SUPREME COURT OF QUEENSLAND

CITATION:	*Meridien Airlie Beach Pty Ltd (Receivers and Managers Appointed) (in liq) & Anor v Karamist Pty Ltd* [2015] QCA 192
PARTIES:	**MERIDIEN AIRLIE BEACH PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)** ACN 101 370 763 (first appellant) **MERIDIEN AB PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)** ACN 101 370 772 (second appellant) **v** **KARAMIST PTY LTD** ACN 010 664 249 (respondent)
FILE NO/S:	Appeal No 11490 of 2014 SC No 9458 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2014] QSC 317
DELIVERED ON:	13 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	13 August 2015
JUDGE:	Margaret McMurdo P and Ann Lyons and North JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	LANDLORD AND TENANT – TERMINATION OF THE TENANCY – FORFEITURE – RELIEF AGAINST FORFEITURE – RELIEF UNDER STATUTE – GENERALLY – where the appellants and respondent entered into two subleases for recreational purposes – where the appellants are the sublessors and the respondent is the sublessee – where the respondent defaulted in payment of the deferred rent within the required timeframe – where the appellants lodged notices of surrender of the subleases – where the respondent eventually paid the deferred rent – where the appellants refused to reinstate the subleases – where the respondent was successful in its application for relief against forfeiture pursuant to s 124 of the *Property Law Act* 1974 (Qld) – where the appellants are appealing

the decision of the primary judge – whether the primary judge misdirected himself in relation to the legal test to be applied in cases of relief against forfeiture – whether the primary judge failed to provide adequate reasons in granting relief to the respondent – whether the primary judge failed to find against the weight of evidence in circumstances where there was insufficient evidence to support the respondent's application

Property Law Act 1974 (Qld), s 124

Ace Property Holdings Pty Ltd v Australian Postal Corporation [2011] 1 Qd R 504; [2010] QCA 55, considered
Capital Projects (Qld) Pty Ltd v Trust Company of Australia Limited [2009] 2 Qd R 313; [2008] QSC 105, applied
Hace Corporation Pty Ltd v F Hannan (Properties) Pty Ltd (1995) 7 BPR 14,326, applied
Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd [1983] 3 NSWLR 378, followed
Loader v Moreton Bay Regional Council (2013) 196 LGERA 207; [2013] QCA 269, considered
Minister for Lands ands Forests v McPherson (1991) 22 NSWLR 687, considered
Platt v Ong [1972] VR 197; [1972] VicRp 18, considered
Shiloh Spinners Ltd v Harding [1973] AC 691, considered
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, followed
Sunland Group Ltd v Townsville City Council & Anor [2012] QPELR 449; [2012] QCA 30, considered
Tannous v Cipolla Bros Holdings Pty Ltd (2001) 10 BPR 18,563; [2001] NSWSC 236, considered
Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315; [2003] HCA 57, considered
World by Nite Pty Ltd v Michael [2004] 1 Qd R 338; [2003] QSC 52, considered
Wynsix Hotels (Oxford St) Pty Ltd v Toomey (2004) 17 BPR 32,663; [2004] NSWSC 236, considered

COUNSEL: A I O'Brien for the appellants
P D Tucker for the respondent

SOLICITORS: McKays Solicitors for the appellants
Porter Davies Lawyers for the respondent

[1] **MARGARET McMURDO P:** The appeal should be dismissed with costs for the reasons given by Ann Lyons J.

[2] **ANN LYONS J:** On 31 October 2014, the respondent (Karamist) sought and obtained relief against forfeiture pursuant to s 124 of the *Property Law Act* 1974 (Qld) in relation to the subleases of two berths in a marina located in the Port of Airlie Complex at Airlie Beach in North Queensland.

[3] The appellants (Meridien) appeal that decision on the basis that, in granting the relief, the primary judge erred in law or otherwise misdirected himself by failing to give

adequate reasons for his decision to grant the relief and by finding against the weight of the evidence in circumstances where there was insufficient evidence to support the conclusion that Karamist's application for relief against forfeiture ought be granted. Meridien also argues that the primary judge fettered his discretion in the approach that he took in requiring that Meridien had to show "there were very exceptional or, at least, exceptional circumstances" for Karamist's application to fail.[1] Counsel for Meridien argues that the primary judge essentially reversed the onus in circumstances where the discretion is at large and it was for Karamist to prove that it was in fact entitled to the relief sought.

Background

[4] The two berths are the largest non-commercial marine berths in the Port of Airlie Complex. Meridien are the lessees of the Port of Airlie Complex under a long-term lease and are the sublessors under the two subleases.

[5] Paul Barrett is the sole director of Karamist. Karamist had entered into the two subleases on or about 23 February 2009. The terms of both subleases were from February 2009 to November 2108 or almost 100 years. Karamist had also purchased land adjacent to the berths for more than $2,000,000 and planned to construct a residential building that would have access to both berths.

[6] The rent payable for the entire term of each sublease was $225,000 and Karamist paid all of the rent except for the deferred rent of $50,000 for each sublease ($100,000 in total). The deferred rent was not payable until Meridien provided Karamist with a notice of intention to commence construction of pontoons adjacent to the berths. The deferred rent was then payable within three business days of the giving of notice and was to be held in trust until practical completion of the pontoon.

[7] On or about 11 May 2012, Meridien gave Karamist a notice of intention to commence construction of pontoons and requested the payment of $100,000 (that is, the deferred rent). At the time the notice was given, Meridien had gone into liquidation and receivers and managers had been appointed.

