SUPREME COURT OF QUEENSLAND

CITATION:	*Wash Investments Pty Ltd & Ors v SCK Properties Pty Ltd & Ors* [2016] QCA 258
PARTIES:	**WASH INVESTMENTS PTY LTD** ACN 139 856 054 (first applicant) **PAUL ROYAL** (second applicant) **YVONNE ROYAL** (third applicant) **v** **SCK PROPERTIES PTY LTD** ACN 140 758 229 (first respondent) **CLAUDE ZARAFA** (second respondent) **SINAN OKAN** (third respondent)
FILE NO/S:	Appeal No 4180 of 2016 DC No 2920 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2016] QDC 77
DELIVERED ON:	14 October 2016
DELIVERED AT:	Brisbane
HEARING DATE:	30 August 2016
JUDGES:	Philippides and Philip McMurdo JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant leave to appeal against the judgment between the applicants and the first respondent delivered on 8 April 2016.** **2. Allow the appeal.** **3. Set aside the order then made and instead order that the applicants pay to the first defendant an amount of $77,219.55.** **4. Order that the claims against the first respondent be dismissed.** **5. Refuse leave to appeal against the dismissal of the**

claims against the second and third respondents.

6. **Order that there be no order as to costs of the proceeding in this court.**

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – FROM DISTRICT COURT – BY LEAVE OF COURT – where the applicants commenced proceedings in the District Court for damages for wrongful termination of a lease and eviction from the subject premises and for defamatory statements made against them by each of the respondents – where the respondents succeeded in their counterclaim and were awarded damages less than the jurisdictional limit of the Magistrates Court and the claims in defamation were dismissed – where the applicants filed a notice of appeal on the basis that they enjoy a right of appeal and no grant of leave is required – where the respondents contend that leave is required under s 118(3) *District Court of Queensland Act* 1967 (Qld) – whether the applicants require leave to appeal – whether leave should be granted in the applicants' proposed appeal against the dismissal of the claims for wrongful termination of the lease and the dismissal of their claims in defamation

LANDLORD AND TENANT – TERMINATION OF THE TENANCY – REPUDIATION – GENERALLY – where in June 2011 the first applicant leased premises from the first respondent, guaranteed by the second and third applicants, for the purpose of carrying out a car wash business – where the business struggled financially from November 2011 and in June 2013 the applicants wrote the respondents indicating that unless rent was reduced the applicants would close the business and declare bankruptcy – where the second respondent subsequently attended the premises, took possession and evicted the applicants – where the applicants alleged that because no valid notice under s 124 *Property Law Act* 1974 (Qld) ("PLA") was provided the respondents wrongfully evicted the applicants – where the trial judge concluded that no s 124 PLA notice was validly served pursuant to the lease but the applicants' conduct amounted to a repudiation of the lease at common law – where the applicants contend that the respondent could not terminate the lease and take possession without first serving a valid notice under s 124 PLA – whether notice under s 124 PLA is a precondition on a lessor's power to re-enter at common law – whether the applicants repudiated the lease

DAMAGES – GENERAL PRINCIPLES – OTHER MATTERS – where by counterclaim the respondents sought damages for outstanding rent and outgoings and other costs – where the trial judge gave judgment for the respondents of $118,469.55 – where it is common ground that the first respondent called upon a bank guarantee and had been paid $41,250 which was

not set-off from the judgment against the applicants – where the first respondent contends the error could be amended under the slip rule – whether the judgment on the counterclaim should be corrected

District Court of Queensland Act 1967 (Qld), s 118(2), s 118(3)
Property Law Act 1974 (Qld), s 124

Abrahams (by his litigation guardian Public Trustee of Queensland) v Abrahams [2015] QCA 286, cited
Apriaden Pty Ltd v Seacrest Pty Ltd (2005) 12 VR 319; [2005] VSCA 139, cited
Chelfield Pty Ltd v Goldsea Pty Ltd [2003] 2 Qd R 243; [2003] QSC 40, distinguished
Fu-Laihsu & Anor v Graham Retailers Pty Ltd [2003] QDC 20, distinguished
Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007) 233 CLR 115; [2007] HCA 61, applied
Marshall v Council of Shire of Snowy River (1994) 7 BPR 14,447, cited
Pickering v McArthur [2005] QCA 294, cited
Praxis Pty Ltd v Hewbridge Pty Ltd [2004] 2 Qd R 433; [2004] QCA 79, cited
Wash Investments Pty Ltd & Ors v SCK Properties Pty Ltd & Ors [2016] QDC 77, cited
Willmott Growers Inc v Willmott Forests Ltd (Receivers and Managers appointed) (In liq) (2013) 251 CLR 592; [2013] HCA 51, cited

COUNSEL: A M Nelson for the applicants
The respondents appeared on their own behalf

SOLICITORS: Stephens & Tozer Solicitors for the applicants
The respondents appeared on their own behalf

[1] **PHILIPPIDES JA:** I have had the advantage of reading the reasons for judgment of Philip McMurdo JA. I agree with his Honour's reasons and the orders proposed.

