SUPREME COURT OF QUEENSLAND

CITATION:	*Whitelaw & Ors v Hookey & Anor* [2020] QCA 145
PARTIES:	**JOHN BRUCE WHITELAW** (first respondent/first applicant) **KA ESTATES PTY LTD ACN 600 469 887 AS TRUSTEE OF THE KA ESTATES UNIT TRUST** (second respondent/second applicant) **JBW ESTATES PTY LTD ACN 600 602 819 AS TRUSTEE OF THE JBW FAMILY TRUST** (third respondent/third applicant) **v** **SCOTT GREGORY HOOKEY** (first appellant/first respondent) **KIDS ACADEMY HOPE ISLAND PTY LTD ACN 164 852 475 AS TRUSTEE OF THE KIDS ACADEMY HOPE ISLAND UNIT TRUST** (second appellant/second respondent)
FILE NO/S:	Appeal No 4832 of 2020 SC No 8477 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Application for Security for Costs Miscellaneous Application – Civil
ORIGINATING COURT:	Supreme Court at Brisbane – [2020] QSC 63 (Flanagan J)
DELIVERED ON:	30 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	16 June 2020
JUDGES:	Morrison JA
ORDERS:	**1. The appellants provide security for the respondents' costs of and incidental to the appeal in the sum of $125,000, such sum to be paid; (i) as to $50,000 by 6 July 2020, and (ii) as to $75,000 by 28 August 2020.** **2. The security in paragraph 1 is to be provided by either:** **a. paying that sum into court; or** **b. delivering to the Registrar of the Court of Appeal a bank guarantee in that sum, given by a bank licensed to carry on a banking business in Australia under the *Banking Act* 1959 (Cth), payable to the Registrar without limitation as to time and otherwise in a form satisfactory to the**

Registrar.

3. **If, by 4.30 pm on 6 July 2020 the appellants have not provided security as to $50,000 in accordance with paragraph 1, then the appeal shall stand dismissed.**

4. **If, by 4.30 pm on 28 August 2020 the appellants have not provided security in the sum of $75,000 in accordance with paragraph 1, then the appeal shall stand dismissed.**

5. **The appellants pay the respondents' costs of and incidental to the application for security for costs.**

6. **The respondents pay the appellants' costs of the application for a stay of the appeal.**

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – SECURITY FOR COSTS – where the parties have been engaged in proceedings in the Supreme Court in relation to questions arising over the ownership and operation of a child care centre at Hope Island – where the respondents/appellants' claims were dismissed and it was declared that the registered lease had been lawfully terminated – where the respondents/appellants have appealed from that decision, contending that there are a considerable number of errors – where the applicants/respondents seek three forms of relief – whether provision of security for costs of the appeal should be awarded – whether the appeal should be stayed if the respondents/appellants did not pay the arrears of rent under the lease

COVID-19 Emergency Response Act 2020 (Qld)
Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 (Qld), s 9, s 12, s 14, s 48, Part 2 Division 3, Part 3

Harpur v Ariadne Australia Limited [1984] 2 Qd R 523; [1984] QSCFC 28, distinguished
Hookey & Anor v Whitelaw and Ors [2020] QSC 63, cited
Molony & Anor v ACN 009 697 367 Pty Ltd (In Liq) [2003] QCA 120, distinguished

COUNSEL: S C Russell (*sol*) for the respondents/applicants
K N Wilson QC for the appellants/respondents

SOLICITORS: Russells Law for the respondents/applicants
Van de Graff Lawyers for the appellants/respondents

[1] **MORRISON JA:** The parties to this application have been engaged in proceedings in the Supreme Court in relation to questions arising over the ownership and operation of a child care centre at Hope Island.

[2] Mr Hookey and Kids Academy Hope Island Pty Ltd (**KAHI**) contended at the trial before Flanagan J that the rights of ownership and operation of the child care centre were governed by an oral joint venture agreement made between Mr Hookey and the first defendant, Mr Whitelaw. Mr Whitelaw and the second and third respondents[1] denied that there was such an agreement, and alleged that the parties' respective rights were governed by reference to a lease executed on 16 July 2014 and registered on 12 February 2016.