[8] Karamist did not pay the requested amount for more than two years.

[9] On 17 April 2014, Karamist received notices to remedy breaches of covenant with respect to the failure to pay the outstanding sum of $100,000. Payment was required within 45 days. Mr Barrett informed Meridien's lawyers that he was in the process of selling two properties and would forward payment upon settlement. Copies of the contracts of sale were then provided on 26 May 2014 and 11 June 2014.

[10] On 12 June 2014, the lawyers for Meridien gave notice of termination of the subleases due to non-payment of the deferred rent.

[11] On 17 June 2014, Karamist paid $100,000, which was the full amount of the deferred rent, into Meridien's lawyers' trust account.

[12] On 25 June 2014, Meridien lodged notices of surrender of the subleases.

[13] On 3 July 2014, the lawyers for Karamist wrote to the lawyers for Meridien requesting that Meridien accept payment of the deferred rent, reinstate the subleases and withdraw the surrender of the subleases.

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1 ARB 21 ll 33-34.

[14] On 11 July 2014, Meridien's lawyers also sought the overdue outgoings of $16,060.18 in respect of each sublease and subsequently requested further amounts for costs. From 24 July 2014 to 12 September 2014, Karamist made various offers but negotiations broke down.

[15] On 3 October 2014, an application for relief against forfeiture was filed by Karamist. Karamist also paid into its solicitor's trust account all outstanding amounts as requested by Meridien.

[16] The application was heard on 31 October 2014.

Counsel's submissions in relation to the factual circumstances before the primary judge

[17] At the hearing of the application, counsel for Karamist argued that it failed to pay the requested amount due to a lack of liquidity at the time and that whilst the sole director, Paul Barrett, made efforts to sell real property to pay the requested amount, caveats prevented him from being able to sell the property. When the caveats were removed in February 2014, contracts of sale were entered into soon afterwards. Counsel for Karamist also outlined the steps taken to pay the deferred rent as well as the efforts made to negotiate the new subleases. Counsel for Karamist also referred the primary judge to the refusal by Meridien's lawyers to reinstate the subleases even after the deferred rent was paid.

[18] Counsel for Karamist had argued that, although the pontoons reached practical completion in January 2013, there was no evidence that the requisite notices had been given to Karamist to enliven the obligation to pay the relevant outgoings as requested and there was no indication given as to what other costs had been incurred. Meridien had argued that all outstanding amounts had not been paid, as no attempt had been made to cover outgoings and Meridien's unpaid legal costs. It is also argued that there was no evidence that Karamist could meet future obligations under the sublease.

[19] Counsel for Karamist argued that not only had Karamist paid the entirety of the rent payable under both subleases but that Mr Barrett had kept Meridien informed in relation to the steps he was taking to improve Karamist's liquidity. Indeed, it would seem that Mr Barrett deposed that from the sale of the real property Karamist was able to satisfy its financial obligations, that it was solvent and that it had never been sued or received any other demand for payment.

[20] Counsel for Karamist submitted to the primary judge that, although the Meridien companies were in liquidation and Karamist required leave to proceed in respect of the application, leave is frequently granted where the rights asserted cannot be accommodated through a proof of debt and if there are reasonable prospects of success. It was argued that this was an appropriate case for granting leave to proceed, as the rights in issue were proprietary interests under long-term leases and it was unopposed by the liquidator of Meridien.

Counsel's submissions in relation to the relevant principles

[21] At the hearing before the primary judge, counsel were in agreement as to the relevant principles and they are not in contention in this appeal. Counsel for Karamist had argued that "Relief from forfeiture is traditionally granted where the object of the transaction, and the right to forfeit, is essentially to secure the payment of money."[2]

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2 ARB 681.

Furthermore, relief is usually granted "where there has been fraud, accident, mistake or surprise; and where the primary object of a bargain is to secure a stated result, which can effectively be obtained when the matter comes before the court and where the forfeiture provision is security for the production of that result."[3]

Submissions by Karamist

[22] Counsel argued that the ability to terminate a lease on account of the non-payment of rent and outgoings falls into the first category where the right to forfeit was essentially to secure the payment of money. Counsel also argued that, in addition to s 124 of the *Property Law Act* 1974 (Qld), there is a general jurisdiction in equity to grant relief from forfeiture in respect of leases. Counsel noted that the exercise of the statutory jurisdiction involved the same principles which applied in relation to the general equitable jurisdiction.

[23] Counsel argued that provided that breaches giving rise to forfeiture could be rectified or compensated so as to effectively place the landlord in the same position as if the covenants had been performed, then relief from forfeiture would likely be granted, as it would be unconscionable for a landlord to rely on strict legal rights in those circumstances. In that regard, counsel relied on the principles in *World by Nite Pty Ltd v Michael*[4] and *Platt v Ong*.[5]

[24] Counsel argued that in respect of a first application for relief from forfeiture due to non-payment of rent, so long as all payments had been brought up to date at the time of the application, then ordinarily relief from forfeiture would be granted absent "very special circumstances" or exceptional "circumstances". Counsel in this regard relied on *Platt v Ong*[6] and *Tannous v Cipolla Bros Holdings Pty Ltd*.[7]

[25] In relation to exceptional circumstances, counsel submitted that such exceptional circumstances might exist if third party rights intervened, if there was insufficient evidence to indicate that a recurrence of default was unlikely or where the defaults are persistent, deliberate or wilful, such as to warrant the refusal of the relief. Counsel also noted that generally courts of equity incline against windfalls.[8] Accordingly, courts of equity would pay close attention to the value of what would be lost by the tenant and what would be gained by the landlord if the forfeiture were to stand.

