SUPREME COURT OF QUEENSLAND

CITATION:	*Hookey & Anor v Whitelaw & Ors* [2020] QCA 184
PARTIES:	**SCOTT GREGORY HOOKEY** (first appellant/first applicant) **KIDS ACADEMY HOPE ISLAND PTY LTD ACN 164 852 475 AS TRUSTEE OF THE KIDS ACADEMY HOPE ISLAND UNIT TRUST** (second appellant/second applicant) **v** **JOHN BRUCE WHITELAW** (first respondent) **KA ESTATES PTY LTD ACN 600 469 887 AS TRUSTEE OF THE KA ESTATES UNIT TRUST** (second respondent) **JBW ESTATES PTY LTD ACN 600 602 819 AS TRUSTEE OF THE JBW FAMILY TRUST** (third respondent)
FILE NO/S:	Appeal No 4832 of 2020 SC No 8477 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Application for Reopening (Civil)
ORIGINATING COURT:	Supreme Court at Brisbane – [2020] QSC 63 (Flanagan J)
DELIVERED ON:	1 September 2020
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGE:	Morrison JA
ORDER:	**Refuse the application to re-open.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS – WHERE APPLICANT SUCCESSFUL IN PROCEEDINGS – where the appellants were ordered to provide security for costs, and to pay the respondents' costs of that application – where since delivery of the judgment the appellants have sought to re-open the case and seek a variation of the order insofar as it provided that they pay the costs of the application – where the basis of the application is that the correspondence between the parties should warrant that the existing order for costs be set aside and that the respondents be ordered to pay the appellants' costs of the application or alternatively that they be the appellants' costs in the appeal – whether the application for reopening should be granted

Whitelaw & Ors v Hookey & Anor [2020] QCA 145, cited

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

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

[1] **MORRISON JA:** On 30 June 2020 I delivered reasons for the judgment on the respondents' application for security for costs, and for a stay of the appeal.[1] Relevantly, the appellants were ordered to provide security for costs, and to pay the respondents' costs of that application.

[2] Since delivery of the judgment the appellants have sought to re-open the case and seek a variation of the order insofar as it provided that they pay the costs of the application. The basis of the application is that the correspondence between the parties should warrant that the existing order for costs be set aside and that the respondents be ordered to pay the appellants' costs of the application, or alternatively that they be the appellants' costs in the appeal.

[3] Normally one would be reluctant to permit a party to re-open and re-agitate such a question where, as here, the opposite parties sought an order for costs and the appellants chose to make no submission about that at the hearing. However, it is unnecessary to examine that question as I have come to the view that the existing order should not be altered. I will briefly explain why.

[4] The parties have agreed on the bundle of correspondence which covers the period of about three weeks prior to the application for security for costs being filed, and ending some four days prior to the hearing of the application itself.

[5] What the correspondence reveals, in summary, is as follows:

(a) in the three weeks leading up to the filing of the application the parties debated the extent of any likely security, with the respondent opening the "bidding" at $125,000 but then reducing it to $112,500, and the appellants first offering $100,000 but then increasing it to $105,250;

(b) this debate was under the umbrella of the respondents' insistence that security ought to be ordered, and the appellants' insistence that security was not warranted;

(c) the debate also included whether any security could be paid in two tranches and, if so, whether the bulk should be paid early or later (the debated split being the appellants' suggested 40:60 as opposed to the respondents' 60:40);

(d) on 3 June 2020 the application was filed together with an affidavit in support;

(e) that day the appellants offered $116,000 as security in two tranches, split 40:60;

(f) over the following week the parties debated the rather unedifying question as to whether there was previous authority for the proposition that security for costs on an appeal could be paid in tranches rather than all at one time; as

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1 *Whitelaw & Ors v Hookey & Anor* [2020] QCA 145.

well, the respondents sought evidence assuring them that any second tranche would, in fact, be paid before committing themselves to that scenario; and

(g) finally, on 12 June 2020, the appellants offered $125,000 for security, in two tranches, and the respondents advised that they would press for relief in the application (which, of course, included the application for a stay).

[6] I do not consider that the competing positions revealed in that correspondence warrant any alteration in the costs order made on 30 June 2020. The appellants offered increasing sums, but in the amount that was eventually ordered, only some four days before the hearing, and nine days after the application and affidavit were filed. Whilst it is true to say that the appellants always indicated a willingness to pay some security, they never managed to achieve agreement on the amount until some time after the application and supporting affidavits had been filed.

[7] For these reasons I refuse the application to re-open. There is no basis for an order for the costs of this application on the indemnity basis. The respondents do not seek an order as to the costs of this application if an order on the indemnity basis is not made.