[3] After a six day trial, Flanagan J dismissed Mr Hookey's and KAHI's claims and declared that the registered lease had been lawfully terminated by KA Estates Pty Ltd. His Honour also ordered that KAHI be granted relief from forfeiture. The basis upon which his Honour resolved the issues was reflected in a detailed judgment.[2]

[4] Mr Hookey and KAHI have appealed from that decision, contending that there are a considerable number of errors including: failing to act on the whole of the evidence; misusing the advantage as a trial judge; giving inappropriate weight to various parts of the evidence; failing to conclude that certain conversations of conduct established a concluded agreement; failing to find that the parties had made a binding oral agreement; failing to find that the parties had conducted their relationship on the common assumption of such a joint venture; failing to find that Mr Whitelaw and the respondents had induced various assumptions or expectations on the part of Mr Hookey and KAHI, disentitling them from giving notice under the lease demanding payment of rent and outgoings; and failing to find that Mr Hookey and KAHI were entitled to damages.

[5] In the application filed on 3 June 2020 the respondents to the appeal sought three forms of relief:

(a) the provision of security for costs of the appeal, in the sum of $125,000;

(b) the dismissal of the appeal if, within 14 days, the appellants have not complied with an undertaking given to Justice Mullins on 12 September 2018, recorded in paragraph 5 of Schedule A to that order, by paying arrears of rent, outgoings and GST; and

(c) the dismissal of the appeal if, within 14 days, the appellants have paid the costs sought on the application.

[6] The applicants' outline of submissions on the application varied what was sought in paragraphs (b) and (c) above. Instead of dismissal, a stay of the appeal was sought, if the appellants did not pay the arrears of rent under the lease, on two bases, the first of which was that the appellants "were *prima facie* in contempt of court" by:

(a) breach of the undertaking, contained in Schedule A to the order by Mullins J, to pay rent, outgoings and GST;

(b) failing to instruct their solicitor to pay the demands for arrears of rent, made on a Trust Security referred to in the order; and

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1 KA Estates Pty Ltd and JBW Estates Pty Ltd.

2 *Hookey & Anor v Whitelaw and Ors* [2020] QSC 63.

(c) KAHI's charging its interest in the Trust Security in favour of its solicitor, to whom it was and is substantially indebted, when the solicitors have refused to pay the sums demanded and thus frustrated the protection set up by the order.

[7] Alternatively, the second basis for the stay was that in breach of trust the appellants and their solicitors had failed to pay the arrears of rent from the Trust Security.

The proceedings below

[8] One of the considerations on an application for security for costs is the prospects of success on the appeal. Thus, it is necessary to say something of the basis for the judgment below.

[9] The central contention on behalf of Mr Hookey and KAHI was that he and Mr Whitelaw made an oral agreement for a joint venture, by 1 July 2014. As the learned trial judge pointed out, the resolution of that issue required a chronological analysis of the relevant events and conversations. His Honour noted that in reaching those findings of fact, he had relied primarily upon contemporaneous documents, but for reasons which he then identified throughout the judgment, he generally preferred the evidence of Mr Whitelaw to that of Mr Hookey.[3]

[10] The learned trial judge made what appears to be a meticulous examination of the competing evidence in the course of examining whether Mr Hookey had proven the oral agreement and joint venture. In the course of that process his Honour made a number of findings against the credit of Mr Hookey. Some of these were simply that the evidence of Mr Hookey was imprecise or based on faulty recollection.[4] But in other respects the findings were critical of Mr Hookey as a witness leading to his Honour's inability to rely upon his evidence.[5]

[11] The learned trial judge's conclusions were that the oral joint venture for which Mr Hookey contended had not been proven by his evidence, was contrary to the contemporaneous documents and not supported by the evidence of other witnesses who dealt with Mr Hookey. Ultimately, his Honour rejected the proposition that he could rely upon Mr Hookey's evidence for the purposes of determining whether a concluded agreement had been made, and found that there was no such agreement, the case thus failing at the threshold.[6] In summarising the findings on that issue, his Honour found that it was the intention of both sides not to make a concluded bargain unless and until they executed a formal written agreement. That finding was based not just upon the evidence of witnesses, but upon the contemporaneous documents.

[12] There is no need to summarise his Honour's conclusions on consequential issues. The foregoing is sufficient to demonstrate that the appellants face a difficult task in overcoming the decision below.[7] So much was frankly acknowledged by Senior Counsel for the appellants before me, in that it was submitted that the appeal will be necessarily

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3 Reasons below at [4].