[26] There was no doubt that, in the application before the primary judge, all rent that was outstanding had been brought up to date on 17 June 2014 and any other monies that had been sought had been placed in escrow so as to cover all other claimed outstanding outgoings and costs. Counsel also noted that no third party rights were involved.

[27] In relation to the recurrence of default, Mr Barrett had deposed in his affidavit to the unusual cashflow problems that had temporarily affected Karamist which had been overcome and as to Karamist's solvency. In addition, Mr Barrett had sworn that he was willing to provide an unconditional bank guarantee of $50,000 on which Meridien could call to meet unpaid outgoings in the future. It was argued therefore that there was more than adequate evidence that Karamist was able to meet future obligations in relation to the subleases.

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3 ARB 681.
4 [2004] 1 Qd R 338, 343-344.
5 [1972] VR 197, 198-199.
6 [1972] VR 197, 199-201.
7 (2001) 10 BPR 18,563, [53].
8 *Wynsix Hotels (Oxford St) Pty Ltd v Toomey* (2004) 17 BPR 32,663, [67]-[70].

[28] In relation to wilfulness, there was no evidence that any other obligation under the subleases had not been met.

[29] In relation to windfall, it was argued that the subleases provided tenancies for nearly 100 years and that, given the requirement to pay the rent upfront except for the deferred amount for the pontoons, the tenancies were akin to freehold interests. It was argued that the rent of $225,000 for a 100 year tenancy equates to an annual rent of $2,250 and if relief from forfeiture was not granted, then Karamist would lose 95 years of tenancy and therefore most of the sum of $350,000 which had been paid upfront in respect of the subleases and they would still remain liable for the deferred rent. In contrast, it was argued that Meridien would lose nothing but retain the ability to lease the marina berths for a higher rent. It was also argued that Karamist would lose the value of the adjoining land.

Submissions by Meridien

[30] Counsel for Meridien argued before the primary judge that relief against forfeiture is not given as of right and that the focus is on the equity of the situation. Counsel agreed with the submissions of Counsel for Karamist that the factors the primary judge needed to take into account included a consideration of the conduct of the parties seeking relief, whether the default was wilful, the gravity of the breaches and the disparity between the value of the property on which forfeiture is claimed compared with the damage caused by the breach.

[31] Meridien argued that the decision to not pay the deferred rent was taken deliberately and that, whilst the subleases were for 99 years, the word "temporary lack of liquidity" was not an apt descriptor for a two year delay in paying the monies owing. Counsel also argued that no real explanation was given as to why Karamist could not pay $100,000 over a two year period in a situation where Karamist was the trustee of the Paul Barrett Family Trust and the accounting evidence was that the trust had assets in excess of $4,000,000. Furthermore, in the period between 2011 and 2014, the Paul Barrett Family Trust had made a profit of over $1,000,000 and had an income of more than $3,000,000.

[32] Counsel for Meridien had also argued that there was no evidence as to why Mr Barrett did not have access to funds in other entities he controlled or why none of the $4,000,000 in the trust could have been drawn to facilitate payment to Meridien. Counsel argued that whilst Mr Barrett had made various offers to pay over a period of time, which was subject to him being able to settle real property transactions, after a notice of termination was sent, he paid $100,000 within five days. Counsel argued that a deliberate decision was made not to pay the money. Counsel submitted there had also been a significant and unexplained delay before the application for relief from forfeiture had been brought, as the subleases were terminated on 12 June 2014 and yet the application was not filed until almost four months later.

[33] Counsel also submitted that Meridien had incurred costs in its attempts to relet the subleases. Despite the indication from Meridien that it was taking steps to relet the berths, Karamist took six weeks after that notification to file the application.

[34] Counsel argued that the doctrine of relief against forfeiture ultimately rests on the notion as outlined in *Minister for Lands and Forests v McPherson* that "a person should not use his legal rights to take advantage of another's misfortune."[9] Counsel submitted that ordinarily relief against forfeiture is sought to enable a business to continue to trade

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9 (1991) 22 NSWLR 687, 691.

from leased premises. In the circumstances here, however, the berths leased by Karamist are not part of a business and are essentially leisure assets, as the covenants in the subleases restrict their use to recreational purposes.

[35] Furthermore, counsel argued that there was no actual evidence to support the proposition that the value of the adjoining real property owned by Karamist would in fact be decreased if the subleases were terminated. In addition, it was submitted that the balance of the prepaid rent would be refunded in accordance with cl 9.5(d) of the subleases.

The decision of the primary judge

[36] Counsel for Meridien advised the Court that the primary judge delivered ex tempore reasons for his decision at the conclusion of the application. A decision was also subsequently published on the Supreme Court Library website, which contained some alterations and additions to the ex tempore reasons. In particular, in the Supreme Court Library website decision, it reads: "The cases suggest, however, that in respect of a first application, relief would generally be granted unless there were *very special or, at least, exceptional* circumstances, such as a likelihood or insufficient evidence to indicate that there would not be a recurrence in the future."[10] The ex tempore decision referred to "*very exceptional or, at least, exceptional circumstances*".[11] Both counsel advised the Court that the ex tempore reasons were the reasons relied upon in the appeal.

