breach concerning rent. Kids Academy pleads the following circumstances as

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149 Whitelaw affidavit, paras 117 and 119.

150 Exhibit 5.

151 Further Amended Counterclaim, para 1(c); Answer to Further Amended Counterclaim, para 3(a) and (b).

152 Further Amended Counterclaim, para 1(d).

demonstrating that two months was not a reasonable time within which to pay the outstanding rent:

> "The circumstances that [KA Estates] had not made a demand for Kids Academy to pay rent pursuant to Clause 7 of the Registered Lease in the period from 2 February 2015 to 11 May 2018 and that Kids Academy was not as at 11 May 2018 earning sufficient income to enable it to meet all of expenses and pay any additional amount on account of the rent payable pursuant to Clause 7 of the Registered Lease."[153]

[132] The s 124 notice dated 11 June 2018 was issued in circumstances where the friendship between Mr Hookey and Mr Whitelaw had come to an end. Mr Hookey had unilaterally decided that Kids Academy would make no further payments to KA Estates. On 12 September 2018, pursuant to consent orders made by Mullins J (as her Honour then was), Kids Academy paid a stated amount of rent and outgoings to KA Estates and gave an irrevocable authority to its solicitors to deal with an amount of $524,389.10 in their trust account to make payment to KA Estates, "as would a bank issuing a bank guarantee".[154] That is, only one month after the breach was required to be remedied under the notice, Kids Academy consented to orders the effect of which was that a substantial amount of the rental arrears was paid and a form of bank guarantee provided.

[133] The fact that consent orders were made by Mullins J whereby Kids Academy did pay a substantial amount of rent and provide a form of bank guarantee one day after KA Estates had counterclaimed for possession, supports a finding that the time of two months under the notice was a reasonable time.

[134] In those circumstances, a period of two months was, in my view, a "reasonable time" for Kids Academy to remedy the breach.

[135] I find that the s 124 notice was valid and that KA Estates lawfully terminated the lease on 11 September 2018 by the commencement of proceedings by way of counterclaim for recovery of possession.

[136] Kids Academy seeks relief against forfeiture under both s 124(2) of the *Property Law Act* 1974 and under the general law.[155]

[137] As at the date of the filing the fourth further amended statement of claim Kids Academy had:

(a) paid to KA Estates all rent due and payable; and

(b) paid all outgoings due and payable; and

(c) paid to its solicitor's trust account, on or about 12 September 2018, the sum of $524,389.10 and given an irrevocable authority and direction to its

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153 Answer to Amended Counterclaim, para 4(b)(iii)(2).
154 Exhibit 9.
155 Fourth Further Amended Statement of Claim, para 84.

solicitors, pursuant to an undertaking given by the plaintiffs to the court on that date.[156]

[138] I note that on 16 October 2018, KA Estates served another Form 7 on Kids Academy seeking $115,616.37 for arrears of rent, an amount of $207,871.86 for interest on late payments under the lease and a further amount of legal costs incurred by the lessor as identified in the letter from Russells dated 24 September 2018 in the amount of $206,779.68. The arrears of rent has been paid. It is common ground between the parties that neither the amount of $207,871.86 nor the amount of $206,779.68 has been paid.[157] As at the date of the issuing of this Form 7 notice, however, KA Estates, as I have found, had already lawfully terminated the lease. Any grant of relief against forfeiture should therefore be subject to terms which deal with both the outstanding payment of interest on late payments and the payment of legal costs incurred by KA Estates in enforcing the lease.[158] KA Estates opposes the Court granting relief against forfeiture on a number of grounds. First, Kids Academy delayed in making any payment of rent in arrears and only did so after the defendants had filed their counterclaim.[159]

[139] Secondly, because Mr Hookey no longer holds a blue card but is otherwise an "executive officer" of Kids Academy, Kids Academy's use of the premises occupied under the lease is an unlawful use.[160]

[140] The second ground arises in the following circumstances. On 7 May 2015, Mr Hookey was issued with a negative notice by the Department of Education and thereafter no longer held a blue card. On 7 May 2015, he resigned as sole director of Kids Academy and Ms Grassby was appointed as the director.[161] Mr Hookey informed Mr Whitelaw in May 2015 that he had lost his blue card and could not be a director of Kids Academy.[162] Mr Whitelaw was content with Ms Grassby being a director of Kids Academy.[163]

