SUPREME COURT OF QUEENSLAND

CITATION:	*Hookey & Anor v Whitelaw & Ors* [2020] QSC 147
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:	29 May 2020
DELIVERED AT:	Brisbane
HEARING DATES:	On the papers. Submissions filed 17 April 2020, 24 April 2020 and 29 April 2020
JUDGE:	Flanagan J
ORDER:	**The Court declares that the lease registered at the Queensland Department of Natural Resources Mines and Energy with dealing number 717067584 ("the Registered Lease") was lawfully terminated by the second defendant by the filing of its defence and counterclaim on 11 September 2018.** **The judgment of the Court is that:** **1. The plaintiffs' second further amended originating application ("the Originating Application") is dismissed.** **2. The plaintiffs' claim for damages in subparagraph 82A(c) of the fourth further amended statement of**

claim is dismissed.

3. **The plaintiffs' claim in subparagraph 85(m) of the fourth further amended statement of claim for a declaration that the notice served by the second defendant as lessor and second plaintiff as lessee in purporting to terminate the Registered Lease is invalid is dismissed.**

4. **The plaintiffs' claim in paragraph 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 second plaintiff pay to the second defendant the amount of $3,712.65 (being interest on rental arrears under the Registered Lease).**

6. **The plaintiffs pay the defendants' costs of the proceeding on the Originating Application.**

7. **The plaintiffs pay the defendants' costs of the counterclaim to be assessed on the indemnity basis.**

The Court further orders that:

8. **The second plaintiff shall, within twenty-one (21) days of the date of this order, deliver to the second defendant, care of its solicitors, a banker's undertaking for the sum of $524,389.10 pursuant to clause 36.1 of the Registered Lease ("the Bank Guarantee"), such undertaking to be:**

   (a) addressed to the second defendant;

   (b) either unlimited in time or expressed to expire no earlier than 1 August 2035; and

   (c) otherwise in the form required by the schedule to the Registered Lease (page 38).

9. **The second plaintiff is at liberty to arrange for the transfer of the funds held by the plaintiffs' solicitors in their trust account pursuant to the undertakings to the Court of 12 September 2018 ("the Trust Security"):**

   (a) for the sole purpose of obtaining the Bank Guarantee, if need be; and

   (b) direct to the bank which issues the Bank Guarantee and only in exchange therefor.

10. **IF within twenty-one (21) days of this judgment, the second plaintiff has delivered the Bank Guarantee to**

the second defendant, then:

(a) the plaintiffs shall thereupon be discharged from their undertakings as to damages given to the Court on 12 September 2018;

(b) the plaintiffs' written authority and direction given by the plaintiffs to their solicitors pursuant to paragraph 3 of Schedule A to the order made on 12 September 2018 is discharged; and

(c) the plaintiffs and their solicitors shall thereupon be at liberty to deal with the said sum of $524,389.10 and any accretions thereon as the plaintiffs direct.

11. For the avoidance of doubt, the solicitors for the plaintiffs are, upon the making of this order, at liberty to deal with the Trust Security in accordance with paragraph 8 hereof, to enable the second plaintiff to deliver the Bank Guarantee to the second defendant within the said period of twenty-one (21) days.

12. IF-

(a) within twenty-one (21) days of this judgment, the second plaintiff has paid the sum of $3,712.65 referred to in paragraph 5 to the second defendant; and

(b) within twenty-one (21) days of this judgment, the second plaintiff has delivered the Bank Guarantee to the second defendant; and

THEN subject to paragraph 13 of this order:

(c) the second plaintiff shall thereupon be relieved from forfeiture of the Registered Lease under the notices dated 11 June 2018, 16 October 2018 and 13 March 2019;

(d) the second defendant shall take no step to enforce any of the said notices.

13. IN THE EVENT of any default on the part of either of the plaintiffs in the satisfaction of any of the conditions set out in subparagraphs 12(a) and 12(b) hereof THEN the second defendant shall thereupon be entitled:

(a) to recover possession of the land the subject of the Registered Lease;

(b) to issue an Enforcement Warrant for possession of the said land and/or for the recovery of any

sums payable under these orders; and

(c) to request the Registrar of Titles (in Form 14 – General Request, Land Title Practice Manual (Queensland)) to register its re-entry under the Registered Lease.