[37] The primary judge recited the facts as set out above and also outlined the relevant principles. The primary judge outlined that provided that breaches giving rise to the forfeiture can be rectified or compensated to place the landlord in the same position as if performance had been on time, relief from forfeiture is likely to be granted because otherwise it would be unconscionable for the landlord to rely on strict legal rights. In particular, the primary judge indicated that in respect of the first application, relief would generally be granted unless there were, as outlined, "very exceptional or, at least, exceptional circumstances."

[38] His Honour noted that in the case before him all outstanding rent had been brought up to date. There was no suggestion of intervening third party rights and there was to be no recurrence of the triggering default because the deferred rent had been paid in full. His Honour stated that "The explanation given for the non-payment for a period of up to two years of $100,000 is unusual cash flow problems which have since been overcome."[12] Furthermore, it was noted that Karamist was solvent. It had been incorporated since 1986 and had not otherwise been sued or received demand for money and there was an indication that Mr Barrett would provide an unconditional bank guarantee of $50,000 to meet unpaid outgoings. His Honour referred to the arguments of Meridien that there had been a deliberate design to prefer other creditors to Meridien over a long period of time. There was also reference made to the submissions by counsel for Karamist in relation to the ability to access the money in the trust as well as the fact that there had been non-payment for a very long period of time.

[39] In granting the relief against forfeiture, the primary judge referred to the decision in *Hace Corporation Pty Ltd v F Hannan Properties Pty Ltd*[13] where McLelland CJ, in equity, said:

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10 ARB 695 ll 30-34 (emphasis added).
11 ARB 21 ll 31-32 (emphasis added).
12 ARB 21 ll 40-42.
13 (1995) 7 BPR 14,326.

> "The court treats a power to forfeit a lease for non-payment of rent as a security for the rent and, generally speaking, on payment of any outstanding rent the court will grant relief against any such forfeiture on such conditions as it may consider appropriate in the particular circumstances, which will usually involve payment of the lessor's costs and expenses. Although relief against forfeiture is a discretionary remedy, the burden of establishing that a forfeiture for non-payment of rent should not be relieved against, where all arrears of rent have been paid and where no interests of third parties have intervened, is a *very heavy burden* and normally involves demonstrating that, by reason of the conduct of the lessee or for some other reason, the grant of relief against the forfeiture would be inequitable."[14] (emphasis added)

[40] His Honour then continued:[15]

> "Here, the only likely future problem will be the payment of outgoings, as all rent, totalling $225,000, for the period of the lease has now been paid. The applicant [Karamist] offers an unconditional bank guarantee of up to $50,000 to secure future outgoings.
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> I am not satisfied that the default was wilful in the sense that it was deliberate in the way that Mr O'Brien suggests. There is sufficient indication in the material that the applicant [Karamist] was suffering a temporary lack of liquidity and took steps to put itself into funds to meet its obligation to the respondents [Meridien] and eventually did. I am not satisfied that the past history is a predictor of future default. The past related to the non-payment of deferred rent; the future pertains only to outgoings which are expenses of a different kind and quantum. In the circumstances, there is no reason for exercising the discretion against the application. The application will be granted."

First ground of appeal

The primary judge misdirected himself in relation to the legal test

[41] Counsel for Meridien submitted that the only authority cited to support the proposition that relief would generally be granted unless there were "very exceptional or, at least, exceptional circumstances" was the decision of *Hace Corporation Pty Ltd v F Hannan Properties Pty Ltd*.[16] However, counsel submitted that the passage quoted from that decision reiterated that the remedy was discretionary and in the context of that case, the court made the comment that there was a "very heavy burden" on a lessor to show some conduct of the lessee, or some other reason, why the grant of relief would be inequitable. Counsel submitted that the context in that case was evidence that rent was repeatedly only ever a few weeks late, such that the statement of there being a heavy burden was really an observation related to the facts of that case as opposed to being a statement of the relevant legal test.

[42] Counsel for Meridien argued that the decision relied upon by the primary judge does not put the test as being one of relief being granted unless there were very exceptional or, at least, exceptional circumstances, nor is there a heavy burden or onus on the lessor.

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14 (1995) 7 BPR 14,326, 14,329.
15 ARB 22 ll 34-46.
16 (1995) 7 BPR 14-326.

Indeed, it is argued that this is contrary to the decision of Martin J in *Capital Projects (Qld) Pty Ltd v Trust Company of Australia Limited*.[17] In that decision, Martin J stated:

> "[10] On such an application the lessor has the burden of proving the breaches of the lease while the lessee must demonstrate to the court that the discretion should be exercised in its favour.
>
> [11] The scope of the power (in respect of the relevantly identical New South Wales legislation) was described by Hamilton J in *Ell v Cisera*:
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> 'The discretion conferred upon the court to excuse or not excuse the breaches and allow renewal of the term is an absolutely general one to be exercised in the light of all the circumstances: *Re a Lease; Kennedy to Kennedy* [1935] NZLR 564 at 567; *Henderson v Ross* [1981] 1 NZLR 417 at 424; *Evanel Pty Ltd v Stellar Mining NL* [1982] 1 NSWLR 380 at 388. In the last mentioned case Wootten J, while holding the discretion to be completely at large, found some analogy in the court's discretion to grant relief against the forfeiture of leases. His Honour's decision was upheld by the Court of Appeal: *Stellar Mining NL v Evanel Pty Ltd* (1983) NSW ConvR 55-118. In *Best and Less (Leasing) Pty Ltd v Darin Nominees Pty Ltd* (1994) 6 BPR 13,783 McLelland CJ in Eq at 13,788 described the power as 'a general discretionary power, which is to be exercised in the manner best calculated to achieve justice between parties in the circumstances of the particular case' and again alluded to the analogy of relief against forfeiture'."[18] (footnotes omitted)

