SUPREME COURT OF QUEENSLAND

CITATION:	*Melksham & Anor v Archerfield Airport Corp & Anor* [2004] QSC 164
PARTIES:	**SIDNEY ALBERT MELKSHAM** (applicant) **ANGELA KAY BURGER** (applicant) **v** **ARCHERFIELD AIRPORT CORPORATION** ACN 081 619 123 (first respondent) **HUNTER AEROSPACE CORPORATION PTY LTD** ACN 008 592 112 (second respondent)
FILE NO/S:	SC No 3674 of 2004
DIVISION:	Civil
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 June 2004
DELIVERED AT:	Brisbane
HEARING DATE:	11 May 2004; 12 May 2004; 19 May 2004
JUDGE:	Holmes J
ORDER:	**That the applicants be relieved from the forfeiture of the lease referred to in the claim and statement of claim, subject to conditions to be settled.**
CATCHWORDS:	LANDLORD AND TENANT – COVENANTS – NOT TO ASSIGN OR SUBLET – WHAT CONSTITUTES ASSIGNMENT, SUBLETTING OR PARTING WITH POSSESSION WITHIN THE MEANING OF THE COVENANT – CONSENT OF THE LESSOR - where the lease contained a covenant which prohibited sub-letting without the lessor's consent - whether there was a breach of covenant LANDLORD AND TENANT – TERMINATION OF THE TENANCY – FORFEITURE - RELIEF AGAINST FORFEITURE – GENERALLY - whether the discretion to grant relief from forfeiture should be exercised *Airports Act* 1996, s 99 *Airports (Building Control)Regulations* 1996, r 2.02, r 4.01 *Property Law Act* 1974, s124(2)

Lam Kee Ying v Lam Shes Tong [1975] AC 247, considered
Shiloh Spinners Ltd v Harding [1973] AC 691, considered
Legione v Hateley (1983)152 CLR 406, applied

COUNSEL: C E Hampson QC, with Mr M Plunkett, for the applicants
P W Hackett for the first respondent
B D O'Donnell QC for the second respondent

SOLICITORS: Carswell & Co Solicitors for the applicants
William R Wilson & Associates for the first respondent
Allens Arthur Robinson for the second respondent

[1] On 14 August 1993, the applicants commenced to lease a hangar at the Archerfield Airport, described in these proceedings as Hangar 623, from the Federal Airports Corporation. In 1998, the lessor's interest was assigned to the first respondent, which at that time took a lease of the entire airport from the Commonwealth Government. The applicants' lease is for 25 years: it is to expire on 13 August 2018. On 20 April 2004, the first respondent re-entered the premises on the basis that the lease was forfeited by reason of a breach of a covenant contained in clause 4.1, which provides:

> "**Tenant not to alienate**
> Subject to the provisions of this clause 4 the Tenant may not:
> (a) sublet, part with possession of, or share possession of the Premises.. .."

The applicants' breach of covenant was said to have been their letting of the second respondent into possession of Hangar 623 prior to its entering into a sub-lease, for which, as at the time a notice to remedy breach of covenant was served, the applicants had not sought the first respondent's consent. Clause 4.13 of the lease prohibited subletting without provision to the lessor, in advance, of any reasonably required details of the proposed sub-lease, and the lessor's consent to it. The applicants now seek relief against forfeiture pursuant to s 124(2) of the *Property Law Act* 1974. The second respondent, the proposed sub-lessee, was joined as a party pursuant to an order I made at the commencement of the proceedings.

Background

[2] Up until September 2003, the applicants had sub-let Hangar 623 to the State of Queensland, for use by Queensland Emergency Services. After that body moved its operations elsewhere on the airfield, they were looking, through their agent, Mr Barry Gartshore, for another tenant. As at late November 2003, his only success had been an arrangement with the owner of an aeroplane for its storage in the hangar. But in December of that year, the second respondent, which runs an aircraft maintenance business, was given notice to vacate Hangar 113, the premises which it occupied at Archerfield Airport. Mr Prior, the first respondent's operations manager, had advised Mr Lucht, who managed the second respondent's Archerfield site, that there were no suitable premises available for the second respondent, but that the first respondent could construct a shed for it. That was not feasible, because the second respondent needed new premises more or less immediately; but Mr Lucht became aware of the availability of Hangar 623. He entered negotiations with Mr Gartshore, and the result was an agreement that the second respondent would enter into a sub-lease of Hangar 623 and would be allowed into the hangar pending execution of the sub-lease.

