

# SUPREME COURT OF QUEENSLAND

CITATION: *Ford v Jewel in the Crown Investments Pty Ltd & Ors* [2014] QSC 42

PARTIES: **Michael Myles Ford and Elizabeth Ford as trustees of the Birkbeck Staff Retirement Fund**

(Plaintiff)

v

**Jewel in the Crown Investments Pty Ltd (ACN 145 649 734) (in liquidation)**

(First Defendant)

and

**John Maclaine Gough and Norma Patrica Groves**

(Second Defendant)

and

**Michael Myles Ford and Elizabeth Ford as trustees of the Birkbecks Staff Retirement Fund**

(First Defendants by Counter Claim)

and

**Ballyclare Pty Ltd (ACN 010 058 018) as trustee for the Birkbeck Jewellers Trust**

(Second Defendant by Counter Claim)

and

**Birkbeck Properties Pty Ltd (ACN 009 950 467)**

(Third Defendant by Counter Claim)

FILE NO/S: BS 6836 of 2012

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 10 March 2014

DELIVERED AT: Brisbane

HEARING DATE: 10 March 2014

JUDGE: Philip McMurdo J

ORDER:

- 1. The Second Defendants pay to the plaintiffs, Mr and Mrs Ford, as trustees for the Birkbeck Staff Retirement Fund, the sum of \$1,021,507.26**
- 2. The Second Defendants pay to Birkbeck Properties Pty Ltd the sum of \$736,660.44**
- 3. The Second Defendants pay to the plaintiffs, Mr and Mrs Ford, as trustees for the Birkbeck Staff Retirement Fund, their costs of the proceedings between them on an indemnity basis.**
- 4. The Second Defendants pay to Birkbeck Properties Pty Ltd their costs of the proceedings between them on an indemnity basis.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH, DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – APPLICATION TO LEASES – where the lessee abandoned the premises prior to the termination of the lease – whether the lessee repudiated the lease – whether the lessor was entitled to damages.

LANDLORD AND TENANT – RENT – BREACH OF COVENANT TO PAY – ACTIONS TO RECOVER RENT OR DAMAGES – DAMAGES – where the lessee failed to pay rent and outgoings – where the lease was guaranteed by the lessee – whether the lessor was entitled to damages.

*Shevill v The Builders Licensing Board* (1982) 149 CLR 620

COUNSEL: FG Forde for the plaintiff and second and third defendant by counter claim

No appearance by the second defendant

SOLICITORS: Gall Standfield & Smith Solicitors for the plaintiff and second and third defendant by counter claim

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HIS HONOUR: This is the trial of the plaintiffs' case against the second defendants, the plaintiffs being Mr and Mrs Ford. It is also the trial of a claim by Birkbeck Properties Propriety Limited, a company controlled by Mr and Mrs Ford, in its proceeding against the same defendants, Mr Gough and Ms Groves. Until  
5 recently, Mr Gough and Ms Groves were legally represented. They have not appeared at this trial. The court has received correspondence from them in the period leading up to the trial which is to the effect that they did not intend to appear. The respective claims against them by Mr and Mrs Ford and Birkbeck, insofar as there were facts still to be proved having regard to what was admitted on the pleadings,  
10 have been supported by evidence from Mrs Ford.

The claim by Mr and Mrs Ford against them is pursuant to the terms of a guarantee for a loan made by Mr and Mrs Ford to the first defendant in the proceedings, which purchased a business with which Mr and Mrs Ford had been associated. The  
15 pleadings contain admissions by Mr Gough and Ms Groves of the relevant loan transaction, the making of the loan, the borrower's default and the existence of the guarantee given by them in favour of the plaintiffs. The case pleaded by the second defendants was one which effectively relied upon what had been pleaded by the first defendant, which broadly speaking was a case in the nature of misrepresentation  
20 claims against the plaintiffs' side of the transaction, by which the first defendant acquired the business. Those various matters raised by the defendants were issues on which the defendants bore the onus of proof.