[2] **PHILIP McMURDO JA:** The applicant company together with its owners, Mr and Mrs Royal, sued the respondents in the District Court. The company had been the lessee of premises at Bribie Island and the respondent company had been its lessor. It claimed that it had been wrongly evicted and sought damages from the first respondent in an amount of approximately $490,000. Mr and Mrs Royal each claimed to have been defamed by the second and third respondents, Mr Zarafa and Mr Okan, by statements said to have been made by them to others about the circumstances of the termination of the lease. They claimed against each of these respondents an amount of $30,000 as damages.[1]

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[1] The applicant company also sued for defamation and all three applicants alleged that the respondent company was liable for the statements of Mr Zarafa and Mr Okan. However it appears that the defamation claims were pressed only by Mr and Mrs Royal and only against Mr Zarafa and Mr Okan and it is the outcome between those parties which is challenged in the notice of appeal.

[3] After an eight day trial, the applicants' claims were dismissed.[2] The first respondent succeeded on its counterclaim, which was for outstanding rental and outgoings under the lease and for damages for breach of that contract. There was a judgment for the first respondent against the applicant company, as the former lessee, and Mr and Mrs Royal, as guarantors of the lessee's performance, in an amount of $118,469.55 together with interest.

Leave to appeal

[4] The applicants filed a notice of appeal challenging the dismissal of their claims and the judgment against them on the counterclaim. The respondents say that there is no right of appeal in any respect from this judgment and that leave to appeal is required under s 118(3) of the *District Court of Queensland Act* 1967 (Qld). That is disputed by the applicants who say that there is a right of appeal enjoyed at least by the applicant company in challenging the dismissal of its claim. This issue turns upon the effect of two judgments of this court.

[5] The first is *Praxis Pty Ltd v Hewbridge Pty Ltd*,[3] where the proposed appeal was by a defendant against a judgment in an amount which was less than the then jurisdictional limit of the Magistrates Courts. The plaintiff's claim had been for damages for a false and misleading representation in connection with the sale of land and the amount which had been claimed exceeded that jurisdictional limit. It was held that leave to appeal was required because the judgment did not fall within s 118(2) which provides:

> "(2) A party who is dissatisfied with a final or interlocutory judgment of the District Court in its original jurisdiction may appeal to the Court of Appeal if the judgment—
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> (a) is given for an amount equal to or more than the Magistrates Courts jurisdictional limit; or
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> (b) relates to a claim for, or relating to, property that has a value equal to or more than the Magistrates Courts jurisdictional limit."

Although the claim had had some connection to property, in that it complained of a misrepresentation in connection with the sale of land, it was not a claim "for" property or a claim "relating to" property and was therefore not within s 118(2)(b). The court there said:[4]

> "[8] The criterion adopted in s 118(2)(b) is concerned not with simple money claims in personal actions like the present, which can be measured by the amount recovered by the judgment; but primarily with claims for the recovery of land or other things *in specie* or their value in actions for detinue and the like. The legislative history of s 118 and its predecessor s 92 of the Act bears this out. It is true that s 118(2)(b) includes not only a claim "for" property having the value specified but also to a claim "relating to" property of that value. But the words "relating to", although susceptible on

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2 [2016] QDC 77.
3 [2004] 2 Qd R 433; [2004] QCA 79.
4 [2004] 2 Qd R 433, 436; [2004] QCA 79 at [8].

> occasions of a wide interpretation, take their meaning and colour from the context in which they appear. An action under s 82 of the *Trade Practices Act* to recover the amount of the loss or damage caused by a contravention of s 53A of that Act is not, within the meaning of s 118(2)(b) of the *District Court of Queensland Act*, a claim relating to property even if the representation constituting the contravening conduct concerned property valued at more than $50,000. If that were not so, a claim for damages itself insignificant in amount for a temporary or casual trespass to land worth millions of dollars would be appealable as of right under s 118(2)(b). The same would apply, for instance, to slight damage inflicted on an unusually expensive motor car or other valuable property."

[6] The second case is *Abrahams (by his litigation guardian Public Trustee of Queensland) v Abrahams*,[5] where the appeal was against an order whereby a District Court judge declined to sanction the compromise of a claim for further and better provision from an estate under s 41(1) of the *Succession Act* 1991 (Qld). In the judgment of the court, it was said:[6]

> "[21] Whilst the proposed compromise may have been less than the jurisdictional limit of the Magistrates Court, the applicant's claim for further and better provision was from his father's estate, which meant that the deceased's entire estate in excess [of] $412,000 was in fact potentially in issue at the time of the application for the sanction. The application for further and better provisions from the estate was therefore a claim "relating to" property in excess of $412,000. That is a value which is more than the Magistrates Court jurisdictional limit. Leave to appeal is not required."

[7] Upon the basis of that passage from *Abrahams*, it is submitted for the applicants that no leave to appeal is required. But that reasoning does not reveal any right of appeal in the present case. The applicant company's claim here was for damages and it was not, in any respect, a claim which put "in issue" any property. Rather, it is the reasoning in *Praxis* which is directly applicable. The applicant company was not seeking relief from the forfeiture of its lease or any other proprietary remedy.