14. The parties shall have liberty to apply on three days' notice in writing to the others.

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] On 7 April 2020, the Court delivered judgment in this matter.[1] The primary issue at trial was whether Mr Hookey and Mr Whitelaw had entered into an oral joint venture agreement by 1 July 2014. This issue was determined in favour of the defendants. The Court also found that a lease between the second plaintiff and second defendant had been lawfully terminated so as to entitle the second defendant to possession. The Court, however, found that the second plaintiff was entitled to relief against forfeiture.

[2] Certain orders were made, including that the Court would hear the parties further as to the conditions of relief against forfeiture and costs. The parties have provided written submissions in relation to these issues and proposed draft orders which consolidate the orders made by the Court on 7 April 2020, as well as further orders concerning the conditions of relief against forfeiture and costs.

Conditions of relief against forfeiture

[3] The parties are in general agreement that pursuant to clause 36.1 of the registered lease, the second plaintiff should deliver to the second defendant, care of its solicitors, a banker's undertaking for the sum of $524,389.10. The only dispute as to the provision of this bank guarantee concerns its timing and form.

[4] The plaintiffs accept that, in accordance with clause 36 of the registered lease, the second plaintiff should provide an unconditional bank guarantee (which does not have an expiry date) for the sum of $524,389.10. They also accept that the bank guarantee should state that it is given at the request of the second plaintiff and to secure the obligations of the second plaintiff to the second defendant in respect of the leased premises. The plaintiffs, however, seek a period of 28 days from the date of any order to provide this bank guarantee. The defendants submit that a period of 14 days is appropriate. The plaintiffs seek a period of 28 days because of the serious consequences that would flow from some issue arising with respect to the provision of the bank guarantee. The plaintiffs must have appreciated, however, that from the date of the judgment of 7 April 2020, the provision of the bank guarantee pursuant to clause 36 of the registered lease would constitute a condition of any grant of relief against forfeiture. I have therefore taken a midway point between the position of the plaintiffs and the defendants as to the timing of the

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1 *Hookey & Anor v Whitelaw & Ors* [2020] QSC 63 ("Reasons").

provision of the bank guarantee and the order will be that the relevant bank guarantee be provided within 21 days.

[5] Pursuant to the undertaking given to the Court on 12 September 2018,[2] the sum of $524,389.10 has been held by the solicitors for the plaintiffs as security pursuant to clause 36 of the registered lease. The defendants are content that the plaintiffs be at liberty to pay the whole of that sum to the bank which issues the bank guarantee. The defendants, however, seek an additional requirement that the monies be transferred to a bank "for the sole purpose of obtaining the bank guarantee".[3] The plaintiffs are content with this rider.[4]

[6] As to the form of the bank guarantee to be provided, the defendants suggest a form of guarantee entitled "Westpac Bankers undertaking". This is not a form of bank guarantee expressly identified in clause 36 and the schedule to the lease. I accept the plaintiffs' submissions that the requirements as to the form of any bank guarantee are sufficiently set out in clause 36 and the schedule to the lease.

[7] Clause 13.1 of the lease required the second plaintiff to pay to the second defendant interest on late payments at the rate equal to the prime lending rate charged by the second defendant's bank plus 5%. The parties are in agreement that the amount of interest on rental arrears is $3,712.65 and that relief against forfeiture should be conditioned on the payment of this amount.

[8] The plaintiffs submit that the provision of the bank guarantee and the payment of the interest in the sum of $3,712.65 should be the only two conditions of any grant of relief against forfeiture. The defendants, however, submit that any grant of relief against forfeiture should be conditional upon the second plaintiff paying:

(a) the sum of $206,779.68 for legal costs as specified in the notice to remedy breach dated 16 October 2018 together with interest on those legal costs in the sum of $42,872.16, or alternatively interest in the sum of $31,824.58; and

(b) fixed costs of the proceedings up to 4 October 2019 in the amount of $682,583.11; and

(c) costs of the proceedings incurred after 4 October 2019 on the indemnity basis.

[9] For the reasons which follow I accept the plaintiffs' contention that relief against forfeiture should only be conditional upon the provision of the bank guarantee and payment of $3,712.65, being interest on rental arrears.