[141] On 13 March 2019, KA Estates served yet another Form 7 notice on Kids Academy. The notice referred to the following provisions of the lease:

> "1. Use the premises for the Permitted Use of a childcare centre and the supply of service ancillary thereto (Reference Schedule, Part D of the Lease);
>
> 2. Lessee's Use means the type of business that the Lessee carries on from the Premises (1.1 Lessee's Use (c) of the Lease);
>
> 3. Lawful use of the Premises (clause 16.2.2 of the Lease);
>
> 4. Lawful use of the Premises for the Permitted Use (clause 16.3.1 of the Lease);

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156 Fourth Further Amended Statement of Claim, para 84A and Fourth Further Amended Defence, para 30; Exhibit 1, affidavit of Jodi Maree Luff sworn 26 July 2019, paras 19 and 20.
157 Exhibit 2, Trial Bundle, Vol 7, p 2153-2154.
158 Clauses 13 and 14 of the lease.
159 Defendants' Outline of Argument, para 233.
160 Fourth Further Amended Defence, para 30A; Defendants Supplementary Submissions, paras 2-5.
161 Exhibit 2, Trial Bundle, Vol 8, p 3125.
162 Grassby affidavit, par 36; T 5-56, lines 33-47.
163 T 5-58, lines 11-13.

5. Only use the premises for the Permitted Use (clause 16.3.3 of the Lease); and

6. Only use the Premises in accordance with Laws regulating the Lessees Use (clause 16.3.4(b) of the Lease);"

[142] The notice continued:

> "THE LESSOR GIVES YOU NOTICE and requires you to remedy the breaches by:-
>
> (a) Mr Scott Gregory Hookey as an *executive officer* of the Lessee, the corporation that is carrying on a regulated business pursuant to the *Working with Children (Risk Management and Screening) Act 2000* (the Act), is required to hold a blue card or a prescribed notice pursuant to the Act otherwise the Lessee remains in breach of these covenants;
>
> (b) Mr Scott Gregory Hookey, as an *executive officer* of the Lessee, is required under the *Education and Care Services Act 2013* (the Second Act) to satisfy the Chief Executive that he is a 'suitable person' to be involved in the child care centre, operated pursuant to a provider approval issued to the Lessee under the Second Act, otherwise the Lessee remains in breach of these covenants."[164]

[143] As I have already determined that the lease was lawfully terminated by KA Estates upon the commencement of proceedings for recovery of possession, it is unnecessary for me to reach any conclusion as to the validity of the Form 7 notice issued on 13 March 2019.

[144] Mr Hookey does not presently hold a blue card. The defendants therefore submit that:

> "… the fact of Kids Academy failing to remedy a specified breach, as notified to it in March 2019, is relevant to the exercise of discretion because s 124(2) provides that the Court is to have regard to 'the conduct of the parties under subsection (1)' and that such conduct includes the service of the s 124 notice by [KA Estates] specifying that the failure by Kids Academy to operate its business lawfully on the premises is in breach of clause 16.3.4(b) of the lease. Further, the failure by Kids Academy to operate its business lawfully (we submit, in breach of clause 16.3.4(b) of the lease) on the premises and the length of time in which it has failed to remedy that breach ought also to be regarded as within 'all the other circumstances' in section 124(2)."[165]

[145] By clause 16.3.4(b), Kids Academy as lessee agreed to only use the premises in accordance with any other laws regulating its use. The permitted use under the lease was as a "child care centre and the supply of services ancillary thereto".[166]

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164 Exhibit 2, Trial Bundle, Vol 7, p 2190.
165 Defendants' Supplementary Submissions, para 9.
166 Exhibit 5, Schedule, Part D to the lease.

The defendants assert that relief against forfeiture should be refused because Kids Academy is conducting an unlawful business on the leased premises.