[8] The judgment which was given on the counterclaim was for less than the jurisdictional limit of the Magistrates Courts, so that it is not within s 118(2)(a). And the dismissal of the claims for defamation, each in the amount of $30,000, on no view could be within s 118(2). It follows that leave to appeal is required in every respect.

[9] In *Pickering v McArthur*[7] Keane JA (as he then was) said that leave to appeal under s 118(3) "will usually be granted only where an appeal is necessary to correct a substantial injustice to the applicant, and there is a reasonable argument that there is an error to be corrected." That statement, which was made with the agreement of McMurdo P and Dutney J, has been consistently applied. Where the appeal is from

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5 [2015] QCA 286.
6 [2015] QCA 286 at [21].
7 [2005] QCA 294 at [3].

the District Court exercising an appellate jurisdiction, the appeal is not by way of rehearing and in that context, it has been held in several judgments of this court that the appeal from the District Court would be limited to an error of law.[8] The proposed appeals being from the District Court in its original jurisdiction, the appeals would not be limited to errors of law. The question for each of the claims which were dismissed and the counterclaim as it was upheld is whether there is a reasonable argument that there is an error of fact or law the correction of which is necessary to avoid a substantial injustice to the applicant. The merits of the proposed appeals have been fully argued.

The lease

[10] The lease was over freehold land at Ningi on Bribie Island. The term of the demise was 10 years commencing on 22 June 2011 with two options for renewal, each for a term of five years. The agreed rent was $150,000 per annum (exclusive of GST). The tenant was also to pay a certain proportion of the outgoings for the property of which the demised premises formed a part. Both the rental and the outgoings were to be paid monthly. The permitted use of the premises was "car wash". Mr and Mrs Royal guaranteed the payment of any money due from the tenant. They also indemnified the landlord "against any liability, loss and costs incurred by it resulting from the breach of this lease or from the lease terminating …".

[11] Clause 17.1 of the lease defined what would constitute an event of default by the tenant. By cl 17.2 it was agreed that if the tenant was in default the landlord, "after first giving notice where required by law", might:

> "(a) re-enter and take possession of the Premises; [or]
>
> (b) by notice in writing to the Tenant terminate this Lease and from the date of giving such notice this Lease shall terminate …".

Breaches of the lease

[12] The applicant company had commenced operating the car wash business at the premises shortly prior to the grant of the lease. The trial judge found that the business "struggled financially" from as early as November 2011. In August 2012 the landlord served a notice to remedy a breach of covenant, pursuant to s 124 of the *Property Law Act* 1974 (Qld) (the "PLA"), for the tenant's failure to pay rent and outgoings.[9] By 4 June 2013, according to the evidence of an employee of the landlord's letting agent who was called in the applicants' case, the arrears of rent and outgoings totalled $33,216.17. The monthly rent and estimated monthly outgoings totalled $16,447.33. A statement prepared by the letting agent as at that date showed that the tenant had been in arrears from at least November 2012.

[13] On 19 June 2013 the applicants' lawyers wrote to the first respondent in terms which the trial judge found to be a repudiation of the lease. It is necessary to set out the letter in full:

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8 *Tsigounis v Medical Board of Queensland* [2006] QCA 295 at [14]-[15]; *Commissioner of Police v Stehbens* [2013] QCA 81; cf *Gobus v Queensland Police Service* [2013] QCA 172 at [5].

9 [2016] QDC 77 at [3].

> "We refer to the above and advise that we have been asked to act on behalf of Wash Investments Pty Ltd in relation to their lease from you.
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> Our clients advise that they have been involved in numerous discussions with you over a period of time in relation to the poor performance of the carwash and the significant increase in outgoings experienced by them. We note that the outgoings for the centre are significantly higher [than] indicated at the time our client entered into the lease and that at present they are well over $100,000.00. Our client's share of same is approximately $30,000.00.
>
> In the current economic climate our client is unable to sustain outgoings of that amount or rent at its current rate. As an example we note that rates have increase[d] during the term by approximately 600% as a result of a rezoning undertaken by yourself. Those actions have led to significantly increased costs for our client.
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> Our clients have reached the point where they will be unable to continue trading unless the current rent can be renegotiated.
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> Our client[s] are hopeful that matters will improve over the next 12 months and accordingly are putting forward a proposal that the rental be reduced to the amount of $110,000.00 plus GST plus outgoings per annum for a period of 12 months. At the end of that period the rental could be mutually reviewed between the parties.
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> The above will provide our clients with an opportunity to make an assessment as to whether the business will eventually be viable and sustainable. Without the above indulgence our clients will have no option but to close the business and declare bankruptcy. Obviously this would not be in the best interests of either party and as such we are seeking your consideration of the above proposal to ensure that our clients can maintain their tenancy for the duration of the lease.
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> We look forward to receiving your response to the above as a matter of urgency."