[43] Counsel argued therefore that the onus is clearly on the party seeking relief and that the primary judge misdirected himself in exercising his discretion when considering the evidence placed by Meridien before the court. In particular, Meridien argues that whilst the persuasive onus may shift to the lessor, it is clear that the evidentiary burden is on the lessee to demonstrate to the court that the discretion should be exercised in its favour. Counsel argues that the discretion conferred upon the court to excuse the breaches and allow the renewal of the term is an absolutely general discretion and is to be exercised in light of all of the circumstances. Counsel submitted that the onus was always on the party seeking the relief (that is, Karamist who was seeking relief against forfeiture) and that the primary judge misdirected himself in exercising the discretion. In particular, it is argued that this misdirection is manifested in the following sentence, "In the circumstances, there is no reason for exercising the discretion against the application."[19] Counsel argues that this shows the approach the primary judge took, that he started from an incorrect basis and that there was an onus on Meridien rather than considering whether or not the discretion had been enlivened or that some persuasive onus had been shifted to the lessors.

[44] In my view, an analysis of the primary judge's reasons does not disclose that he has misdirected himself in relation to the applicable test. It is clear that from a close reading of the reasons, his Honour was acutely aware that the discretion was at large. It is clear that in the quotation from *Hace Corporation Pty Ltd v F Hannan (Properties)*

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17 [2009] 2 Qd R 313, 317.

18 *Capital Projects (Qld) Pty Ltd v Trust Company of Australia Limited* [2009] 2 Qd R 313.

19 ARB 22 ll 45-46.

Pty Ltd, his Honour recited the principles and stated that "Although relief against forfeiture is a discretionary remedy, the burden of establishing that a forfeiture for non-payment of rent should not be relieved against, where all arrears of rent have been paid and where no interests of third parties have intervened, is a very heavy burden."[20]

[45] I consider that there was a clear acknowledgement of the discretionary nature of the relief and that Karamist needed to establish that the arrears of rent had been paid and there were no third party interests. It was clear that his Honour was balancing the factors that go into the discretion. He indicated that he was not satisfied that the default was wilful in that it was deliberate. His Honour was also satisfied that the evidence indicated that the loss of liquidity was temporary and that Mr Barrett took steps to put Karamist in funds to meet its obligation to Meridien. Furthermore, the reasons made it clear that the primary judge considered it was unlikely that there would be any further breaches in the future, given all the rent under the subleases had in fact been paid and the only future obligation related to future outgoings and a significant amount of $80,000 was put into escrow. That aspect was also the subject of significant analysis by the primary judge during submissions.

[46] I do not consider there is any basis for a conclusion that his Honour had actually reversed the onus and was indeed balancing all of the factors that were required to be considered in the exercise of the discretion.

The second ground of appeal

The primary judge did not give adequate reasons

[47] The second ground of appeal is that the primary judge did not give adequate reasons because the requirement to give reasons obliges the judge to state the basis which has led to the conclusion concerning the disputed factual questions and to list the findings on the principal contested issues. Counsel for Meridien argues that the primary judge analysed the issues in relation to the exercise of the discretion in about seven lines and that he did not make a real attempt to grapple with the evidence that was relied upon. In particular, it was argued that the finding that the default was not considered to be wilful is said to be not sufficiently based on an analysis of the evidence.

[48] In this regard, counsel argued that the balance of evidence indicated that the default by Karamist was in fact wilful, particularly given it continued for a period of two years in circumstances where substantial assets were owned by the trust and a significant profit was available to the trust in the relevant period. Counsel for Meridien argues that the issue of wilful default should have been dealt with in more extensive detail in the reasons of the primary judge in granting the relief sought by Karamist. It was argued that the primary judge should have identified the specific basis upon which he was satisfied that the relief should be granted. In this regard, counsel relies on the decisions of this Court in *Sunland Group Ltd v Townsville City Council & Anor*[21] and *Loader v Moreton Bay Regional Council*.[22]

[49] In the New South Wales Court of Appeal decision of *Soulemezis v Dudley (Holdings) Pty Ltd*,[23] Mahoney JA referred to his earlier decision in *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd*[24] where he had held that there is no duty

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20 *Hace Corporation Pty Ltd v F Hannan Properties Pty Ltd* (1995) 7 BPR 14-326, 14-329; ARB 22 ll 22-26.
21 [2012] QCA 30.
22 [2013] QCA 269.
23 (1987) 10 NSWLR 247, 269.
24 [1983] 3 NSWLR 378, 385-386.

to make a decision in respect of every matter of fact or law which was or might have been raised in a particular proceeding. He held that it was not the duty of a judge to make a decision on every matter which is raised in argument. In particular, he considered that reasons need not ordinarily be given in cases which were procedural applications or in cases for applications for leave where the considerations of fact and law are clear. He also considered it was not necessary for a judge who is exercising a discretionary judgment to detail every factor the judge has found to be relevant or irrelevant or to itemise in the assessment of damages each of the factual matters to which the judge has had regard.