What Mr and Mrs Ford had to do at this trial, absent any evidence against them in  
25 relation to those defences, was to prove the up to date balance of the debt. I am satisfied from Mrs Ford's evidence that the plaintiffs have done so and that they, that is Mr and Mrs Ford, are entitled to a judgment in the amount which they seek. Therefore, there will be a judgment whereby the second defendants, Mr Gough and Ms Groves, are ordered to pay to the plaintiffs, Mr and Mrs Ford, as trustees of the  
30 Birkbeck Staff Retirement Fund, the sum of \$1,021,507.26.

The claim by Birkbeck Properties Proprietary Limited is under another guarantee which was given by Mr Gough and Ms Groves to support a lease by Birkbeck to Jewel in the Crown Investments of the premises upon which the business was  
35 conducted.

The defendants to Birkbeck's claim have not pleaded a case in response to Birkbeck's pleading. But in any case, the facts of the lease, the guarantee of that lease and the lessee's default and abandonment of the premises is well established by  
40 Mrs Ford's evidence. In particular, it is established that the lessee abandoned the premises and stopped paying rent and outgoings in or about March 2013 ahead of the termination by Birkbeck of the lease on or about 7 May 2013.

Mrs Ford gave her evidence on this claim by reference to a schedule of loss, which  
45 has been marked exhibit 5. That is in the form of a document showing a calculated loss from 1 April 2013 through to 31 October 2015, which but for the early termination of the lease would have been the date of the expiry of its initial term of five years.

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More correctly, however, Birkbeck's claim must be for the outstanding rent and outgoings, guaranteed as they were by Mr Gough and Ms Groves, up to the termination of the lease on or about 7 May last year and thereafter against those defendants as parties obliged to meet the first defendant's, that is the tenant's, obligation to pay damages for the loss of the lease.

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I had considered whether the claim by Birkbeck might be affected by *Shevill v the Builders Licensing Board* (1982) 149 CLR 620. But in my conclusion it is distinguishable because here there was a repudiation by the lessee by its abandonment of the premises prior to the termination of the lease.

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Therefore, I am satisfied that Birkbeck became entitled to damages for the loss of the contract which was the lease. In turn, the terms of the guarantee, signed by Mr Gough and Ms Groves in relation of the lease, make them liable for whatever damages are recoverable by the landlord against the tenant.

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The evidence of Mrs Ford is that the premises had been impossible to relet for a number of reasons, the most substantial of which appears to be the downturn in the rental market in this part of Southport due to work being done on the light rail project, but perhaps for other circumstances of the market. Her evidence explains that attempts have been made to relet the premises but to no avail.

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The claim by Birkbeck ultimately makes some allowance for the contingency that the premises might be relet prior to 31 October 2015. The amount of that allowance, I'm satisfied, is a reasonable one.

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Ultimately, therefore, the amount of Birkbeck's claim would be the same if it were set out as, more precisely, it should have been, in a way which distinguished the liability for rent and outgoings up to the termination of the lease and a liability for damages after that date. For these reasons, then, there will be a judgment whereby Mr Gough and Ms Groves are ordered to pay to Birkbeck Properties Proprietary Limited the sum of \$736,660.44.

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As to costs on the claim by Mr and Mrs Ford, the judgment which they have obtained is more favourable than an offer to settle, which they made on 26 June 2013. Unless another order is appropriate in the circumstances the plaintiffs should have their costs on the indemnity basis under rule 360. I do not see that any order other than that is appropriate. It will be ordered then that the second defendants pay to the plaintiffs their costs of the proceedings between them on the indemnity basis.

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On the claim by Birkbeck Properties, clause 23 of the guarantee of the lease provides that the defendants should pay on a solicitor and own client basis the costs of the enforcement or attempted enforcement of any rights under the guarantee. Because of that contractual entitlement of Birkbeck Properties, it is appropriate that it recover its costs, in the exercise of the court's discretion, on an indemnity basis. It will be

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ordered that the defendants, Mr Gough and Ms Groves, pay to Birkbeck Properties Propriety Limited its costs of the proceedings between them on the indemnity basis.