4 For example, Reasons below at [30]-[31], [40]-[41] and [70].

5 For example, Reasons below at [32] and [64]-[67].

6 Reasons below at [104].

7 *Devries v Australian National Railways Commission* (1993) 177 CLR 472, 479, [1993] HCA 78; *Fox v Percy* (2003) 214 CLR 118, [2003] HCA 22; *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679, [2016] HCA 22.

run on the basis that the findings below were contrary to the contemporaneous documents.

[13] There are, in my view, substantial hurdles to be overcome by the appellants on the eventual appeal. However, the complexity of the evidential analysis does not permit a conclusion at this stage as to the likely prospects of success. That is, I do not consider that I can conclude either that the appeal is hopeless, or that the appeal has good prospects. For that reason I intend to proceed, as I foreshadowed at the hearing of the applications, on the basis that the appeal has prospects of success.

Impecuniosity

[14] The applicants sought to draw inferences of impecuniosity from searches which they had conducted, revealing that KAHI: had an excess of liabilities over assets; was a single venture entity, i.e. that of the childcare centre; owns no real estate; and had defaulted on the rent. Similar searches had been done in respect of Mr Hookey personally, which showed: he had no apparent assets apart from shares in proprietary companies with no assets; and two residential properties which were for sale. Each of Mr Hookey and KAHI had secured their assets to orthodox lenders, as well as their solicitors on a second mortgage. This formed the basis for a submission that there was reason to doubt that either of the appellants could meet a costs order if the appeal was unsuccessful.

[15] Senior Counsel for the appellants did not strongly contest this issue. His submissions pointed to a previous description by the solicitors for the applicants, to the effect that Mr Hookey was a wealthy man. However, as was pointed out, those comments were made prior to the most recent set of searches.

[16] For the purposes of this application I consider enough has been demonstrated to show that there is a risk that any costs orders will not be met.

Will an order stultify the appeal?

[17] Senior Counsel for the appellants conceded that if an order for security was made, even in the sum of $125,000, it would not have the effect of stultifying the appeal. In accordance with an offer made recently in the course of correspondence, it was submitted that if security were ordered it should be in two tranches, namely $50,000 by 19 June 2020 and $75,000 by 28 August 2020.

Overlap between the appellants

[18] Senior Counsel for the appellants submitted that there was almost a complete overlap between the issues to be agitated on the part of Mr Hookey, and those on behalf of KAHI. Thus it was contended that this was a case where any costs order would be made against Mr Hookey in any event, and since he was a primary protagonist and not simply standing behind the corporate appellant, this was not an appropriate case for security for costs.

[19] The principles applicable on this issue appear in *Molony & Anor v ACN 009 697 367 Pty Ltd (in Liq)*[8] by reference to the judgment of Connolly J in *Harpur v*

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8 [2003] QCA 120 at [22]-[25], [29].

Ariadne Australia Limited.[9] *Harpur v Ariadne* established that if there were two parties, one corporate and one who litigated in person and was a person of substantial means, it was inappropriate to order security for costs against the corporate defendant even though, looked at in isolation, such an order could be justified against them. However, that was only applicable if each of the appellants was liable to the whole of the costs. In other words, it was applicable where there was a complete overlap between the interests of the two parties. As was said by White J (as her Honour then was) in *Molony*: "Where there is more than one plaintiff there must be a coincidence of interest".[10]

[20] This is not a case where there is a coincidence of interest. By reference to the originating application one is able to identify various forms of relief which are sought only by Mr Hookey, and not by KAHI.[11] Those issues are substantial, consisting of a declaration that Mr Whitelaw holds half of his shares in the second defendant on constructive trust for Mr Hookey, and consequential orders compelling their transfer. Further, paragraph 4H(b) claims the payment of $1,000,000 to Mr Hookey.

[21] Further, both in the originating application and in the amended statement of claim, declaratory relief in respect of a notice of termination of the lease is sought only by KAHI.

[22] Senior Counsel for the appellants conceded that there was not a precise overlap in the claims between the two appellants.[12] However, it was said to be inevitable that there will be only one costs order if the appeal is unsuccessful.

[23] Whilst it is true to say that it is likely there will only be one costs order, that is not an inevitable outcome and will depend upon the issues eventually agitated on appeal and the time spent on those that are joint issues, and those that are not. As things presently stand I do not accept that the case falls so clearly within the principle originally enunciated in *Harpur v Ariadne*, that that is a reason for refusing security for costs.