[50] Furthermore, Mahoney JA held that a judge was not required to make an explicit finding on every disputed piece of evidence. He considered that it was sufficient if the inference as to what is found is appropriately clear. His Honour ultimately concluded "In my opinion, the law does not require that a judge make an express finding in respect of every fact leading to, or relevant to, his final conclusion of fact; nor is it necessary that he reason, and be seen to reason, from one fact to the next along the chain of reasoning to that conclusion."[25]

[51] His Honour continued:

> "There is, I think, no formula the application of which to the instant case will indicate what, in that case, the judge must do. Where, in the decision of an ordinary dispute, reasons are necessary, they are necessary because of the expectation that, being a judicial decision, a sufficient explanation will be given of why the order was made. And, in my opinion, it will ordinarily be sufficient if – to adapt the formula used in a different part of the law: see *R v Associated Northern Collieries* (1910) 11 CLR 738 at 740 – by his reasons the judge apprises the parties of the broad outline and constituent facts of the reasoning on which he has acted.
>
> To require that a judge detail the way in which he has reasoned step by step to his conclusion is, in my opinion, to mistake the nature of the reasoning process. In the present case, as I have said, the objection made to what the judge did is that he did not explain, or explain with sufficient clarity, how the CAT scan could and did lead him to the conclusion that after 17 January 1984 the worker's condition changed. Conclusions of that kind are not arrived at by syllogisms. Syllogisms may lead to a conclusion of that kind: more often, their role (if they have one) is as the auditor of the reasoning processes and of the conclusions already arrived at by other processes."[26]

[52] In my view, the primary judge did sufficiently grapple with the evidence before him and did indicate the evidence he was relying on. In particular, it was clear that the primary judge accepted that there had been a lack of liquidity and that there had not been wilful default in the sense that Karamist chose not to make payment when it could have done so. He was clearly not satisfied on the evidence before him that there were assets available that could have been used. The primary judge clearly rejected the submission by Meridien that an inference should have been drawn that it was wilful. He also stated "There is sufficient indication in the material that the applicant [Karamist] was suffering a temporary lack of liquidity and took steps to put itself into

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25 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 271.

26 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 273.

funds to meet its obligation to the respondents [Meridien] and eventually did."[27] In the circumstances, I do not consider that further reasons were required on that aspect of the evidence, particularly when during submissions the primary judge had indicated that he was not satisfied about the strength of the supporting evidence that Meridien wanted his Honour to rely on in drawing the inference that Mr Barrett was moving money around to suit himself.[28] Whilst there was indeed evidence of assets in the material before the primary judge, there was no evidence of cash being held in the trust and Mr Barrett had deposed of the need to obtain a loan from a family member for $100,000 until his Norman Park property was sold and settled in August 2014.

[53] I do not consider therefore that this ground has been made out.

[54] I consider that the appeal should be dismissed with costs.

[55] **NORTH J:** I have had the benefit of reading in draft the reasons of Ann Lyons J. For the reasons given by her Honour I agree that the reasons given by the primary judge were adequate. I also agree generally with her Honour's reasons concerning the first ground of appeal but wish to make some brief observations. I am grateful to her Honour's extensive reference to the evidence and the issues in the appeal.

[56] In *Shiloh Spinners Ltd v Harding*[29] Lord Wilberforce said of the equitable power to relief against forfeiture[30]:

> "There cannot be any doubt that from the earliest times courts of equity have asserted the right to relieve against the forfeiture of property. The jurisdiction has not been confined to any particular type of case. The commonest instances concerned mortgages, giving rise to the equity of redemption, and leases, which commonly contained re-entry clauses; but other instances are found in relation to copyholds, or where the forfeiture was in the nature of a penalty. Although the principle is well established, there has undoubtedly been some fluctuation of authority as to the self-limitation to be imposed or accepted on this power. There has not been much difficulty as regards two heads of jurisdiction. First, where it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money, equity has been willing to relieve on terms that the payment is made with interest, if appropriate, and also costs (*Peachy v. Duke of Somerset* (1721) 1 Stra. 447 and cases there cited). … Secondly, there were the heads of fraud, accident, mistake or surprise, always a ground for equity's intervention, the inclusion of which entailed the exclusion of mere inadvertence and a fortiori of wilful defaults.
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> Outside of these there remained a debatable area in which were included obligations in leases such as to repair and analogous obligations concerning the condition of property, and covenants to insure or not to assign.
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> …
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> It was soon after that the critical divide or supposed divide occurred, between the liberal view of Lord Erskine L.C. in *Sanders v. Pope*

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27 ARB 22 ll 40-42.
28 ARB 11 ll 14-16.
29 [1973] AC 691.
30 [1973] AC 691 at 722-723.

> (1806) 12 Ves.Jun. 282 and the strict view of Lord Eldon L.C. in *Hill v. Barclay.* The latter case came to be followed as the true canon; the former was poorly regarded in Lincoln's Inn, but it is important to observe where the difference lay. This was not, as I understand it, in any disagreement as to the field in which relief might be granted, for both cases seem to have accepted that, in principle, relief from forfeiture might be granted when the covenant was to lay out a sum of money on property: but rather on whether equity would relieve against a wilful breach. The breach in *Sanders v. Pope* was of this kind but Lord Erskine L.C. said, at p. 293:
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> > 'If the covenant is broken with the consciousness, that it is broken, that is, if it is wilful, not by surprise, accident, or ignorance, still if it is a case, where full compensation can be made, these authorities say, not that it is imperative upon the court to give the relief, but that there is a discretion.'
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> To this Lord Eldon L.C. answers, 18 Ves.Jun. 56, 63:
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> > '…with regard to other cases,' (sc. waste or omitting repairs) 'the doctrine I have repeatedly stated is all wrong, if it is to be taken, that relief is to be given in case of a wilful breach of covenant.'
>
> The emphasis here, and the root of disagreement, clearly relates to wilful breaches, and on this it is still Lord Eldon L.C.'s view which holds the field. …"