Was there a breach of covenant?

[3] On 22 March 2004, the first respondent served the applicants with a notice to remedy breach of covenant. The covenant was described in that notice as

> "the covenant by the lessee pursuant and subject to clause 4 of the lease, not to sublet, part with possession of, or share possession of the premises or give an licence, franchise or concession relating to the premises without first providing details of the proposal (including a copy of the proposed documentation) as the lessor may reasonably require and obtaining the written consent of the lessor ... granting a sublease, licence, franchise or concession to or sharing possession with or parting with possession in favour of, Hunter Aerospace Corporation Pty Ltd".

[4] Mr O'Donnell QC, for the second respondent, contended that permitting the second respondent to use and occupy the premises in anticipation of the sub-lease did not amount to parting with or sharing legal possession. He relied on this statement by the Privy Council in *Lam Kee Ying v Lam Shes Tong*:[1]

> "A covenant which forbids a parting with possession is not broken by a lessee who in law retains the possession even though he allows another to use and occupy the premises."

Here, Mr O'Donnell said, any possession by the second respondent was not exclusive so as to amount to the applicants' parting with legal possession; nor was there an exclusive possession joint with the applicants so as to amount to a sharing of legal possession.

The parties' dealings in relation to Hangar 623

[5] To determine whether the second respondent was given legal possession, it is necessary to go into what occurred in relation to the hangar in some detail. Mr Gartshore gave evidence. He said that he had spoken to representatives of the second respondent at the end of 2003, between Christmas and New Year. At the beginning of February he provided a key to enable the second respondent's staff members to look at the premises and measure them up, and in late February he permitted the second respondent to move some material into the premises. At about that time the aircraft being stored there was removed at the second respondent's request. The second respondent also did some electrical and painting work on the premises during this period, but it was not, Mr Gartshore said in his oral evidence, in occupation of the hangar. Rather tellingly, however, Mr Gartshore, in one of his affidavits, had earlier said this:

> "As I am not familiar with the terms of the lease between the Applicants and the Respondent, I did not appreciate that in parting

[1] [1975] AC 247 at 256.

> with possession of the leased premises the Applicants were in breach of the lease".

[6] Mr Gartshore said that the second respondent paid the sum of $8,000 per month to the applicants, but that it really constituted a payment by way of good will until such time as a sub-lease was executed. However, among the documents in evidence is a facsimile dated 5 January 2004 from the second respondent to Mr Gartshore confirming an intention to enter a lease for the hangar and enclosing a cheque "for the January 2004 rental". The letter undertakes to continue payment at that rate plus outgoings "pending formal execution of the lease". It requests that the name of the tenant shown on the lease be "BAE Systems Australia Ltd", the parent company of the second respondent, because a reorganisation is expected. Mr John Richards, of the firm of Carswell & Co, the applicants' solicitors, explained in evidence it was expected at that time that BAE Systems Australia Ltd would take over the assets and undertaking of the second respondent within the year.

[7] Mr Gartshore said in evidence that he had not himself given any instructions for the preparation of a sub-lease. However, that seems inaccurate. On 12 January 2004, he sent a facsimile to Mr Richards. It requested him to prepare a draft lease and provided the details of term and rent (which was, consistently with the earlier letter, $96,000 p.a.).

[8] The sub-lease was duly drawn. It gives as the commencement date 1 January 2004. So, indeed, does the copy of the now executed sub-lease. In evidence Mr Richards said that in fact that was contrary to his instructions and was a mistake; he had been told by facsimile on 6 January that the lease ought to reflect a commencing date of 1 March 2004. On 13 January 2004 the draft sub-lease, showing BAE Systems Australia Ltd as the sub-lessee, was sent to the second respondent. It was not conditional upon the first respondent's consent. The document was not then

executed; but a sub-lease executed immediately prior to trial, naming the second respondent as sub-lessee, was tendered. In its tendered form, the sub-lease contains a clause making it conditional upon the consent of the first respondent.