Quantum of the security

[24] The applicants' material is relatively bare of the sort of proof one sees on applications for security for costs, where there is often a detailed estimate by an experienced litigation solicitor, or alternatively by a costs assessor. However, this case is a little different. One of the exhibits on behalf of the applicants for security is a letter dated 21 May 2020 in which the solicitors set out a schedule calculating the costs of the appeal based on the Scale of Costs and on a standard basis. It sets out various items, splitting the components between solicitors' professional costs and disbursements. The total was $148,010. The same letter offered to accept $125,000 by way of security.

[25] On the appellants' side, on 12 June 2020 their solicitors wrote an open letter offering security in the following terms:

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9 [1984] 2 Qd R 523 at 531-2.
10 *Molony* at [29].
11 Paras 4, 4A, 4B, 4C and 4H(b) and (e).
12 Respondents' outline, paras 4 and 5.

(a) $50,000 by 19 June 2020;

(b) $75,000 by 28 August 2020; and

(c) costs of the application to be costs in the cause.

[26] In the course of oral argument before me, it was effectively accepted that the sum of $125,000 was an appropriate amount.

Conclusion on security

[27] Balancing the matters referred to above, I have come to the conclusion that it is an appropriate case in which to order security. Further, given the fact-heavy nature of the appeal, there is reason to think that a substantial proportion of the costs to be incurred in preparation for the appeal will be incurred towards the end of the period of preparation. As security is just that, security for costs incurred, there is no reason why the appellants' proposal to pay in two tranches should not be adopted. The hearing date for the appeal is late September, and the second tranche will be nearly a month before that. In either case, if the sum is not paid into court, in cash or in a form satisfactory to the Registrar, the appeal will stand dismissed. The staged payment also recognises, as was perhaps implicit in the submissions by Senior Counsel for the appellants, the risk that the appeal might not proceed on all current points once further attention is paid to it.

Relief based on arrears of rent

[28] The second part of the relief sought on this application was in respect of undertakings given as part of an order by Justice Mullins on 12 September 2018. Those undertakings were given by each of Mr Hookey and KAHI, relevantly as follows:

> "Each of the plaintiffs … further undertakes (without admission), until the trial of this proceeding or further order, that:-
>
> 1. KAHI will forthwith on the making of this order pay to KA Estates the sum of $623,260.92, on account of the claim by KA Estates for rent and outgoings and GST due under the Registered Lease …
>
> 2. KAHI will, by the close of banking business on Wednesday 19 September 2018, pay to KA Estates the further sum of $63,669.88, on account of the claim by KA Estates for rent and outgoings and GST due under the Registered Lease …
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> 3. They will, forthwith on the making of this order, provide to their solicitors, Fraser Clancy Lawyers Pty Ltd, an irrevocable written authority and direction in the following terms:-
>
> "Dear Sirs
>
> We, **SCOTT GREGORY HOOKEY** and **KIDS ACADEMY HOPE ISLAND PTY LTD** give this authority and direction pursuant to our undertaking to the Supreme Court of Queensland in Proceeding No 8477 of 2018 given on 12 September 2018.

We **HEREBY IRREVOCABLY AUTHORISE AND DIRECT** you to deal with the sum of $524,389.10 ("**the Trust Security**") in your trust account on the following bases until further order of the court:-

(a) your firm is to have the same obligation to make payment from the Trust Security to the second defendant, KA Estates Pty Ltd, as would a bank issuing a bank guarantee in favour of the second defendant pursuant to clause 36 of the Registered Lease, and

(b) the second defendant is to have the same right under clause 36 of the Registered Lease to call on your firm to make payment from the Trust Security to the second defendant as the second defendant has to call on a bank guarantee in favour of the second defendant issued pursuant to clause 36 of Registered Lease,

save and except in relation to each of such obligation and right, an obligation to make and a right to seek payment of any interest on late payments …"

…

5. KAHI will pay the rent, other outgoings and any other moneys payable in accordance with the Registered Lease, save and except for any interest on late payments claimed by KA Estates thereunder and for sums payable under the registered lease in relation to the period before 1 October 2018."

[29] The relief sought is that if the appellants have not complied with their undertaking given in paragraph 5 of the undertaking within 14 days, by paying the arrears of rent, outgoings and GST, the arrears being identified as $136,341.15 plus interest, then the appeal shall be stayed.

[30] As noted above, the applicant's outline expanded the relief sought, with an alternative claim for a stay if the appellants and their solicitors did not pay the arrears of rent from money held in the trust account of the solicitors pursuant to the irrevocable authority given in paragraph 3 of the undertaking.