The landlord re-enters

[14] On 25 June 2013, the second respondent, Mr Zarafa, went to the premises where, according to the trial judge's findings, he handed a document entitled "Eviction" to Mr and Mrs Royal. Mr Zarafa's evidence was that he placed this document on a desk in front of Mr and Mrs Royal. The evidence of Mrs Royal was that Mr Zarafa did bring a document to the premises on that day which he "threw" onto the desk but which she did not read. Mr Royal's evidence was that Mr Zarafa told him that this was an "eviction notice". It was clear to Mr and Mrs Royal that Mr Zarafa was purporting to terminate the lease on behalf of the first respondent and was delivering a notice to that effect. Mr Zarafa's evidence, again which the trial judge accepted, was that he said to them that he was at the premises "to take over whether you like it or not" and that they then began to pack up some of their possessions. After spending about an hour in doing so, Mr and Mrs Royal left the premises and did not return.

[15] On 27 June 2013, the applicants' lawyers wrote to the first respondent saying:

> "We are advised by our clients that on 25 June 2013 you terminated the lease between our clients and yourself and took possession of the premises."

The letter asserted that Mr and Mrs Royal had not been allowed to remove all of their possessions and that the third respondent, Mr Okan, had assaulted Mr Royal. The letter continued that the lease having been terminated, pursuant to a certain clause of the lease the tenant's chattels were to be removed and demanded that a date and time be specified for Mr and Mrs Royal to do so. It then set out details of what the applicants admitted to be owing for outgoings and rent, totalling $28,274.95. It referred to a bank guarantee in an amount of $41,250 which was held by the landlord as security for the tenant's performance. The letter demanded payment of $12,975.05, being the difference between the amount of that guarantee and the amount admitted to be owing for outgoings and rent.

[16] Upon the applicants' case, the tenant was wrongly evicted on 25 June 2013 so that upon the basis of that conduct by the landlord, the tenant was entitled to terminate the lease which it did. Upon the respondents' case, the landlord's re-entry was valid, because it was entitled to terminate the lease either for breaches of the lease by the tenant or for the tenant's renunciation of the lease by, in particular, the letter from its lawyers of 19 June 2013.

The trial judge's reasoning about termination

[17] There was an extensive factual controversy at the trial as to whether, as the first respondent contended, it had served a notice under s 124 of the PLA on or about 4 June 2013. Mr and Mrs Royal denied receiving any such notice. I have mentioned already a witness in the applicants' case who had been an employee of the letting agent. She gave evidence to the effect that she prepared a schedule setting out the outstanding rent and outgoings as at 4 June 2013, which was identical to that which the respondent Mr Okan testified had been attached to the s 124 notice which he had prepared and posted. But the evidence of this witness, Ms Riek, was that her schedule had been prepared only on or about 1 July 2013 (therefore after the landlord's re-entry), in response to a request from her employer made only a couple of days earlier. The trial judge reasoned, in effect, that an identical document must have been prepared by somebody else in the letting agent's office which was then provided to Mr Okan on or about 4 June 2013 and that it was that document which was attached to the s 124 notice which her Honour found was posted by Mr Okan.

[18] However her Honour concluded that no notice had been duly served under s 124, because the notice which Mr Okan posted was sent by ordinary mail.[10] Clause 19.1 of the lease provided that a "notice consent or approval" was to be "left at or posted by certified mail to the address of the party as set out in [the lease]". Her Honour rejected an argument that the requirement for certified post was to be disregarded because for many years it had not been possible to post anything by certified mail. In her view what was required was still some service beyond merely posting the notice. There is no challenge to that conclusion by the respondents.

[19] Having concluded that there was no notice served in compliance with s 124, her Honour considered whether there was a "common law right" to terminate the lease

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10 [2016] QDC 77 at [48].

without such a notice being given. She concluded that "Having regard to the continuing and persistent failure to meet its obligations under the lease insofar as the payments of moneys coupled with the letter sent on the 19th of June 2013 … this was conduct sufficient enough to amount to repudiation."[11] Her Honour also referred to evidence, which she accepted, that Mrs Royal had told Mr Okan on 14 June 2013 that no further payments could be made by them at that point in time. Her Honour thereby concluded that the first respondent was entitled to re-enter and take possession of the demised premises, as it did on 25 June 2013.[12]

[20] Her Honour rejected the argument for the applicants, which is repeated in this court, that the first respondent was unable to forfeit the lease for a repudiation constituted by the letter of 25 June 2013 without giving a notice in accordance with s 124 of the PLA.[13] Her Honour there cited the judgment of the Victorian Court of Appeal in *Apriaden Pty Ltd v Seacrest Pty Ltd & Anor*[14] and judgments in the New South Wales Court of Appeal in *Macquarie International Health Clinic Pty Ltd v South West Sydney Area Health Service*[15] and *Marshall v Council of the Shire of Snowy River*.[16]

Section 124 of the PLA

[21] Section 124 relevantly provides as follows:

> "(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant, obligation, condition or agreement (express or implied) in the lease, shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice—
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> (a) specifying the particular breach complained of; and
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> (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
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> (c) in case the lessor claims compensation in money for the breach, requiring the lessee to pay the same;
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> and the lessee fails within a reasonable time after service of the notice to remedy the breach, if it is capable of remedy, and, where compensation in money is required, to pay reasonable compensation to the satisfaction of the lessor for the breach.
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> …
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> (9) This section applies to leases made either before or after the commencement of this Act, and shall have effect despite any stipulation to the contrary."