[9] At the end of January 2004, the second respondent set about moving its business from Hangar 113 to Hangar 623. Mr Steven Tilbee, its senior maintenance manager, was given the task of coordinating the move. According to his affidavit, he arrived at the airport on 27 January 2004 and spent about 5 weeks there, during the course of which he organised the supply of power and water and the fit out of the new premises, including the construction of a mezzanine floor and internal walls, and the moving of plant and equipment between the hangars.

[10] Mr Lucht gave evidence by affidavit and in person. The second respondent had, he said, contractual arrangements with the Department of Defence for maintenance of Iroquois helicopters. Among other contractual requirements it was necessary that the site be properly secured in order to protect computer equipment. Such equipment had been moved into Hangar 623 in mid February 2004, and steps were taken from then to ensure that no one came onto the premises during working hours without permission and that no one was able to gain access to them after working hours. The locks were changed so as to prevent unauthorised access, and would in fact have prevented even the applicants from gaining entry. (They were not, however, made aware of that fact.) Various other items were transferred from Hangar 113 to Hangar 623 in February 2004. On 1 March 2004, the second respondent commenced business operations from Hangar 623.

[11] Mr Richard Kent, the airport general manager, says that he became aware of the move under way when Mr Tilbee advised him of his involvement on 6 February 2004. On 13 February 2004, Mr Kent wrote to the applicants, drawing their

attention to clause 4.13, noting that there had been no request for consent to sublet and advising that subletting without such consent was a breach which would entitle the first respondent to terminate the lease. He invited the applicants to seek the first respondent's consent and to provide information for that purpose. It seems that there was some delay in dealing with the letter because of the applicants' absence overseas. A reply from Mr Richards, dated 10 March 2004, indicated that he had only then received it. He responded to the effect that negotiations with the second respondent were still under way and that the applicants would comply with the lease.

[12] On 9 March 2004, by a letter which may have crossed with Mr Richards' reply to their first letter, the solicitors for the first respondent pointed out that the second respondent appeared to be in possession of Hangar 623, whether or not a written lease had been entered, and demanded to know the basis of that possession. On 22 March, they repeated the assertion that the applicants had parted with possession. By a letter of 5 April, they asked directly for particulars of the date upon which the applicants had parted with possession of the premises and the terms on which that was done. Those particulars were not provided; on that and other occasions the response of the applicant's solicitors made no reference to the assertion that possession had been given, and continued to reiterate that a sub-lease had yet to be finalised, and that until it was entered there was no necessity to seek consent.

Breach of covenant

[13] The fact that the applicants did not deny, but rather studiously avoided addressing, the first respondent's assertions that they had given the second respondent possession of the premises is one of a number of factors which lead me to the conclusion that the covenant in the lease against parting with or sharing of

possession was breached, at the very latest, in March. In that month the second respondent was in physical possession of the hangar and had begun to carry on its business there. The locks had been changed and the premises secured so that only the second respondents could enter freely; that may not have been known to the applicants, but clearly there was nothing about their dealings which made the second respondent think that it was not entitled to do so.

[14] Mr Gartshore, at least when he made his affidavit, seems to have viewed the events prior to the entering of the sub-lease as amounting to parting with possession. The second respondent paid to the applicants, from 1 January, the amount of $8,000 per month; a payment it described as rent, and precisely the amount stipulated in the sub-lease as monthly rent. The sub-lease is expressed to run from 1 January, although, Mr Richards says, the intended commencement date was 1 March. Accepting that, it is reasonable to infer that 1 March, at the latest, was the date on which both parties agreed that the relationship of lessor and lessee was to commence; and although the sub-lease as finally executed remains conditional on the first respondent's consent, everything indicates that, as between them, they have acted consistently with its having effect from that date. In all the circumstances, the conclusion that the applicants had, at the very least, shared possession of the premises with the second respondent before the service of the notice to remedy on 22 March, and, accordingly, that there was a breach of covenant justifying service of that notice, and ultimately, re-entry by the first respondent, is inescapable.