[31] Oral addresses in the trial concluded on 31 October 2019. Final written submissions were filed on 15 November 2019. Judgment was reserved and handed down on 7 April 2020, except for the terms upon which KAHI would be granted relief from forfeiture.

[32] The relevant defaults occurred in the payment of rent on 2 April 2020, 2 May 2020 and 2 June 2020.

[33] The dispute between the parties as to payment of the rent was a relatively simple one. After evidence concluded in the trial the plaintiffs contended that the undertaking was clear and unambiguous in that it was only given "until the trial of this proceeding or further order", and therefore the undertaking expired at the start

of the trial.[13] The position adopted was that on proper construction of the undertaking, the appellants had been released.

[34] There was correspondence between 11 November and 19 November 2019, to the effect that the undertakings would be continued until judgment or further order in the proceedings. However, no agreement was reached.

[35] On the appellants' contention the undertakings ceased to be in force once judgment was handed down, and the trial of the proceedings was thus concluded. On the appellants' contention, that occurred on 7 April 2020 when the judgment (except as to terms of relief from forfeiture) was handed down. That was prior to when the April rent fell due.

[36] That, of course, would not answer the original default on 2 November 2019. However, it was also uncontentious that whilst the November rent was paid one day late, it was paid in full. The defaults relevant to this application for relief are those in April, May and June 2020.

[37] The debate between the parties about whether the undertakings had been breached and, if so, how that should be remedied, has involved a considerable course of correspondence, trading accusations and criticism of conduct. That said, the correspondence also included negotiations between the respective solicitors, though no resolution was reached.

[38] That dispute has been overtaken by events brought about by the COVID-19 pandemic. The *COVID-19 Emergency Response Act* 2020 (Qld) became effective on 23 April 2020. Further, the *Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation* 2020 (Qld) was gazetted on 28 May 2020.[14]

[39] The appellants contend that the demands for rent, even the rent due under the three alleged defaults, contravene the *COVID-19 Emergency Response Regulation*, s 12. Part of that contention is also that the action to recover under the lease is stayed – s 48(2).

[40] Section 48 of the *Emergency Response Regulation* is in these terms:

> "(1) This section applies in relation to a lease if-
>
> (a) during the pre-commencement period-
>
> (i) a proceeding for a lease dispute was started in relation to the lease; or
>
> (ii) the lessor under the lease had started or taken an action that, if it had been started or taken after the commencement, would constitute taking a prescribed action in contravention of section 12; and
>
> (b) on the commencement-
>
> (i) the dispute has not been resolved; or

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13 Email from Mr Fraser, 4 November 2019.

14 I will refer to this Regulation as the *Emergency Response Regulation*.

(ii) the action has not been completed or finalised.

(2) The proceeding or action, to the extent that it relates to the action mentioned in subsection (1)(a)(ii) and remains unresolved, incomplete or not finalised, is taken to be stayed or suspended until the response period ends."

[41] For the purposes of s 48, the "pre-commencement period" means the period starting from 29 March 2020, and ending immediately before commencement of the Act.

[42] Both in correspondence and in submissions before me the applicants contested the applicability of s 12 or s 48 to the dispute between the parties.

[43] In my view, for the reasons which flow there is no need to resolve that issue.

[44] Overshadowing the debate as to s 48 is the fact that on 15 June 2020, the day before the hearing of this application, the appellants engaged the provisions of Div 3 of the *Emergency Response Regulation*, for rent relief. It was accepted that the process thus invoked had retrospective effect in relation to rental payments, and could impact upon the rent that was due and not paid in April, May and June 2020.

[45] The *Emergency Response Regulation* provides in s 12:

"(1) A lessor under an affected lease must not take a prescribed action on any of the following grounds-

(a) a failure to pay rent for a period occurring wholly or partly during the response period;

(b) a failure to pay outgoings for a period occurring wholly or partly during the response period; …"

[46] The term "prescribed action" is relevantly defined in s 9 as being:

"A ***prescribed action*** is an action under a lease … or the starting of a proceeding in a court or tribunal, for any of the following in relation to the lease or other agreement-

…

(i) a claim on a bank guarantee, indemnity or security deposit for unpaid rent or outgoings;

…

(k) exercising or enforcing another right by the lessor under the lease ..."