[22] Section 124(1) does not create a right of re-entry or forfeiture. Rather it imposes a condition on the exercise of such a right which is conferred by a lease. That is a

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11 [2016] QDC 77 at [88].
12 [2016] QDC 77 at [89].
13 [2016] QDC 76 at [94].
14 (2005) 12 VR 319; [2005] VSCA 139.
15 (2010) 15 BPR 28,563; [2010] NSWCA 268.
16 (1994) 7 BPR 14,447.

right which is exercisable for a breach of a covenant, obligation, condition or agreement in the lease. Therefore s 124(1) is engaged only where a right of re-entry or forfeiture is to be exercised on the basis of a *breach*. It is not engaged where a lessor seeks to re-enter or forfeit the lease, not for the lessee's breach, but upon another ground.

[23] A lease is a species of contract, as French CJ, Hayne and Kiefel JJ said in *Willmott Growers Inc v Willmott Forests Ltd (Receivers and Managers appointed) (In liq)*.[17] Therefore, as Mason J said in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*,[18] "the ordinary principles of contract law, including that of termination for repudiation or fundamental breach, apply to leases." In that case a lessor was held to be entitled to damages for loss of bargain where it had re-entered in consequence of the lessee's repudiation in asserting that, in the circumstances which then existed, it was under no liability to pay rent. It was held that the right to terminate the lease for the lessee's repudiation was not excluded by an express term which entitled the lessor to re-enter for the lessee's breach.

[24] As the plurality[19] said in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*,[20] the term repudiation is used in different senses. Their Honours said:[21]

> "First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations. It may be termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it. … Secondly, it may refer to any breach of contract which justifies termination by the other party. … There may be cases where a failure to perform, even if not a breach of an essential term … manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially to its requirements. This overlapping between renunciation and failure of performance may appear conceptually untidy, but unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In contractual renunciation, actions may speak louder than words."

[25] The trial judge found that there was a "common law" right to terminate this lease which came from a combination of the "continuing and persistent failure [by the tenant] to meet its obligations under the lease" and the letter of 19 June 2013.[22] This conduct, in combination, was characterised by her Honour as a repudiation. Upon that analysis, the present case is an example of that described in that passage in *Koompahtoo Council*, in that the tenant's failure to perform had manifested an unwillingness or inability to perform. It was not a repudiation in the sense of a

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17 (2013) 251 CLR 592, 604; [2013] HCA 51 at [39].
18 (1985) 157 CLR 17, 29.
19 Gleeson CJ, Gummow, Heydon and Crennan JJ.
20 (2007) 233 CLR 115, 135; [2007] HCA 61 at [44].
21 Ibid.
22 [2016] QDC 77 at [88].

breach of contract which justified termination under the general law of contract. Rather, it was repudiation in the nature of a renunciation. That was a ground for termination which was distinct from that conferred by the lease itself, where by cl 17.2, it had been agreed that the landlord could re-enter and take possession and terminate the lease if the tenant was in default. It follows that the landlord's rights of re-entry and forfeiture, according to the findings of the trial judge, were not of a kind which engaged s 124(1).

[26] That is supported by, amongst other cases, those to which I have referred above at [20], particularly the reasoning of Meagher JA in this passage of his judgment in *Marshall v Council of Shire of Snowy River*,[23] when discussing the equivalent of s 124 in the *Conveyancing Act* 1919 (NSW):

> "An examination of the decision of the High Court of Australia in *The Progressive Mailing House Pty Ltd v Tabali* (1985) 157 CLR 17, particularly per Deane J at 55, demonstrates that, a lease being a contract, when one party to it repudiates it or commits a fundamental breach or a breach of one of its essential terms, the other party may "accept" the repudiation or breach and terminate the lease. In such a case the lessor, presuming him (as in the present case) to be the innocent party, will have two rights: first, a contractual right to terminate the lease by re-entry for breach of covenant (in this case contained in cl 4 of the lease), and secondly on the application of the ordinary principles of contract law to terminate for breach. If he relies on the former right, he must comply with s 129 of the *Conveyancing Act* before re-entering; if, as here, he relies on the latter right, s 129 becomes an irrelevance."

In *World Best Holdings Ltd v Sarker*[24] Handley AJA disagreed with that passage insofar as it referred to a right to terminate for a fundamental breach or a breach of an essential term, but agreed that a termination for a repudiation would fall outside the ambit of the equivalent of s 124(1).