The discretion to grant relief from forfeiture

[15] Section 124(2) of the *Property Law Act*, pursuant to which this application is made, gives the Court a discretion, "having regard to the proceedings and conduct of the parties under sub-section (1), and to all the other circumstances, [to] grant or refuse

relief, as it thinks fit". Sub-section (1) of s 124 deals with breach, notice to remedy, failure to remedy and forfeiture; further assistance as to what are "relevant proceedings and conduct of the parties" can be found in cases involving relief granted in equity. This passage from the judgment of Lord Wilberforce in *Shiloh Spinners Ltd v Harding*[2] gives some guidance:

> "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."

as do these criteria in the vendor/purchaser context set out in the judgment of Mason and Deane JJ in *Legione v. Hateley* [3]:

> "(1) Did the conduct of the vendor contribute to the purchaser's breach? (2) Was the purchaser's breach (a) trivial or slight, and (b) inadvertent and not wilful? (3) What damage or other adverse consequences did the vendor suffer by reason of the purchaser's breach? (4) What is the magnitude of the purchaser's loss and the vendor's gain if the forfeiture is to stand? …."[4]

Did the first respondent's conduct contribute to the applicants' breach?

[16] Mr Gartshore said he was unaware that the first respondent's consent to sub-letting was required, and that he knew of other instances in which the first respondent had apparently acquiesced to sub-letting although its consent had not formally been given. In one particular case, one of the applicants sublet a hangar without consent. Although the first respondent had advised in that case that it was withholding consent pending the supply of information, and no consent was in the event

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2 [1973] AC 691 at 723-724.
3 (1983) 152 CLR 406.

obtained, it took no steps to re-enter the premises or forfeit the lease. In response to that example, Mr Bird, one of the directors of the first respondent, said that although there was no answer to the first respondent's request for information, the lease itself in that case was to expire on 30 June 2004 and it had not been thought worthwhile to take any further steps. In addition, the hangar involved was on a very different site from Hangar 623; it had no access to the airport aprons or runways and its occupation did not raise the same security concerns as applied to Hangar 623.

[17] There seems, according to Mr Kent's affidavit, to have been another occasion during the first respondent's term as lessor on which the applicants entered a sub-lease without consent: at the expiration of the State of Queensland's first sub-lease of Hangar 623, the applicants entered a further sub-lease with it for which consent although sought, had not been given. No action was taken by the first respondent in that instance; it perceived Queensland Emergency Services, Mr Kent said, as a "blue-ribbon" tenant. The applicants had, however, been generally unhelpful in relation to sub-leases; when the first respondent took possession of the airport it sought to establish the details of any existing sub-leases and for that purpose asked its tenants to provide copies of relevant documents. The applicants had never complied.

[18] I do not consider that the first respondent's apparently more relaxed approach to sub-letting on other occasions can assume much significance in this case, particularly when one has regard to the alacrity with which Mr Kent acted to dispel any notion that the first respondent's consent could be assumed. As early as 13 February 2004, he made it clear that the first respondent expected to receive a request for consent to a subletting and be provided with the necessary information

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[4] at p449.

for its consideration. That position was maintained in its subsequent correspondence. There was no encouragement given to the applicants to think that it could allow the second respondent to take exclusive or shared possession of the premises in the interim, as it appears to have done at least in the second half of February, and certainly from 1st March. The lapse in time between the sending of Mr Kent's letter and its coming to Mr Richards' attention was unfortunate, because its contents may have made the applicants think more carefully about the implications of its actions, but it can hardly be laid at the first respondent's door.

Was the breach deliberate?

[19] Against the application for relief from forfeiture, Mr Hackett, for the first respondent said that the applicants' conduct was a deliberate flouting of the requirements of the lease. Although they had repeatedly been advised that the second respondent was not entitled to occupy the premises without the first respondent's consent, they did not provide the requested details of the proposed arrangement. Even when a copy of the sub-lease was eventually provided to the first respondent on 20 April, the detail of the rent payable (which was relevant to rent review under the applicants' own lease) was deleted from it. And it was inconsistent with the sub-lease as executed: it contained no provision making it conditional on the first respondent's consent, and the sub-lessee was shown as BAE rather than the second respondent.

[20] The applicants' conduct as a whole, it was submitted, was a wilful non-compliance with its obligations, consistent with other breaches by it: its failure to seek consent on other occasions of sub-letting, its storage of the aircraft in Hangar 623 from November to February without the first respondent's permission, and its failure to provide copies of sub-leases to the first respondent.

[21] Both the applicants and the second respondent contended that any breach of the lease was not deliberate. The applicants had not appreciated that interim arrangements to allow the second respondent into the premises amounted to a sharing of, or parting with, possession. It had always been intended that consent would be sought for the sub-lease. In a letter of 17 March and in subsequent letters the applicant's solicitors had raised the possibility of a meeting to discuss the first respondent's concerns.