[47] Division 3 of the *Emergency Response Regulation* imposes mandatory obligations on a lessee and lessor in negotiating outcomes. The process mandates the following steps:

(a) a party (the initiator) to an affected lease, may ask in writing for the other party "to negotiate the rent payable under … the lease": s 14(1);

(b) upon that request being made the parties are obliged to exchange information, and to negotiate the conditions of the lease which are the subject of the request, and comply with s 15: ss 14(2) and (3);

(c) s 15 provides that the lessor "must offer the lessee a reduction in the amount of rent payable under the lease", and that offer must relate to any or all of the rent payable under the affected lease during the response period: ss 15(1) and (2);

(d) the reduction must include, to the extent of no less than 50 per cent, a waiver of rent: s 15(2)(b); and

(e) the parties are obliged to cooperate and act reasonably and in good faith in negotiating the reduction: s 15(3).

[48] Part 3 of the *Emergency Response Regulation* also contains provisions for resolution of a dispute by way of mandatory mediation by the Small Business Commissioner. Arguably that would apply here if the parties did not observe their obligations under Div 3.

[49] The application by KAHI is under s 14 of the *Emergency Response Regulation*. Given that it imposes mandatory obligations upon both the lessee and the lessor to negotiate the question of rent, and given that the lessor is obliged to offer a reduction in rent within 30 days after receiving sufficient information about the request, and that offered reduction covers the entirety of the response period, there is a real question as to whether the breaches by non-payment of rent in April, May and June will still subsist once the process under Div 3 is completed. In my view, that is a powerful discretionary factor against the grant of relief.

[50] That factor affects also the claims for relief based upon the solicitors' response under the irrevocable authority. Their default is said to be the failure to meet the rent payments for April, May and June.

[51] That being the case, it is in my view inappropriate to grant the relief sought, which is to stay the appeal.

[52] In the circumstances, I do not need to consider whether the application is objectionable also because it seeks a remedy based on contempt of court without engaging the process applicable to a contempt application; moreover, whether relief of that kind should be granted when the solicitors are not made parties to the application.

[53] The applicants contended that the solicitors for the appellants have breached the terms of the irrevocable authority granted to them pursuant to paragraph 3 of the undertaking. There is no question that the authority was given to them, and thus paragraph 3 was satisfied. If the solicitors have not responded to demands made of them that is a matter that should be pursued against them personally. They are not parties to this application. Submissions for the applicant went so far as to assert that it should be inferred that the appellants themselves had instructed the solicitors to breach the irrevocable written authority and direction. On the state of the material as it stands, I would be reluctant to make that finding. The solicitors are not parties, and they have not filed material to answer for themselves.

[54] For these reasons I would refuse the alternative relief.

Costs

[55] The applicants sought an order that the costs of this application be fixed and paid within 14 days, and in default of payment, the appeal stand dismissed. I would not make that order, not least because it acts as a form of guillotine order in respect of a normal costs order.

[56] The appellants resisted the provision of security for costs, and that application has succeeded. There is no reason why costs of that application should not follow the event.

[57] However, the application for the alternative relief was for discretionary relief (a stay of the appeal) based on the failure to pay the arrears of rent. It confronted the fact that the undertaking was "until the trial of this proceeding or further order". No extension was agreed or ordered. Arguably all defaults occurred after the completion of the trial. And, there was a risk that KAHI as lessee would apply for relief under the *Emergency Response Regulation*, not least because that had been the subject of correspondence which attributed the defaults to the impact of the COVID-19 pandemic.

[58] Costs of that application should also follow the event.

Orders

[59] I order that:

1. The appellants provide security for the respondents' costs of and incidental to the appeal in the sum of $125,000, such sum to be paid: (i) as to $50,000 by 6 July 2020, and (ii) as to $75,000 by 28 August 2020.
2. The security in paragraph 1 is to be provided by either:
    a. paying that sum into court; or
    b. delivering to the Registrar of the Court of Appeal a bank guarantee in that sum, given by a bank licensed to carry on a banking business in Australia under the *Banking Act* 1959 (Cth), payable to the Registrar without limitation as to time and otherwise in a form satisfactory to the Registrar.
3. If, by 4.30 pm on 6 July 2020 the appellants have not provided security as to $50,000 in accordance with paragraph 1, then the appeal shall stand dismissed.
4. If, by 4.30 pm on 28 August 2020 the appellants have not provided security in the sum of $75,000 in accordance with paragraph 1, then the appeal shall stand dismissed.
5. The appellants pay the respondents' costs of and incidental to the application for security for costs.
6. The respondents pay the appellants' costs of the application for a stay of the appeal.