[27] In this court, as before the trial judge, the applicants sought support from a judgment of Wolfe CJDC in *Fu-Laihsu & Anor v Graham Retailers Pty Ltd*.[25] That was an application for summary judgment by a landlord against a tenant and its guarantors. There was a money claim for outstanding rent and damages. There was also a claim for the recovery of possession upon the basis that the tenant had repudiated the lease. Her Honour gave summary judgment upon (part of) the money claims but not upon the claim for possession. The Chief Judge held that the landlord had been unable to re-enter by changing the locks because it had not given the notice under s 124(1). But there was no consideration of the present question, namely whether a termination of a lease for the tenant's renunciation had to be preceded by such a notice. Nor was that question discussed in another case to which the applicants' argument referred, *Chelfield Pty Ltd v Goldsea Pty Ltd*.[26]

Repudiation: a pleading objection

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23 (1994) 7 BPR 14,447.
24 [2010] NSWCA 24 [38]-[40].
25 [2003] QDC 20.
26 [2003] 2 Qd R 243; [2003] QSC 40.

[28] The applicants argue that the trial judge ought not to have found that the lease was repudiated by the tenant at least because that had not been alleged in the respondents' pleading. In the amended defence, the respondents pleaded that the landlord was entitled to re-enter because the tenant was in "material default" of the lease by the non-payment of rental and outgoings and had failed to remedy that breach by complying with the notice which, it alleged, had been given under s 124(1). The applicants are correct in submitting that there was no alternative plea that the lease was able to be terminated for the first applicant's repudiation.

[29] However that argument of repudiation was very much part of the first respondent's case by the end of the trial. In its written submissions after completion of the evidence, it referred to the letter of 19 June 2013 and submitted that "it is difficult to conceive [of] a clearer case of repudiation than this letter … The letter is [a] deliberate and unequivocal notification by [the first applicant] that it no longer intended (nor could) fulfil the terms of the lease in a manner substantially consistent with its terms." Those written submissions also contended, citing *Apriaden Pty Ltd v Seacrest Pty Ltd* and *Marshall v Snowy River Shire Council*, that a notice under s 124 was unnecessary in view of the tenant's repudiation. In the applicants' written submissions at the trial the point was not addressed.

[30] On the third day of the trial there was some discussion between the trial judge and the respondents' counsel as to the scope of the first respondent's case that it was entitled to terminate the lease. The respondents' counsel was asked to confirm that it was his client's case that once the breaches identified in the alleged s 124 notice had not been remedied, there was an entitlement to re-enter. Her Honour asked "that's your case?", to which counsel responded "it's part of our case, your Honour" and that "there are alternate means by which my client lawfully took possession." Counsel went on to say that at the time of re-entry, the tenant was "in material default of the lease" and that there was "authority to support the proposition that you actually don't need to serve [a s 124 notice]" in that circumstance.

[31] In that exchange, counsel did not identify the argument, which he advanced at the end of the trial, that it was unnecessary to give a s 124 notice because there had been a repudiation in the nature of a renunciation. Nevertheless the applicants were put on notice that there would be an argument that the lease had been terminated even absent a s 124 notice. I am mindful of the benefit of hindsight, but the applicants should have anticipated, at least from that point in the trial, the argument which ultimately prevailed. After all there was considerable authority to support it. Further it does not appear that the absence of a plea of this point affected the conduct of the trial and the ultimate outcome. There is no suggestion that had the point been pleaded, some other evidence, which was relevant, would have been tendered to meet it. There was no controversy as to the fact of the conduct which the trial judge found was repudiatory. Contrary to an argument now made for the applicants, it would not have been relevant to explore by further evidence what the applicants believed to have been the effect of their conduct.

Was there a repudiation?

[32] The question here is whether the first applicant evinced an unwillingness or an inability to render substantial performance of the contract.[27] In *Shevill v Builders*

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27 *Koompahtoo Council* (2007) 233 CLR 115, 135.

Licensing Board,[28] it was said that "Repudiation of a contract is a serious matter and is not to be lightly found or inferred."

[33] Critical to the respondent's case was the letter of 19 June 2013 which is set out above at [13]. It contained unambiguous statements that the first applicant was unable to comply with the lease, particularly the obligation to pay outgoings and rent in the amounts which the lease required. It stated that the applicants' business could not continue trading if the first applicant was to be held to performance of the terms of the lease. It did express some optimism that "matters will improve over the next 12 months". But there was no assurance that at that time any arrears of rent or outgoings would be paid. Rather all that was said was that if the rent was reduced to an amount of $110,000 plus GST for a period of 12 months, "at the end of that period the rental could be mutually reviewed between the parties." In effect it was said that the first applicant could pay no more than about 70 per cent of the agreed rent in the next 12 months with no prediction as to what could be paid after that period. The letter also stated that without such a reduction in the rent, the applicants would have no option but to close the business and "declare bankruptcy".

[34] For the applicants it is submitted that this was nothing more than an attempt to negotiate a variation of the contract. In my view it was unambiguously a statement of an inability to render substantial performance of the contract. The difference between the agreed rent and that which was proposed was substantial.