(a) Legal costs as per notice to remedy breach dated 16 October 2018 ($206,779.68)

[10] Section 124(2) of the *Property Law Act* 1974 (Qld) provides that relief against forfeiture may be granted on such terms (if any) as to costs, expenses, damages,

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2 Exhibit 9.

3 Defendants' submissions on costs and terms upon which the Court ought to grant relief against forfeiture following Judgment delivered on 7 April 2020 ("Defendants' Submissions on Costs"), paragraph 4.

4 Submissions by the Plaintiffs in Reply to the Defendants' Submissions with Respect to Costs and Relief Against Forfeiture ("Plaintiffs' Reply Submissions"), paragraph 2.

compensation, penalty or otherwise as the Court, in the circumstances of each case, thinks fit.

[11] In the Reasons[5] the Court noted that any grant of relief against forfeiture should be subject to terms which deal with both the outstanding payment of interest on late payments and the payment of legal costs incurred by the second defendant in enforcing the lease. This observation was a reference to clauses 13 and 14 of the lease. Clause 13 concerns interest on late payments. Clause 14.1.2 requires the second plaintiff as lessee to pay the lessor's reasonable costs incurred in connection with –

> "(f) the surrender or termination of this Lease (otherwise than by the effluxion of time); or
>
> (g) any breach by the Lessee of any obligation on its part contained in this Lease (including in connection with the exercise or attempted exercise by the Lessor of its rights which accrue in consequence of that breach)."

[12] Clause 1.1 defines "Reasonable Costs" to include the lessor's external legal costs on a solicitor and own client basis. In the Reasons at [129] to [135], I set out the relevant chronology. This chronology includes that on 11 June 2018, the solicitors for the second defendant issued a Form 7 Notice to Remedy Breach of Covenant pursuant to s 124 of the *Property Law Act* 1974 (Qld). The Court determined that this notice was valid and that the second defendant by the filing of its defence and counterclaim on 11 September 2018 terminated the lease pursuant to clause 31.1.7(c). It was unnecessary for the Court, therefore, to determine the validity of the Form 7 notice issued by the second defendant on 16 October 2018. It is this notice that contains the demand for legal costs in the amount of $206,779.68. As observed in the Reasons,[6] at the time of issuing this Form 7 notice the lease had already been validly terminated. The defendants submit that the second defendant has contractual rights to be paid not only this amount of legal costs, but also the cost of the entire proceeding on an indemnity basis. The defendants rely on clause 14.1.2(f) and (g).

[13] Clause 14.1.2(f) and (g) makes the lessee liable to pay the lessor's "Reasonable Costs" incurred in connection with any breach by the lessee of any obligation contained in the lease and termination of the lease. These costs extend to the lessor's solicitor and own client costs in connection with the exercise or attempted exercise by the lessor of its rights which accrue in consequence of any breach.

[14] The tax invoices from the solicitors for the second defendant were attached to the Form 7 notice of 16 October 2018. The invoices are for the period 26 June 2018 to 13 September 2018. They were jointly tendered at trial and admitted for all purposes.[7] The legal costs were also the subject of a letter of demand dated 24 September 2018. The defendants refer to the fact that neither the second defendant (as "client") nor the second plaintiff (as "third party payer") has applied

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5 [2020] QSC 63 at [138].
6 At [138].
7 Exhibit 2, Trial Bundle Vol 7, pages 2153-2188.

for the legal costs the subject of the demand made 24 September 2018 (and itemised in the tax invoices) to be assessed within the relevant time period.[8]

[15] The difficulty with the tax invoices is that it is not possible to discern whether the amount of $206,779.68 constitute legal costs in connection with the exercise of the second defendant's rights regarding the second plaintiff's breach of the lease, in particular a failure to pay rent. The amount of legal costs, for example, includes $82,500 for counsel fees. I accept, as submitted by the plaintiffs, that the amount of costs claimed appears to relate to the proceedings and not simply to the exercise of rights by the second defendant under the lease.[9] The plaintiffs submit, correctly in my view, that the legal costs claimed in the Form 7 notice dated 16 October 2018 should be dealt with in the normal way as costs of the litigation, rather than as a condition of relief against forfeiture. The Court is not in a position to determine whether the amount of $206,779.68 constitutes costs solely in connection with the breach and termination of the lease. Neither the fact that the tax invoices were tendered, nor the fact that neither the second plaintiff nor the second defendant sought to have the costs assessed, assist in determining whether the legal costs claimed are costs contemplated by clause 14.1.2(f) and (g).