The applicants' conduct and intentions

[22] The position both the applicants and the second respondent seems to have assumed throughout was that as long as the sub-lease was not signed, there was no reason for them to ask for consent and hence nothing of which the first respondent could complain. The first part of that reasoning might have some force, but it overlooks the question of whether there was a breach of the lease in granting possession of the premises to the second respondent. That was an issue not addressed at any stage in the responses of the applicants to the first respondent's inquiries; probably because they were oblivious to the issue originally, and then later chose not to answer because it was patent that the breach had occurred.

[23] It was, in my view, intended when negotiations began for the sub-lease that the second respondent would be permitted to enter into possession of the premises; and by the time Mr Richards responded on 10 March to Mr Kent's letter the applicants were well and truly in breach of the lease. I do not, however, think that the original letting of the second respondent into possession, although itself an intended act, was perceived by the applicants as a breach of the lease; but at least from 9 March there was, I think, a consciousness that they were in breach, combined with an optimism that any difficulty could be resolved. That optimism was not entirely unfounded:

the second respondent and its parent company were reputable entities; the second respondent had been an apparently welcome tenant at the airport since 1992.

[24] My impression is that the arrangement as originally made with the second respondent was one entered in the belief that it would encounter no obstacle; that when it was understood that the first respondent was not acquiescent the applicants became evasive about what had been agreed; but it is not a case of an intentional defaulting on obligations from the outset, more an instance of carelessness and a too-late realisation of the implications. That impression is not altered by the other examples pointed to by Mr Hackett. The other instances where sub-letting proceeded without consent are not inconsistent with the view that the applicants were genuinely (although unsatisfactorily) vague about what was required of them; the permitting of the aircraft owner to store his plane in Hangar 623 would not, on the authority of *Lam Kee Ying*, appear to have constituted any breach of the lease; nor did the first respondent point to any obligation on the part of the applicants to provide copies of sub-leases entered before it began its lease of the airport.

Was the breach serious?

[25] The first respondent maintained that the applicants' breach had serious implications for it, since it entailed moving into Hangar 623, without providing proper information, a tenant which was neither responsible in its conduct nor suitable, given its operations, for the site; both of which features were evidenced by its conduct in the period between 1 January 2004 and the re-taking of possession on 19 April 2004, and again on 12 May, during the hearing of this application.

[26] The first respondent's lease was for 50 years, with a further option for a 49 year period. It was particularly important, Mr Bird said, that safety obligations were met

to ensure that the first respondent retained the approval and good will of the Commonwealth as head lessor. The hangar at site 623 carried security concerns because it gave onto the airport aprons and runways and other airport facilities. That made it essential that the first respondent was kept informed about any proposed use of the area.

The use of areas not within the lease

[27] The second respondent posed a risk to the first respondent because of its unsuitability as a sub-lessee in that particular location in the airport; it was a concern that its activities had spilled out onto the common area, and would continue to do so. The site it had previously occupied at Hangar 113 included both the hangar itself and two areas of land around it on which equipment could be kept. The relative sizes of the two sets of premises were significant: the floor space of Hangar 113 was 1,218 m^2 while the additional areas outside the hangar were 1,766 m^2 and 521 m^2 in size. The area of Hangar 623 was 852 m^2, without any useable area in addition to the hangar space itself. At Hangar 113, the second respondent stored outside the hangar a shipping container and an aircraft jig, neither of which would fit into Hangar 623.

[28] The second respondent's inability to confine its operations to Hangar 623 was evidenced by the fact that it had left equipment on the concrete apron outside Hangar 623, which was not part of the leased area. It had also left a helicopter parked on a helipad area outside the hangar which had previously been used, by special dispensation, by Queensland Emergency Services and which again was not within the rights conferred by the lease. After this transgression came to light, the first respondent gave it permission over a three day period to work on a helicopter

on the helipad, but that permission was not extended; the helicopter on the helipad was an obstacle to runway use.