[146] The third basis upon which the defendants resist any grant of relief against forfeiture is that the alleged defaults were wilful. Related to this issue is the breakdown in relations between Mr Hookey and Mr Whitelaw.[167]

[147] The equitable rules governing relief against forfeiture have been consolidated by statute in each Australian State and Territory. In Queensland, the relevant statutory provision is s 124(2) of the *Property Law Act* 1974, which provides as follows:

> "(2) Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, or has re-entered without action the lessee may, in the lessor's action (if any) or in proceedings instituted by the lessee, apply to the court for relief, and the court, having regard to the proceedings and conduct of the parties under subsection (1), and to all the other circumstances, may grant or refuse relief, as it thinks fit, and in case of relief may grant the same on such terms (if any) as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court in the circumstances of each case thinks fit."

[148] A lessee is not entitled to relief against forfeiture as of right and the court retains a discretion whether to grant relief in any particular case.[168] The observations of Lord Wilberforce in *Shiloh Spinners v Harding*[169] may be regarded as generally relevant to this discretion:

> "But it is consistent with these principles that we should reaffirm the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result. The word 'appropriate' involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach.

[149] In considering the scope of the discretion, a distinction is drawn between forfeiture for non-payment of rent and forfeiture for breaches of other covenants.

[150] The court has a broad discretion to grant relief against forfeiture on the basis of non-payment of rent. This relates to the purpose of the right of forfeiture as a security for the payment of rent: once arrears and any costs have been paid, the court will usually grant relief. This position is summarised in *Gill v Lewis*:[170]

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167 Defendants' Supplementary Submissions, paras 14-19.
168 *Pioneer Quarries (Sydney) Pty Ltd v Permanent Trustee Co of NSW Ltd* (1970) 2 BPR 9562.
169 [1973] AC 691 at 725 per Lord Wilberforce.
170 [1956] 2 QB 1, 13.

> "As to the conclusion of the whole matter, in my view, save in exceptional circumstances, the function of the court in exercising this equitable jurisdiction is to grant relief when all that is due for rent and costs has been paid up, and (in general) to disregard any other causes of complaint that the landlord may have against the tenant."

[151] Relief against forfeiture may be denied where the premises are being used for an illegal purpose.[171] In some cases, this has been related to the position that breach of a lease by the use of premises for an illegal purpose is incapable of remedy.[172]

[152] It is convenient to deal with the first and third basis upon which the defendants resist relief against forfeiture being granted. As I have already observed, it is my intention to hear the parties as to the terms of any grant of relief against forfeiture in circumstances where it appears that there are outstanding payments of interest and legal costs under the lease. It remains the case, however, that Kids Academy has paid all arrears of rent and continues to pay rent under the lease. I do not regard the previous non-payment of rent and the failure to provide a bank guarantee as constituting flagrant or wilful defaults under the lease. The lease was executed on 16 July 2014, initially as a requirement of Westpac for the provision of finance to Mr Whitelaw. Until the falling out between Mr Whitelaw and Mr Hookey, there had been no demands for payment of rent and the provision of a bank guarantee in accordance with the lease. The arrangements which were in place were that Mr Whitelaw, through KA Estates, was paid 9% interest on his capital contribution and Kids Academy ensured that interest payments under the Westpac loan were made. It was not until 11 June 2018 that any demand was made for the payment of rent in arrears and the provision of the bank guarantee. Although I have found that there was no oral joint venture agreement entered into prior to 1 July 2014, there were extensive discussions between Mr Whitelaw and Mr Hookey concerning the purchase of the land and the development of a childcare business on the land. The fact that by these proceedings Mr Hookey sought to establish that there was an oral joint venture agreement does not render any non-payment of rent, nor a failure to provide a bank guarantee a flagrant or wilful breach of the lease.

[153] The defendants, by reference to *Casquash Pty Ltd v New South Wales Squash Ltd* (No 2),[173] submit that the serious breakdown in relationship between the parties is a relevant consideration in determining whether the court should grant relief against forfeiture.[174]

[154] In *Casquash*, two leases of commercial squash court premises were executed, the second of which was also registered. A dispute arose as to which lease was in the agreed form, with the main area of dispute being liability for Council rates. Based on the terms of the first executed lease, the lessor claimed that the lessee had breached the lease by non-payment of outgoings and exercised its right of re-entry. The lessee claimed relief against forfeiture. It was found that the lessee had dishonestly procured the execution and registration of the second lease (under which the lessor was liable for the outgoings). Accordingly, the lessors were

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171 *Gill v Lewis* [1956] 2 QB 1, 13-14.