[16] This is not to suggest that clause 14.1.2(f) and (g) is not relevant to the Court's exercise of discretion in awarding costs. As observed by Bond J in *Pioneer Australia Pty Ltd v Quinn*:[10]

> "The authorities suggest that the costs discretion should ordinarily be exercised in a way which corresponds with the plaintiffs' contractual entitlement, unless there is some reason to take a different course." (citations omitted).

[17] The application of this principle is relevant to the exercise of discretion in awarding costs concerning the counterclaim.

[18] As it cannot be determined that the demand for legal costs in the amount of $206,779.68 constitutes a demand for reasonable costs incurred in connection with the second defendant exercising or attempting to exercise its rights under the lease, it follows that the second defendant has not established its right to interest on such costs in the sum of $42,872.16 or alternatively in the sum of $31,824.58.

(b) Fixed costs in the amount of $682,583.11

[19] The second defendant's invoices evidencing its legal costs of $682,583.11 were called for by the plaintiffs' senior counsel during the cross-examination of Mr Whitelaw and tendered by the plaintiffs following that cross-examination, during which Mr Whitelaw identified those invoices and gave evidence that they were paid by the second defendant.[11]

[20] The defendants rely on clause 14.1.2(f) and (g) in submitting that the second plaintiff is contractually liable for the amount of $682,583.11 as constituting the

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8 *Legal Profession Act* 2007 (Qld) s 335; Defendants' Submissions on Costs, paragraph 8(d).

9 Submissions on Behalf of the Plaintiffs with Respect to the Terms of the Grant of Relief Against Forfeiture and Costs ("Plaintiffs' Submissions on Costs"), paragraph 35.

10 [2019] QSC 82 at [15].

11 Exhibit 13; T 5-60, lines 4-39.

second defendant's reasonable costs in connection with the breach and termination of the lease. The second defendant would only be entitled to this amount if the cost of the entire proceedings were incurred in connection with the exercise of its rights under the lease. The proceedings, however, involved more than the second defendant exercising its rights under the lease. As I observed in [1] and [2] of the Reasons:

> "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.
>
> 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."

[21] The primary issue at trial was whether Mr Hookey and Mr Whitelaw had entered into an oral joint venture agreement by 1 July 2014. This finding required a detailed analysis of oral conversations between Mr Hookey and Mr Whitelaw together with contemporaneous documents. The discussions and documents did not directly concern the lease but rather centred on a potential partnership arrangement between Mr Hookey and his entities and Mr Whitelaw and his entities. The parties to the proceedings extended beyond the second plaintiff as lessee and the second defendant as lessor. As correctly submitted by the plaintiffs, clause 14.1.2(f) and (g) is concerned with costs incurred by reason of any breach of the lease and consequent termination of the lease and "does not extend to all of the costs that might be incurred in a dispute between parties who happen to also be lessee and lessor".[12] The defendants in their written submissions also accept that the central issue in the proceedings was the existence of a joint venture agreement:

> "The Court's order as to costs ought to give proper account for the relative complexities in the plaintiffs' and defendants' case respectively. The plaintiffs' case was complex. It relied on allegations that, in the first half of 2014, the respective parties made an oral Joint Venture Agreement… on 22 express terms and/or 13 implied terms pleaded which contradicted the terms of the Registered Lease. The plaintiffs' case relied on claims at both common law (contract and conventional estoppel) and in equity (equitable estoppel and fiduciary duties).
>
> The plaintiffs' case took up 'the bulk' of the trial dealing with its various iterations – as the plaintiffs' put it, 'the bulk of the trial was concerned with the existence or otherwise of the joint venture, and the court rejected the plaintiffs' case in that regard. The declaration that the lease was validly terminated followed that finding.'"[13]

[22] The defendants, in my view correctly, draw a distinction between the complexity of the plaintiffs' case with the defendants' counterclaim, which was relatively

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12 Plaintiffs' Reply Submissions, paragraph 10.