[29] That state of affairs produced a letter dated 3 March 2004 from Mr David Bannister, production controller for the second respondent, complaining of the difficulty imposed on the second respondent by its inability to use the helipad:

> "It is with regret that we were not informed of this inconvenience prior to accepting a lease on this hangar, as being able to operate the aircraft from in front of the hangar was one of the redeeming features in deciding on this location.
> ...
> It now appears that, compared to our previous hangar, we will have further to transport our aircraft for the purpose of ground running and test flying. Without this easy accessibility it will mean that a major component of our military contract will now come under undue pressure with the extra time involved in transversing [sic] the airfield.
> ...
> To use the present air field ground run pad and helipads will require extensive and unrealistic periods of aircraft towing. Helicopters have to be towed very slowly due to the requirement for a walker to support the rear tail structure as compared to fixed wing aircraft which require only one person when towing. This slow pace in moving helicopters over such a large distance not only encroaches of airfield movements but is an inefficient means of labour resources, can be detrimental to other aircraft operations and, places undue pressure on surface air traffic controllers. As well as the aircraft there is also much ground support equipment which will have to be transported back and forth to the aircraft location. Further is the danger that could eventuate whilst using distant airfield pads when helicopter, personnel and equipment are caught in a fast rising storm which, as you know, occurs quite frequently during all seasons in Brisbane."

The ground run pad alluded to in Mr Bannister's letter as the alternative area for testing is at the opposite side of the airport from Hangar 623. His references to having to move aircraft round the airfield and the risks involved in doing so were relied on by the first respondent as further demonstrating the risks inherent in the second respondent's occupation of Hangar 623.

[30] A similar concern was that the second respondent's concurrent storage of material at Hangar 113 would entail travel between that hangar and Hangar 623, causing wear and tear on the taxi ways and aprons of the airport. According to Mr Bird, the second respondent had already moved equipment from Hangar 113 to Hangar 623 using the airfield runways and had caused damage to the tarmac. He was concerned that future incidents of ferrying equipment might also do similar damage.

[31] Mr Lucht, in explaining the second respondent's position, said that the company's requirements in the two different premises were different. In Hangar 113 it had been necessary to accommodate the lessor's aircraft, which took up about a third of the floor space. The company at the time it occupied Hangar 113 was working on up to 6 aircraft; under its current contracts it was not contemplated that more than 3 aircraft would be worked on at any given time. Nor was the jig needed to carry out that work, so there was no occasion for it to be moved to Hangar 623. If any equipment were needed from the Hangar 113 site, it could be obtained by road; there was no need to use the taxi way.

[32] Mr Lucht said that he first became aware through discussion with Mr Bird on about 24 April that the area outside Hangar 623 did not form part of the leased premises. Since that date the equipment which had been placed out there, which consisted of some rotor boxes and transmission round containers as well as some vehicles, a forklift, tow-motor and company utility, had been moved inside the hangar.

[33] He and others working for the second respondent had thought from seeing the emergency services helicopter using the helipad outside the terminal that it also was available for use, but once he was told otherwise, the second respondent did not used it again without approval. The helipad was not essential to the functioning of the second respondent. Instead, helicopters could be moved along a taxi way and

around the airport to the ground run pad. As to Mr Bannister's complaints of that process, Mr Lucht said, in effect, that the former had been engaged in some special pleading, and that the difficulties he had foreshadowed were unlikely to come to pass. The second respondent would not need to use the ground run pad more than 3 days per month, and the taxi ways were not very busy.

[34] The hearing of the application was re-opened to enable the first respondent to file and read further affidavit material dealing with what it said was another instance of the second respondent's misuse of the apron area outside the hangar during the hearing. Mr Bird deposed that on 12 May, the second day of the hearing, at about 3:30pm, he saw crates he thought to be wing boxes on the airport taxi way in front of the hangar. Twenty minutes later he noticed that they had been removed. He was informed by the airport foreman that those boxes had been in the same position at 9am and 11:30am on that day. Mr Bird said that he also looked into the hangar 623 and saw that there were four helicopter fuselages inside it.

[35] In material filed in response, Mr Bruce Coates, an aircraft maintenance engineer employed by the second respondent, said that the boxes were in fact main rotor blade boxes, and that they had indeed been placed outside the hangar on 3 separate occasions on 12 May. On the first two occasions they had been placed outside for approximately 15 minutes to give more space for work on helicopters. On the third occasion the boxes had been left outside "about lunch time" so that some equipment could be shifted; but he had forgotten to return them to the hangar until 3:30. Mr Lucht deposed that he had made it very clear to his staff that under no circumstances could items be placed outside on the concrete apron. The hangar had now been rearranged to ensure there was sufficient room for the boxes even when full repairs were taking place. As to Mr Bird's observation of helicopter fuselages inside the

hangar, Mr Lucht said that there were three fully assembled helicopters inside the hangar; the fourth was merely being stripped for spare parts.