[35] The conduct which had preceded that letter, in the nature of frequent and ongoing defaults in making timely payments of rent and outgoings, of itself may not have constituted a repudiation. But it was relevant, the trial judge reasoned, in characterising the letter of 19 June 2013. It made it yet more difficult to characterise the letter as a tactical exercise, rather than as an admission of an inability to perform the contract.

[36] Consequently the trial judge was correct in concluding that there was an entitlement to re-enter and forfeit the lease without giving a notice under s 124 and that the first applicant's claim for damages against the first respondent could not succeed. It was the first respondent which had duly terminated the contract and which was entitled to damages.

[37] The complaints made in this court about the assessment of the first applicant's loss, including the complaint that a forensic accountant's evidence in the respondents' case on that question was wrongly admitted, need not be considered. Nor is it relevant to consider, in the case between the applicants and the first respondent, the applicants' complaint that the trial judge "unfairly interfered in the trial process" by, amongst other things, limiting the examination and cross-examination of witnesses. The outcome of the claim and counterclaim between the applicants and the first respondent was the result of facts which were undisputed.

The counterclaim

[38] After taking possession, the first respondent conducted the car wash business until it leased the premises to an unrelated party from 1 November 2013. It sold the freehold on 30 June 2014. Her Honour calculated the first respondent's entitlement under the counterclaim by reference to amounts for outstanding rent and outgoings as at the termination of the lease; loss of rent and outgoings from 1 July 2013 to

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28 (1982) 149 CLR 620, 633.

31 October 2013; a small difference between the rent and outgoings under the applicants' lease and those payable under the new lease; an amount for legal fees payable pursuant to a term of the applicants' lease; and some small amounts (totalling less than $3,000) which were to be set off against the first respondent's claim. The result was the amount of $118,469.55 for which the first respondent was given judgment against the applicants.

[39] The applicants submit that there were two errors in that calculation. The first, which is conceded by the first respondent, is that her Honour overlooked the fact that the first respondent had called upon the bank guarantee which it had received to secure the first applicant's performance of the lease. It was common ground on the pleadings that the first respondent had called upon that bank guarantee and been paid $41,250. In this court, all that was said for the first respondent was that the error could have been rectified by the trial judge being asked to do so under the slip rule.[29] Whether that is so need not be considered here. Now that the judgment on the counterclaim is challenged in this court, it is appropriate to correct it by granting leave to appeal and allowing the appeal in that respect.

[40] The other argument for the applicants is that the trial judge failed to give credit for the income which was received by the first respondent in the period in which it conducted the business. There was income of that kind. But the question was whether there were any profits derived by the first respondent because clearly there were some expenses from the conduct of the business. The trial judge accepted evidence that no profits were made and that this was because the car wash machine was not working properly during this period.[30] There is no challenge to those findings.

[41] Consequently the amount for which the first respondent should have been given judgment was $77,219.55. There is no argument that Mr and Mrs Royal were not also liable for this sum.

[42] The trial judge gave a judgment in the amount of $118,469.55 "plus interest, calculated pursuant to cl 5.7 of the lease …". Clause 5.7 was as follows:

> "If the Tenant does not pay on time any amount payable by it under this Lease it shall pay the Landlord interest on that amount from when it becomes due for payment until it is paid. Interest is calculated on daily balances at a rate of 2% per annum above the rate quoted on the day of demand by the Landlord's principal bankers (as nominated by the Landlord) on unsecured overdraft accommodation in excess of $100,000."

The trial judge found no facts from which that interest rate and thereby the interest could be calculated. Nor was there any consideration given to whether cl 5.7 provided an entitlement to interest upon those components of the first respondent's claim which were in the nature of damages for breach of contract. The judgment was irregular by requiring the payment of interest without specifying an amount of interest to be paid.[31]

The defamation claims

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29 *Uniform Civil Procedure Rules* r 388.

30 [2016] QDC 77 at [140].

31 According to Form 58 in the *Uniform Civil Procedure Rules*.

[43] The first of the publications alleged by Mr and Mrs Royal were said to have been made on 8 July 2013 to a Ms O'Connor, who knew Mr and Mrs Royal, having met them in the course of her work as a driving instructor teaching their daughter to drive. Ms O'Connor's evidence was that on that day she went to the office of the premises to get some coins for the operation of the machine and was surprised that Mr and Mrs Royal were not there. She asked where they were and was told by someone in that office that "he had pretty much kicked them out because they were six months behind in their rent and owed $70,000".[32] In the applicant's case, it was alleged that these words were spoken by Mr Zarafa.

[44] Mr Zarafa's evidence, which the trial judge accepted, was that he may have been at the premises on 8 July 2013 but that he would not have said the words which were attributed to him. Ms O'Connor impressed the trial judge "as a witness who was prepared to support Mr and Mrs Royal in any way she could".[33] Therefore her Honour was not satisfied that the relevant words were spoken.