13 Defendants' Submissions on Costs, paragraphs 77 to 78.

straightforward.[14] The counterclaim, relying upon the validity of three separate s 124 notices served on 11 June 2018, 16 October 2018 and 13 March 2019, sought a declaration that the lease had been lawfully terminated and an order for recovery of possession. The plaintiffs sought to resist this relief by challenging the validity of the s 124 notices and asserting that the second defendant had no right to terminate the lease or recover possession. In the alternative, the plaintiffs sought relief against forfeiture. The second defendant's third s 124 notice of 13 March 2019 raised the issue of Mr Hookey not holding a Blue Card. This issue was pleaded by the second defendant as a positive case in resisting any grant of relief against forfeiture. The defendants alleged that, owing to the provisions of the *Working With Children (Risk Management and Screening) Act* 2000 (Qld), the child care business was deemed to be carried on by Mr Hookey unlawfully and, as a consequence, the second plaintiff was in breach of the lease in failing to use the premises according to "any other laws regulating the Lessee's Use".[15]

[23] The defendants submit that, having regard to the chronology of events set out in paragraph 21 of their written submissions, the costs of the entire proceedings were incurred in connection with the exercise (or, at least, the attempted exercise) of the second defendant's rights under the lease. They submit that the "inescapable conclusion" is that the entire proceeding "has been about breach, enforceability and termination of the Registered Lease".[16] I do not accept this submission. It ignores that the central and discrete issue that was determined at trial was whether the parties had entered into an oral joint venture agreement. While the words "in connection with" are words of wide import, the costs incurred must still be ones concerning the exercise of rights by the second defendant under the lease.

[24] The central issue for determination in the proceedings involved parties beyond the lessee and lessor, and required an analysis of evidence unrelated to the second defendant seeking to enforce its rights under the lease.

[25] Any grant of relief against forfeiture should not, therefore, be conditional upon the plaintiffs paying the entire cost of the proceedings (including costs fixed in the amount of $682,583.11 up to 4 October 2019) on the indemnity basis. As discussed below, however, in relation to the exercise of the cost discretion, I am of the view that the plaintiffs should pay the defendants' costs in relation to the counterclaim to be assessed on the indemnity basis. This reflects an exercise of discretion which corresponds with the defendants' contractual entitlements under clause 14.1.2(f) and (g). The issues raised by the counterclaim and the legal costs incurred by the second defendant in pursuing those issues may be described as costs "in connection with" the breach and termination of the lease. The seeking of relief against forfeiture by the second plaintiff should also be viewed as being "in connection with" the termination of the lease.

(c) Costs of the proceedings incurred after 4 October 2019 on the indemnity basis

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14 Defendants' Submissions on Costs, paragraph 79.
15 Exhibit 2, Trial Bundle Vol 5, page 1337 (Lease, clause 16.3.4(b)).
16 Defendants' Submissions on Costs, paragraph 22.

[26] For the reasons given in relation to (b) above, the grant of relief against forfeiture should not be conditional upon the plaintiffs paying the defendants' costs of the entire proceedings incurred after 4 October 2019 on the indemnity basis.

Costs of the Proceedings

[27] Quite apart from any reliance on clause 14.1.2(f) and (g) of the lease, the defendants seek indemnity costs of the proceedings on two further bases:

(a) a settlement offer made on 12 August 2019 under r 353 of the UCPR; and

(b) a *Calderbank* offer made on 3 September 2019.

[28] Neither the offer to settle nor the *Calderbank* letter necessitates or warrants an award of indemnity costs. The offer to settle in paragraph 2(c) required delivery to the defendants of a copy of a Positive Notice (a Blue Card) issued to Mr Hookey under the *Working with Children Act* in respect of the child care business. The *Calderbank* letter in paragraph 5(a) contained a similar requirement. At trial, the defendants failed in their contention in relation to the necessity for Mr Hookey to hold a Blue Card and its effect on the second plaintiff lawfully conducting the child care business from the leased premises. It cannot be said, for the purposes of rule 361, that the defendants made an offer which was not accepted by the plaintiffs and the plaintiffs did not obtain an order that is more favourable to the plaintiffs than the offer. As I have already observed, the defendants pleaded a positive case resisting any grant of relief against forfeiture. The defendants failed on this issue.