Unauthorised building work

[36] Another complaint made by the first respondent was that the second respondent had undertaken unauthorised building work. The site leases contain a requirement that any alterations first receive the first respondent's consent. In addition, s 99 of the *Airports Act* 1996 prohibits the carrying out of any building activity without approval, which, pursuant to reg 2.02 of the *Airports (Building Control) Regulations* 1996, must be sought from the airport building controller: in this case the Airport Environmental Protection and Building Control Office, an agency which, pursuant to Reg 4.01, acts on the Commonwealth's behalf.

[37] In March 2004, Mr Kent said, the second respondent had erected a chain-mesh fence over two metres high at site 113, in order to secure the jig and other equipment. The construction of such a fence constituted a building activity, requiring the approval of both the first respondent and the airport building controller, neither of which had been obtained.

[38] Mr Lucht said that he had made an application for approval on 12 March, the day construction of the fence was to commence. The application, which was put into evidence, is addressed to the airport building controller, although on Mr Lucht's account it was actually sent to the first respondent. On 17 March the first respondent required the lessee of Hangar 113 to have the fence removed. The second respondent promptly took it down. The first respondent then gave permission for the construction of a temporary fence. It was not entirely happy with the result:

notwithstanding that the fence was to be temporary, a six-foot high chain mesh fence bolted to a concrete area was installed.

[39] Similarly, the first respondent complained, the second respondent had undertaken unauthorised building works in Hangar 623, in the form of the installation of the mezzanine storage area, the construction of internal walls and the electrical installations, without seeking or obtaining the approval of the first respondent or the airport building controller. In response, Mr Lucht said that in early April he had had a meeting with the relevant officer of that agency and that steps were now being taken for the obtaining of the requisite approval.

The consequences of the breach

[40] The applicants' breach in giving possession of the premises to the second respondent without explanation, let alone permission, has, I think, rightly been regarded by the respondent as serious. However it does not seem to have caused any significant financial loss for the first respondent. There is the question of cost of repair to the runway damaged in the course of the second respondent's move between hangars; but that no doubt will be met by the second respondent. No question has been raised as to its means or financial stability. The first respondent took umbrage but no actual harm at the unauthorised building works. More significant are the airport safety issues: the first respondent's concerns about the second respondent's tendency to appropriate bits of the tarmac not covered by the lease are understandable, and are likely to have been made more acute by the further incident occurring during the course of the hearing.

[41] But what falls to be considered, in terms of the consequences of the applicants' breach, is the second respondent's conduct to date, and the inconvenience and risk it

has caused; not any risk it might pose in the future. Importantly, it is not a necessary consequence of relief from forfeiture that the second respondent will become a sub-lessee. The applicants are still under an obligation to seek the first respondent's consent, which is necessary both under its own lease and under the sub-lease. Questions about the second respondent's suitability longer-term as a tenant for the site can be canvassed at that point. To date the second respondent's presence has, quite justifiably, been a cause of concern to the first respondent, but it seems improbable that any lasting damage has been done.

Are the consequences of forfeiture disproportionate to the breach?

[42] Upon forfeiture, the applicants stand to lose the benefit of the remaining 14 years of the lease. Its terms required the applicants upon its commencement to construct a hangar on site 623, a requirement no doubt reflected in the respective rentals charged for site and hangar. Tax invoices put into evidence show that the applicants pay rent on the site at a rate of $875.44 per month, with outgoings such as rates and electricity adding another $1,030. Under the proposed sub-lease, which presumably reflects market rates, the second respondent is to pay rent on the hangar of $8,000 per month plus utility charges. The applicants' potential profit from sub-letting over the remaining life of the lease is obviously significant, even allowing for the prospect that if the proposed sub-lease does not receive consent another tenant will have to be found.