172 For example *Hoffman v Fineberg* [1949] Ch 245; *Rugby School (Governors) v Tannahill* [1934] 1 KB 695; *Rugby School (Governors) v Tannahill* [1935] 1 KB 87.

173 [2012] NSWSC 522.

174 Defendants' Supplementary Submissions, para 32.

entitled to rectification of the registered lease and had a right of re-entry based on the lessee's non-payment of outgoings. Further, the lessee had committed non-monetary breaches of the lease in failing to supply office space to the lessor and refusing contractors access to the premises. In the circumstances, relief against forfeiture was refused. This was partly due to the terms of the lease which required an unusual degree of ongoing cooperation between the lessor and lessee (such as rectification and repair works). Pembroke J found that:[175]

> "I will not detail all of the unsavoury evidence that reflects the wholesale breakdown in the relationship or the wilful and obdurate conduct on behalf of the plaintiff. The relationship is poisonous, acrimonious and unsalvageable … The parties are engaged in litigation on other fronts, not just in these proceedings. The plaintiff's breaches were deliberate and recalcitrant. The monetary breach was the ultimate result of the insistence by [the lessee] on a form of the lease that was procured by conduct that I have characterised as dishonest. The non-monetary defaults were the result of wholly unreasonable behaviour. There is no hope for the continuation of a stable commercial relationship… This is an extreme case. If I grant relief against forfeiture, there will only be more disputation. And there will likely be more litigation."

[155] *Casquash* is readily distinguishable from the present case. Even though there is personal animosity between Mr Hookey and Mr Whitelaw, this is not a sufficient basis to suggest that Kids Academy as lessee will conduct itself other than in accordance with the terms of the lease. Mr Whitelaw was content, from the opening of the childcare centre in February 2015 through to his falling out with Mr Hookey in early 2018, for Kids Academy to conduct a childcare business from the premises. Unlike the situation in *Casquash*, the lease does not require "an unusual degree of ongoing cooperation" between KA Estates as lessor and Kids Academy as lessee.

[156] I would not refuse relief against forfeiture on the second basis identified by the defendants. I am not satisfied that Kids Academy's use of the premises is unlawful. Since February 2015, it has been conducting a childcare business from the premises. KA Estates through Mr Whitelaw was aware since May 2015 that Mr Hookey has not held a blue card. KA Estates through Mr Whitelaw permitted Kids Academy to continue to use the premises for a childcare business from May 2015 until the friendship between Mr Hookey and Mr Whitelaw ended in early 2018. In these circumstances, the asserted unlawful use of the premises is more a legal construct than a reality.

[157] KA Estates submits that the unlawful use of the premises by Kids Academy arises upon a proper construction of the provisions of the *Working with Children (Risk Management and Screening) Act* 2000 ("the Act"). In summary, the defendants submit that:

(a) Mr Hookey must hold a current positive notice (also known as, and evidenced by, a "blue card") because he is an "executive officer" of Kids Academy. Schedule 7 of the Act defines executive officer of a corporation to mean any person, by whatever name called and whether or not the person is a director

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175 [2012] NSWSC 522, [59].

of the corporation, who is concerned or takes part in the management of the corporation;

(b) Mr Hookey is deemed to be carrying on the childcare business by virtue of s 166 of the Act. This section provides that a person is taken to be carrying on or proposing to carry on the regulated business by being, or proposing to be, an executive officer of the corporation;

(c) Kids Academy is in breach of the lease in that it must only use the premises in accordance with "any other laws regulating the Lessee's Use".[176] The key question, according to the defendants, is whether Mr Hookey is an "executive officer" of Kids Academy. The defendants identify the critical question for the court to determine as being whether Mr Hookey falls within the definition of "executive officer" of Kids Academy under Schedule 7 of the Act.[177]