[45] The claim against Mr Okan relied upon the evidence of a Mr Starmer. He had known Mr Royal for 15 years. Mr Starmer said that he recalled requests from "Sini" (a reference to Mr Okan) to come to the premises to assist with the repair of the car washing machine. His evidence was that during one of these conversations, he was told that Mr Royal was no longer at the site because he hadn't paid his rent for some time. Mr Starmer believed that the rent hadn't been paid for five or six months, according to what he was told. Mr Okan denied making a statement as alleged. The trial judge accepted his evidence and rejected that of Mr Starmer.

[46] Her Honour went on to conclude that if these publications had been made, they could not "carry … an imputation that could be capable of supporting a general imputation that both Mr and Mrs Royal were insolvent, of bad character and lacked moral probity",[34] as the applicants had pleaded.

[47] Further again, her Honour said that if the publications had been made, and carried the imputation (as pleaded) that Mr and Mrs Royal were insolvent, that would have been substantially true.[35] And her Honour concluded that had the defamation claims been upheld she would have awarded each of the plaintiffs damages of only $500. For Mr and Mrs Royal, it was argued that such an assessment would have been erroneous. But on any view, the alleged defamations could not have attracted more than a minimal amount and less than the amount of $30,000 which was claimed. In substance, the defamation claims were premised upon the correctness of the applicants' case that they had been wrongly evicted from the premises. In truth, the extent of the arrears of rental and outgoings was of the order of two months, rather than five or six months. But a misstatement in that respect could not have attracted a substantial award of damages.

[48] The most immediate obstacle for each of the applicants on these claims is the finding by the trial judge that the alleged statement was not made. That requires a challenge to her Honour's findings about the credibility of not only the second or third respondents, but also that of Ms O'Connor or Mr Starmer. Save in one respect, the applicants' arguments do not reveal a basis for interfering with these credit findings.

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32 [2016] QDC 77 at [155].
33 [2016] QDC 77 at [165].
34 [2016] QDC 77 at [185].
35 [2016] QDC 77 at [192].

That qualification is in the applicants' argument that the trial judge erred in accepting the evidence of Mr Okan that he prepared and posted a notice under s 124, as he said that he had done in early June 2013. If he was untruthful in that evidence, that would affect his credibility more generally.

[49] In this court counsel for the applicants made extensive written and some oral submissions in an endeavour to demonstrate that Mr Okan's evidence in that respect was false. That issue is inconsequential in the case between the applicants and the first respondent, because there was no challenge by the first respondent to the trial judge's conclusion that a s 124 notice had not been duly *served*. And there is no other question raised in the proposed appeals affecting the first respondent for which the question of Mr Okan's credibility could now be relevant. Therefore, as counsel for the applicants conceded, Mr Okan's credibility could be relevant now only to the defamation claims made against him.

[50] The challenge to Mr Okan's evidence that he prepared and posted a notice under s 124 is not without some force. On this evidence, there was attached to the notice a document prepared by the letting agents showing the calculation of rental and outgoings to 4 June 2013. As already discussed, an identical document in all respects was prepared within the office of the letting agents but some weeks later, after the re-entry of the premises. That document and the one which Mr Okan said was attached to the s 124 notice were identical in some remarkable respects, suggesting that Mr Okan had used that later document in compiling what he presented at the trial as the notice and its attachment. Moreover there was no likely explanation in the respondents' case of why the letting agents were requested to prepare, in late June 2013, a statement of what was outstanding as at 4 June, if that had already been provided on or about 4 June 2013 and Mr Okan had retained a copy.

[51] But ultimately this attack on Mr Okan's credibility could be relevant only to whether leave to appeal should be granted to the end of a retrial of the claims against him, because this court could not fairly determine whether Mr Okan was truthful. Given that success on an appeal would result only in a retrial and that, on any view, the damage from the alleged defamation could not warrant a substantial award of damages, I would not grant leave to appeal against the judgment in Mr Okan's favour. And there is no basis for granting leave to appeal against the judgment in favour of Mr Zarafa, because in that case, there is no arguable basis for impugning the trial judge's assessment of the credibility of Mr Zarafa.

Conclusions and orders

[52] The applicants have demonstrated an error by the trial judge in not allowing for the sum of $41,250 received by the first respondent under the bank guarantee. The judgment on the counterclaim should be varied accordingly. The order for interest on the judgment sum should be set aside. This requires a grant of leave to appeal and, in those respects, the appeal to be allowed. Leave to appeal against the judgment between the second and third applicants and the second and third respondents should be refused.

[53] As to the costs of the proceedings in this court, I would make no order in the circumstances that the applicants have succeeded but only in one respect, which was not controversial, and the respondents were not legally represented in this court.

[54] I would order as follows:

(1) Grant leave to appeal against the judgment between the applicants and the first respondent delivered on 8 April 2016.

(2) Allow the appeal.

(3) Set aside the order then made and instead order that the applicants pay to the first defendant an amount of $77,219.55.

(4) Order that the claims against the first respondent be dismissed.

(5) Refuse leave to appeal against the dismissal of the claims against the second and third respondents.

(6) Order that there be no order as to costs of the proceeding in this court.

[55] **DAUBNEY J:** I agree with Philip McMurdo JA.