[57] His Lordship's reasons make it clear that one of the circumstances in which the court might decline to grant relief against forfeiture was when the breach of covenant was a wilful breach. This was again emphasised by his Lordship when, addressing the power of the court to relieve against forfeiture for breaches of covenance or conditions other than those for the payment of rent or money, his Lordship said[31]:

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

[58] I have not overlooked that, as well as the power to relieve in equity, there is a power in statutes,[32] but I do not understand that the principles governing the discretionary exercise of the power to grant relief, under either the statute or in equity differ. When considering the "structure of inquiry in a forfeiture case" the learned authors of

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31 [1973] AC 619 at 723-4.

32 Relevantly in this State, s 124 *Property Law Act* 1974.

"Meagher, Gummow & Lehane's Equity: 'Doctrines and Remedies'"[33] after referring to the speech of Lord Wilberforce in *Shiloh Spinners* pose the following questions[34]:

> "(a) Was the provision for forfeiture meant to secure performance of a primary stipulation (for example, to pay rent or to make repairs)?
>
> (b) Whether the answer to *(a)* is Yes or No, is the reliance on the forfeiture by the party entitled to its benefit coloured by fraud, mistake, accident or surprise?
>
> (c) If Yes to *(a)* or *(b)*, is compensation available such that, if relief be granted against the forfeiture, the party who would have been entitled to its benefit will be placed in the position that person would have occupied had the forfeiture not occurred?"
>
> (d) If Yes to *(c)*, has the plaintiff undertaken to perform the plaintiff's side of the bargain, and is the plaintiff ready and willing to do so – including by paying the compensation under *(c)*?
>
> (e) If Yes to *(d)*, what are the available forms of relief, and which of them would be most apt to place the parties in the positions they would respectively have occupied had the event exposing the plaintiff's proprietary rights to forfeiture not occurred, and had forfeiture not taken place?
>
> (f) If Yes to *(c) and (d)*, is there any equitable defence to the relief considered under *(e)* or, if not, any reason why the court ought in its discretion to refuse relief?"

[59] One recent example of the factors that attention might be directed towards in a given case when considering whether to grant relief against forfeiture, is found in the reasons of Keane JA in *Ace Property Holdings Ltd v Australian Postal Corporation*[35] where his Honour said[36]:

> "[163] Consideration of the question of relief from forfeiture requires attention to a number of issues: the gravity of the breach or breaches in question, whether the breach was inadvertent or wilful, the damage to the covenantee and the relative loss to the covenantor if relief is not granted.[37]"

[60] "Meagher, Gummow & Lehane" suggests that issues of the wilfulness of the breach and its gravity may be relevant to considerations of questions (b), (d) and (f).[38]

[61] The evidence demonstrated the following:

1. Karamist Pty Ltd was the sub-lessee under two registered sub-leases of two marina berths and the Meridien companies were the sub-lessors[39];

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33 J D Heydon, M J Leeming & P G Turner, 5th ed LexisNexis Butterworths 2015. (Afterwards referred to as "Meagher, Gummow & Lehane").

34 At para [18-270].

35 [2011] 1 Qd R 504.

36 [2011] 1 Qd R 504 at [163].

37 Citing *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 723-724 and *Legione v Hateley* (1983) 152 CLR 406 at 449.

38 See para [18-275].

39 See AR 41 and 48 respectively.

2. The terms of both sub-leases were almost 100 years;[40]

3. Both sub-leases provided that the rent payable for the term of the lease was $225,000 (GST inclusive);

4. The rent was payable on or before the commencement of the lease save that by clause 2.3 payment of $50,000 of the rent to the sub-lessors might be deferred until after certification of the practical completion of the construction by the sub-lessor of a pontoon adjacent to the marina berth;[41]

5. At the commencement of the sub-lease Karamist Pty Ltd duly paid $350,000 being the rent then due under the sub-leases;

6. By letter of 11 May 2012 the solicitors for the sub-lessors gave notice of intention to commence works and called for payment of $100,000 being the deferred rent of $50,000 under the both sub-leases;[42]

7. Karamist Pty Ltd failed to pay the $100,000 and thereafter there was correspondence and negotiation until by letters of 17 April 2014 the solicitors for the sub-lessors delivered notices to remedy the breach of covenant;

8. The money was not paid so by letter of 12 June 2014, the solicitors for the sub-lessor gave notice of termination of both sub-leases with immediate effect;[43]

9. On 17 June 2014 Mr Barrett on behalf of Karamist Pty Ltd authorised payment of $100,000 into the trust account of the solicitors for the sub-lessors;

10. Thereafter the solicitors for the sub-lessors lodged notices of surrender of the sub-leases which were registered and the solicitors for Karamist Pty Ltd wrote requesting that the Meridien companies accept payment of the deferred rent, reinstate the sub-leases and withdraw the surrender of the sub-leases;

11. At the application on 31 October 2014 Karamist Pty Ltd had paid or had secured funds so to make payment or had offered to pay all monies due and payable under the sub-leases for rent, all expenses or costs or interest incurred or lost by the sub-lessors and the costs of the application to relieve against forfeiture;

12. No third party had acquired an interest in the property consequent upon or subsequent to the forfeiture such that an order might be inequitable.