[158] KA Estates as lessor accepts that it bears the onus of proof in establishing that Kids Academy is conducting the childcare business other than in accordance with the Act. It asserts, however, that as it is not prosecuting Kids Academy or Mr Hookey for a breach of the Act, KA Estates only seeks to show that the relevant conduct is a breach of the Act and the lease. The civil standard therefore applies.[178]

[159] The "key question" identified by the defendants is not, in my view, the relevant question. The provision of the Act which makes it an offence to carry on a regulated business without a current positive notice, namely a blue card, is s 197. This section provides:

> "**197 Carrying on regulated business**
>
> (1) A person must not carry on a regulated business unless –
>
> (a) the person has a current positive notice; or
>
> (b) the person –
>
> (i) is a transitioning person; and
>
> (ii) has applied for a prescribed notice.
>
> Maximum penalty – 500 penalty units or 5 years imprisonment
>
> Note – under section 166, particular executive officers of a corporation that carries on a regulated business are taken to carry on the regulated business."

[160] The note to s 197 is a reference to s 166(2). Section 197 is not directed to a corporation but rather to a natural person who carries on a regulated business. The effect of s 166(2) is that a natural person who is an executive officer of a corporation is deemed to be a person who carries on the regulated business. Section 197 does not create an offence in relation to a corporation, rather it seeks to make a person criminally liable if that person is an executive officer of the corporation and does not hold a positive notice.

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176 Defendants' Outline of Argument, para 216.
177 Defendants' Outline of Argument, para 220.
178 Defendants' Supplementary Submissions, para 40.

[161] Even assuming the evidence is sufficient to establish that Mr Hookey, after his resignation as a director of Kids Academy, remained an executive officer for the purposes of s 166(2), this does not result in Kids Academy using the premises unlawfully. There is no suggestion that Ms Grassby, as a director of Kids Academy, does not hold a blue card. She recalls the conversation with Mr Hookey and Mr Whitelaw on 7 or 8 May 2015 when the issue arose:

> "Scott: The department has taken by blue card off me. So I can't be the Director of Kids Academy Hope Island now. Amanda can be the Director she already has a Blue Card, unless you want to be the Director, John.
>
> John: I don't think I should become a Director as I do not know enough about child care and what the regulations require.
>
> Amanda: I am willing to be the director, and the application will be easy. I have to do the same for Kids Academy Spring Hill anyway."[179]

[162] Since May 2015, Ms Grassby has been a director of Kids Academy and would fall within the definition of "executive officer" in Schedule 7 to the Act. She is a person who has both been concerned and takes part in the management of Kids Academy.[180] Ms Grassby described part of her role as follows:

> "I supervise the centre director to ensure that legislative requirements which must be met by the Child Care Business are satisfied; I also work collaboratively with Jodi Luff in managing budgets and in relation to fees, the Commonwealth Government's child care subsidy, and Queensland Kindergarten funding, and as the sole director of Kids Academy and the "person with management and control" under the Education and Care Service National Law, I am the point of contact for the Queensland Education Department for the Child Care Business."[181]

[163] Kids Academy therefore operates the childcare business from the leased premises in circumstances where its director, Ms Grassby, who would also be an executive officer for the purposes of the Act, holds a blue card. Even if Mr Hookey was successfully prosecuted under s 197, this does not render Kids Academy's use of the premises unlawful.

[164] The plaintiffs submit, correctly in my view:

> "The prohibition [in s 197] is directed towards a person who carries on the business: that person must have a positive notice. The section is directed towards a natural person. Although a reference to a person generally includes a reference to a corporation as well as an individual,[182] that stipulation will not apply insofar as the context or

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179 Grassby affidavit, para 36.

180 Grassby affidavit, paras 2(d), 6; second affidavit of Amanda Grassby sworn 14 October 2019, para 2(c).

181 Exhibit 1, second affidavit of Amanda Grassby sworn 14 October 2019, para 2(c).

182 *Acts Interpretation Act 1954* (Qld), s 32D.