[43] There is also the question of capital as well as income loss. Mr Gartshore was director of a company which engaged in hangar construction. He said that the hangar on site 623 had been constructed by the applicants in 1993 at a cost of $375,000, and that subsequently amounts totalling $150,000 had been spent on it. He thought that the current cost of replacing it would be about $880,000. The

hangar could be dismantled, but a concrete load-bearing wall would have to be cut into pieces and would have to be re-constructed if any re-building of the hangar were to occur. The timber work inside the hangar would have to be dumped. In this respect, Mr Hackett, for the first respondent, pointed out that the applicants could not complain of a loss on the construction costs of the hangar, because those costs were exceeded by some hundreds of thousands of dollars by the rent received in the nine years that they leased the premises to the Queensland Emergency Service. Nonetheless, the applicants have a substantial asset in the hangar, the value of which will be largely lost to them if relief is not granted.

[44] It was suggested by the applicants and the second respondent that the first respondent stood to make a windfall gain from forfeiture. If the lease were to be forfeited the hangar could be re-let at full market rental, presumably something of the order of the $8,000 per month agreed by the second respondent. But the terms of the lease permit the applicants to remove the hangar, and indeed it has been required by the first respondent to do so. It is a matter of speculation as to whether it would or would not remain on the site in the event of forfeiture, and there is no evidence that the first respondent has any intended use for it.

[45] The second respondent's perspective was pressed by its counsel, Mr O'Donnell: if the lease were to be forfeited it would lose any rights under the sub-lease. Mr Lucht, in an affidavit, expressed his concern that if the second respondent were not able to continue its operations from the premises, its parent company's contracts with the Department of Defence would be at risk, as would the jobs of its 20 employees at the site. The first respondent sought to counter that concern with an offer made at the start of the hearing to permit the second respondent to remain for 6 months while it sought alternative premises or another hangar was built for it by the first

respondent. According to the second respondent, that offer was little consolation: it had anticipated six years in the premises. It would lose the benefit of alterations it had made to the building with the construction of the mezzanine floor and the installation of wiring and air lines.

[46] The second respondent's concern as to its business operations and the maintenance of Defence Department contracts ought, one expects, to be alleviated somewhat by the prospect of six months within which to continue operations and seek alternative premises. And the losses which it identifies may be suffered in any event depending, in the first instance, on whether the first respondent gives its consent to the sub-lease and if it refuses, on whether any application in respect of that refusal is successful. It is true, however, that should relief from forfeiture not be granted it will lose any prospect that it has of continuing in the premises in the longer term. While its conduct to date has not been to the first respondent's satisfaction, there is, nonetheless, I think, a general readiness to comply (exhibited in the prompt removal of the offending fence, the acceptance of the unavailability of the helicopter pad, and the willingness, albeit with one aberration, to cease use of the apron for storage) which might eventually lead to its satisfying the first respondent of its good intentions. That is a matter of conjecture, but its existence as a possibility is a factor, albeit minor, in favour of relief.

Conclusion

[47] This seems to me a case in which the applicants' breach, while it cannot properly be characterised as trivial, was not committed in a calculated disregard of their obligations under the lease. They were, rather, careless of those obligations, and their responses to the first respondent's inquiries were unsatisfactory. Some of that carelessness seems to be due to the difficulty of both the applicants and the second

respondent in coming to terms with the reality of a more commercial and tightly controlled environment than they had been used to under the previous lessor. Nonetheless, having regard to the lack of any lasting consequence, it seems to me that forfeiture is a disproportionately punitive outcome. Considering all the factors I have identified, the balance falls in favour of the grant of relief.

[48] However, any order ought to be conditional on the rectification of the current situation in which the applicants remain in breach of the lease as long as the second respondent remains in possession without a valid sub-lease. What I have in mind is a set of conditions which at a minimum requires the applicants to do what is required to seek the first respondent's consent to the sub-lease. It may be necessary to factor in the possibility of further relief being sought against any unreasonable withholding of consent, and to require that if such consent is not ultimately forthcoming, the applicants re-take possession of the premises from the second respondent; or it may be that suitable undertakings can be crafted.

[49] I will invite counsel to discuss appropriate conditions, and subject to their satisfactory formulation will order that the applicants be relieved from forfeiture of the lease referred to in the claim and statement of claim. As to costs, it seems to me that, the breach having been found, the applicants ought to pay the first respondent's costs, but I will hear counsel's submissions on the point.