[29] I note that the defendants no longer press the *Calderbank* offer as constituting a separate basis for an order for indemnity costs.[17]

[30] Pursuant to rule 681(1) of the UCPR, costs of a proceeding are in the discretion of the Court but follow the event unless the Court orders otherwise. Rule 684 permits a court to make an order for costs in relation to a particular question in, or a particular part of, a proceeding. In the present proceedings, the defendants were successful both in resisting the Originating Application and in their counterclaim. As to the Originating Application, as is evident from the Reasons,[18] the plaintiffs had a number of difficulties. The Court's conclusion that the parties had not entered into an oral joint venture agreement was, however, only reached after a detailed analysis of the chronological events leading up to 1 July 2014. That analysis showed that conversations had occurred between Mr Hookey and Mr Whitelaw in the context of seeking to establish a potential 50/50 partnership. While the plaintiffs' case had its difficulties, it could not be described as one falling within the principles identified by Sheppard J in *Colgate Palmolive v Cussons.*[19]

[31] The appropriate order is that the plaintiffs pay the defendants' costs of the proceeding on the Originating Application. The costs of the counterclaim, however, should be paid by the plaintiffs on the indemnity basis. As I have observed above, the primary relief sought pursuant to the counterclaim was the termination of the lease and recovery of possession. The defendants' legal costs of the counterclaim may properly be viewed as costs "incurred in connection with" the second

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17 Defendants' Submissions on Costs, paragraph 58.
18 [2020] QSC 63 at [104]-[112].
19 (1993) 46 FCR 225 at 233-234.

defendant exercising its rights as lessor under the lease.[20] While the second defendant was not successful in resisting a grant of relief against forfeiture, such a grant is discretionary. A lessee is not entitled to relief against forfeiture as of right. The Court retains a discretion whether to grant relief in any particular case. I accept the defendants' submission that a lessee in the position of the second plaintiff ought not to be regarded as "winning" part of the case by being granted relief against forfeiture so as to disentitle the lessor of the costs of the litigation, particularly where those costs fall within a contractual entitlement and ought to be paid on an indemnity basis.[21] The payment for costs has traditionally been regarded as "the price" an applicant for relief against forfeiture must pay to obtain it.[22] The plaintiffs' submission that they are entitled to costs on the forfeiture claim is therefore misconceived.[23]

[32] The plaintiffs seek an apportionment of costs on the basis that the second defendant failed in resisting relief against forfeiture on the basis that Mr Hookey did not hold a Blue Card. I do not accept that costs should be apportioned, as submitted by the plaintiffs. First, the issue concerning the Blue Card was a secondary issue at trial which took up little time. The Court found that the second plaintiff could not be said to be acting in breach of the lease by Mr Hookey failing to hold a Blue Card. As correctly submitted by the defendants, this was "a narrow point of legal interpretation".[24] Even though the second defendant lost on this issue it is not, in my view, appropriate to apportion costs because of this failure. As observed by Mahoney JA in *Waters v PC Henderson (Aust) Pty Ltd*:[25]

> "… Unless a particular issue or group of issues is clearly dominant or separable it will ordinarily be appropriate to award the costs of the proceedings to the successful party without attempting to differentiate between those particular issues on which it was successful and those on which it failed."

[33] The plaintiffs sought to challenge the validity of each of the s 124 notices, the second defendant's right to terminate the lease and its right to recover possession. These issues were essentially determined in favour of the second defendant. It was the second plaintiff which sought relief against forfeiture. The fact that the discretion was exercised in its favour does not entitle the plaintiffs to an apportionment of costs.

[34] Issues concerning the validity of the s 124 notices, termination, recovery of possession and relief against forfeiture are "in connection with" the second defendant seeking to enforce its rights under the lease.

[35] The appropriate order is that the plaintiffs pay the defendants' costs of the counterclaim to be assessed on the indemnity basis.

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20 Clause 14.1.2(g).

21 Defendants' Submissions on Costs, paragraph 32.

22 Defendants' Submissions on Costs, paragraph 32 citing *Hayes v Gumbola Pty Ltd* (1986) 4 BPR 9247 (Young J); *Cicinave Pty Ltd v Jasco Pty Ltd* (1989) 5 BPR [97329] (Powell J); *Tannous v Cipolla Bros Holdings Pty Ltd* [2001] NSWSC 236, [3], [9] (Barrett J); *Kumaragamage v Rallis* [2001] NSWSC 466, [10] (Austin J).