> subject matter otherwise indicates or requires.[183] In this case, section 197 cannot be directed towards a corporation as a corporation cannot have a current positive notice. This follows from the fact that the nature of the process is such that only a natural person can make an application for a prescribed notice."[184]

[165] I also accept the submission of the plaintiffs that the line of authorities relied upon by the defendants regarding unlawful use of the premises is "far removed from the present case".[185] The unlawful uses of the premises considered in those cases include non-compliance with council orders regarding repairs and fire safety, the occupation of the premises in breach of liquor licensing regulations, a lessee serving a term of imprisonment for indecent treatment of children on the premises, unlawful gambling on the premises, sale of alcohol without a permit and storing inflammable liquids in contravention of the *Inflammable Liquid Act* 1915 (NSW). The approach adopted in *Gill v Lewis*[186] is instructive:

> "As to the conclusion of the whole matter, in my view, save in exceptional circumstances, the function of the court in exercising this equitable jurisdiction is to grant relief when all that is due for rent and costs has been paid up, and (in general) to disregard any other causes of complaint that the landlord may have against the tenant. The question is whether, provided all is paid up, the landlord will not have been fully compensated; and the view taken by the court is that if he gets the whole of his rent and costs, then he has got all he is entitled to so far as rent is concerned, and extraneous matters of breach of covenant, and so forth, are, generally speaking, irrelevant.
>
> But there may be very exceptional cases in which the conduct of the tenants has been such as, in effect, to disqualify them from coming to the court and claiming any relief or assistance whatever. The kind of case I have in mind is that of a tenant falling into arrear with the rent of premises which he was notoriously using as a disorderly house: it seems to me that in a case of that sort if the landlord brought an action for possession for non-payment of rent and the tenant applied to the court for relief, the court, on being apprised that the premises were being consistently used for immoral purposes, would decline to give the tenant any relief or assistance which would in any way further his use or allow the continuance of his use of the house for those immoral purposes. In a case of that sort it seems to me that it might well be going too far to say that the court must disregard the immoral user of the premises and assist the guilty tenant by granting him relief."

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183 *Acts Interpretation Act 1954* (Qld), s 32A.

184 Further Submissions on Behalf of the Plaintiffs, para 6.

185 Further Submissions on Behalf of the Plaintiffs, para 27; *Batiste v Lenin* (2002) 11 BPR 20,403; *Beamer Pty Ltd v Star Lodge Supported Residential Services Pty Ltd* [2005] VSC 236; *Chaka Holdings Pty Ltd v Sunsim Pty Ltd* (1987) NSW Conv R 55-367; *Gill v Lewis* [1956] 2 QB 1; *Hoffman v Fineberg* [1949] CH 245; *Lo Giudice v Biviano* [1962] VR 412 and *Stieper v Deviot Pty Ltd* (1977) 2 BPR 9602.

186 [1956] 2 QB 1, 13-14.

[166] In the present case, the leased premises has always been used as a childcare centre. This is not a case where the lessee has applied to the court for relief against forfeiture in circumstances where the premises were being used either for immoral purposes or dangerously.

[167] In the result, I would grant Kids Academy relief against forfeiture but I will hear the parties as to terms limited to any outstanding payments of interest or costs under the lease.

Disposition

1. The plaintiffs' second further amended originating application is dismissed.

2. The plaintiffs' claim for damages in para 82A(c) of the fourth further amended statement of claim is dismissed.

3. The plaintiffs' claim in para 85(m) of the fourth further amended statement of claim for a declaration that the notice served by the second defendant as lessor and Kids Academy as lessee in purporting to terminate the lease registered at the Queensland Department of Natural Resources with dealing number 717067584 is invalid is dismissed.

4. The plaintiffs' claim in para 82C of the fourth further amended statement of claim for a declaration that the termination of the registered lease was invalid is dismissed.

5. The Court declares that registered lease number 717067584 was lawfully terminated by KA Estates by the filing of its defence and counterclaim on 11 September 2018.

6. Kids Academy be granted relief against forfeiture as claimed in para 84D of the fourth further amended statement of claim.

7. I will hear the parties further as to the terms of the grant of relief against forfeiture.

8. I will hear the parties as to costs.