[62] A brief resort to statistics is illuminating. At the commencement of the lease Karamist Pty Ltd was obliged to and made payment of approximately 78 per cent of the rent payable for the entire term of both sub-leases. Yet at the time of the forfeiture of the sub-leases approximately 94 per cent of the term under them remained to run. There is an obvious disproportion between the term of the lease forfeited and the proportion of the total rent owing and unpaid. This observation is not a prelude to suggesting that the exercise of the discretionary power to relieve against forfeiture of the sub-leases arose because the forfeiture was in some way penal in its effect. While the equitable power to relieve against penal provisions in contracts and to relieve against forfeiture are in a sense cognate, they have a common history in their development,

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40 From 23 February 2009 to 30 November 2108.

41 Under the sub-leases a notice of intention to commence works would trigger an obligation to pay the $50,000 into the trust account of the solicitors for the sub-lessors with subsequent payment to the sub-lessors following a notice of practical completion.

42 AR 82-88.

43 AR 94-95.

they are distinct doctrines having different operations.[44] In this case no issue of the "special heads of fraud, accident, mistake or surprise" arose[45] nor is this reference to the feature of the forfeiture in this case a prelude to a suggestion that the exercise of the power can be supplemented by relief awarded upon the basis that the forfeiture was unconscionable.[46] Rather the statistics draw attention to the "disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach."[47] This therefore serves to focus attention upon the question whether the conduct of Karamist Pty Ltd in not paying the instalments promptly after demand by the solicitors for the sub-lessor was wilful.[48]

[63] In an affidavit Mr Barrett, the sole director of Karamist Pty Ltd, swore that at the time of receipt of the notice of 11 May 2012 calling for payment of the $100,000 that:

> "Karamist was unable to pay the Deferred Rent at that time due to a temporary lack of liquidity. I was expecting to receive funds from the sale of a property at 12 Wendell Street, Norman Park (the Norman Park Property) and it took longer to realise those funds than expected. That was due (at least in part) to the fact that on 27 June 2011 and 21 July 2011 non-lapsing caveats were placed on the Norman Park Property, which prevented me from selling the property until those caveats were removed."[49]

[64] Mr Barrett swore that it was not until in about February 2014 that he negotiated the removal of the caveats over the Norman Park property when he immediately moved to sell the property, the delay being caused by protracted litigation. He swore that the source of the $100,000 that he caused to be paid into the trust account of the solicitors for the sub-lessor on or about 17 June 2014 was from a family member who lent him the money[50]. Thus, it was submitted the failure to pay was not wilful but caused by a temporary lack of liquidity.

[65] This issue was the focus of much of the debate before his Honour at first instance. The parties made competing submissions referring to the affidavits and exhibited documents. The evidence of Mr Barrett was challenged only to the extent that it was submitted that there was insufficient proof or support from the documents of a lack of liquidity with the result that the inference should be drawn that the non payment was wilful. But Mr Barrett was not cross-examined and the documentary evidence being not inconsistent with his unchallenged sworn evidence it was open to his Honour to find, as he stated in his reasons, that he was "not satisfied that the default was wilful in the sense that it was deliberate"[51].

[66] In the premises the discretion exercised by his Honour and the order made was well open to him and entirely consistent with established authority. As Ann Lyons J has

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44 "Meagher, Gummow & Lehane" consider para [18-005], [18-215] and [18-220].

45 See *Shiloh Spinners* at 722 and 723 quoted at [2] above.

46 The judgement of the High Court in *Tanwar Enterprises Pty Ltd v Cauchi & Ors* (2003) 217 CLR 315 makes it clear that the principles set out by Lord Wilberforce in *Shiloh Spinners* apply in Australia and are not to be supplemented: see *Tanwar* at [55]-[58] in context. See further "Meagher, Gummow & Lehane" at [18-280].

47 See para [3] above.

48 It being common ground in this case that no third party had acquired any interest in the property that would make the exercise of any power to relieve against forfeiture inequitable.

49 See AR at 25.

50 AR 25.

51 AR 22 at l 39. Indeed in the absence of any cross-examination the conclusion was nigh inevitable.

pointed out, the primary judge did not misdirect himself. His Honour well appreciated the discretionary nature of the remedy and that the onus of proof rested upon Karamist Pty Ltd. But in the circumstance that the evidence established the grounds for the favourable exercise of the discretion consistent with authority an evidential burden thus fell upon the Meridien companies to demonstrate that for some reason the discretion should not be exercised[52]. It is with this in mind that the reasons of McLelland CJ in Eq in *Hace Corporation Pty Ltd v F Hannan (Properties) Pty Ltd*[53] quoted by her Honour[54] should be understood. In like vein should the reasons of the primary judge.

[67] In the circumstances that this court is not required to exercise the discretion afresh and that the order of the primary judge is upheld counsel for the appellant did not submit that the costs of the appeal should not follow the event[55]. I agree with the orders proposed by Ann Lyons J.

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52 See "Cross on Evidence: Australian ed", JD Heydon, LexisNexis para [7001]-[7015] concerning an onus of proof and the shifting evidential burden.

53 (1995) 7 BPR 14,326 at 14,329.

54 At para [37] above.

55 cf appeal hearing transcript at 1-12 l 5 – 1-14 l 5.