23 Plaintiffs' Reply Submissions, paragraph 20.

24 Defendants' Submissions on Costs, paragraph 83.

25 (1994) 254 ALR 328 at 330-331.

Disposition

[36] The Court declares that the lease registered at the Queensland Department of Natural Resources Mines and Energy with dealing number 717067584 ("the Registered Lease") was lawfully terminated by the second defendant by the filing of its defence and counterclaim on 11 September 2018.

[37] The judgment of the Court is that:

1. The plaintiffs' second further amended originating application ("the Originating Application") is dismissed.

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

3. The plaintiffs' claim in subparagraph 85(m) of the fourth further amended statement of claim for a declaration that the notice served by the second defendant as lessor and second plaintiff as lessee in purporting to terminate the Registered Lease is invalid is dismissed.

4. The plaintiffs' claim in paragraph 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 second plaintiff pay to the second defendant the amount of $3,712.65 (being interest on rental arrears under the Registered Lease).

6. The plaintiffs pay the defendants' costs of the proceeding on the Originating Application.

7. The plaintiffs pay the defendants' costs of the counterclaim to be assessed on the indemnity basis.

The Court further orders that:

8. The second plaintiff shall, within twenty-one (21) days of the date of this order, deliver to the second defendant, care of its solicitors, a banker's undertaking for the sum of $524,389.10 pursuant to clause 36.1 of the Registered Lease ("the Bank Guarantee"), such undertaking to be:

   (a) addressed to the second defendant;

   (b) either unlimited in time or expressed to expire no earlier than 1 August 2035; and

   (c) otherwise in the form required by the schedule to the Registered Lease (page 38).

9. The second plaintiff is at liberty to arrange for the transfer of the funds held by the plaintiffs' solicitors in their trust account pursuant to the undertakings to the Court of 12 September 2018 ("the Trust Security"):

   (a) for the sole purpose of obtaining the Bank Guarantee, if need be; and

(b) direct to the bank which issues the Bank Guarantee and only in exchange therefor.

10. IF within twenty-one (21) days of this judgment, the second plaintiff has delivered the Bank Guarantee to the second defendant, then:

(a) the plaintiffs shall thereupon be discharged from their undertakings as to damages given to the Court on 12 September 2018;

(b) the plaintiffs' written authority and direction given by the plaintiffs to their solicitors pursuant to paragraph 3 of Schedule A to the order made on 12 September 2018 is discharged; and

(c) the plaintiffs and their solicitors shall thereupon be at liberty to deal with the said sum of $524,389.10 and any accretions thereon as the plaintiffs direct.

11. For the avoidance of doubt, the solicitors for the plaintiffs are, upon the making of this order, at liberty to deal with the Trust Security in accordance with paragraph 8 hereof, to enable the second plaintiff to deliver the Bank Guarantee to the second defendant within the said period of twenty-one (21) days.

12. IF-

(a) within twenty-one (21) days of this judgment, the second plaintiff has paid the sum of $3,712.65 referred to in paragraph 5 to the second defendant; and

(b) within twenty-one (21) days of this judgment, the second plaintiff has delivered the Bank Guarantee to the second defendant; and

THEN subject to paragraph 13 of this order:

(c) the second plaintiff shall thereupon be relieved from forfeiture of the Registered Lease under the notices dated 11 June 2018, 16 October 2018 and 13 March 2019;

(d) the second defendant shall take no step to enforce any of the said notices.

13. IN THE EVENT of any default on the part of either of the plaintiffs in the satisfaction of any of the conditions set out in subparagraphs 12(a) and 12(b) hereof THEN the second defendant shall thereupon be entitled:

(a) to recover possession of the land the subject of the Registered Lease;

(b) to issue an Enforcement Warrant for possession of the said land and/or for the recovery of any sums payable under these orders; and

(c) to request the Registrar of Titles (in Form 14 – General Request, Land Title Practice Manual (Queensland)) to register its re-entry under the Registered Lease.

14. The parties shall have liberty to apply on three days' notice in writing to the others.