DISTRICT COURT OF QUEENSLAND

CITATION:	*Sandy's Swim Pty Ltd v Morgan* [2022] QDC 131
PARTIES:	**SANDY'S SWIM PTY LTD** **(ABN 73 641 260 451)** (plaintiff) **v** **LANCE MORGAN** (defendant)
FILE NO:	2508 of 2021
DIVISION:	Civil
PROCEEDING:	Applications
ORIGINATING COURT:	District Court
DELIVERED ON:	9 June 2022
DELIVERED AT:	Brisbane
HEARING DATE:	28 April 2022
JUDGE:	Dearden DCJ
ORDER:	

1. **The plaintiff's application for summary judgment filed 11 April 2022 and the plaintiff's application filed 21 April 2022 are dismissed.**

2. **The defendant's application for security for costs is granted.**

3. **The parties are to participate in a mediation within 30 days of this order or such further period as the parties mutually agree, in writing, on the following terms:**

    (a) **The defendant's solicitor is to provide the names of two counsel to the plaintiff within 7 days of this order.**

    (b) **The plaintiff is to provide the names of two counsel to the defendant's solicitors within 7 days of this order.**

(c) The parties are to use best endeavours to negotiate the selection of a mediator within 10 days of this order.

(d) The defendant's solicitor is to notify the mediator in writing (copied to the plaintiff) within 14 days of this order.

(e) 7 days prior to mediation, the defendant's solicitor is to prepare a brief to the mediator containing the pleadings and up to five documents selected by the plaintiff's and up to five documents selected by the defendant.

(f) The costs of the mediator is to be paid 3 days before the mediation in the following shares:

(i) 50% - the plaintiff; and

(ii) 50% - the defendant.

4. **If the proceedings do not settle by mediation, then within 30 days of the filing of a mediator's certificate that parties have not resolved their dispute, the plaintiff shall give security for the defendant's costs of the proceeding in the sum of $60,000 in a form acceptable to the Registrar of the District Court of Queensland.**

5. **The plaintiff pay the defendant's costs of the plaintiff's applications filed 11 April 2022 and 21 April 2022 and the defendant's application filed 19 April 2022.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – WHEN GRANTED OR REFUSED AND CONDITIONS – where the plaintiff seeks an order for summary judgment – where the defendant submits there is a dispute as to who the lessee is – where the defendant submits it has reasonable prospects of success

	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SECURITY FOR COSTS – FACTORS RELEVANT TO EXERCISE OF DISCRETION – PLAINTIFF'S OR APPLICANT'S IMPECUNIOSITY – GENERALLY – where the defendant seeks security for costs of the proceeding – where the defendant submits there is a reasonable belief that the corporation would be unable to pay the defendant's costs if ordered to pay them – where the plaintiff seeks the application be dismissed for abuse of process
LEGISLATION:	*Civil Proceedings Act 2011* (Qld) s 17 *Corporations Act 2001* (Cth) ss 131-133, 1335 *Human Rights Act 2019* (Qld) s 1 *Property Law Act 1974* (Qld) s 124 *Uniform Civil Procedure Rules 1999* (Qld) rr 5, 292, 389A, 670 – 672, 690
CASES:	*Aqua Blue (Noosa) Pty Ltd v Soil Surveys Engineering Pty Ltd* [2010] QSC 176 *BAS (Qld) Pty Ltd v Complete Taxi Management Pty Ltd* [2016] QDC 54 *Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd* [2012] QCA 114 *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd* [2006] FCA 1352 *Clyde Contractors Pty Ltd v Northern Beaches Developments Pty Ltd* [2001] QCA 314 *Champtaloup v Thomas* [1976] 2 NSWLR 264 *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 *Combined Property Holdings Pty Ltd v Galea* [2020] QSC 338 *Denbrook Constructions Pty Ltd v CBA Developments Pty Ltd* [2021] QDC 325 *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 *Filmana Pty Ltd v Tynan* [2013] QCA 256 *Heyman v Darwins Ltd* [1942] AC 356 *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417 *Hyperion Technology Pty Ltd v Queensland Motorways Ltd* [2013] QSC 20

LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd [2011] QCR 105

Logan APZ Pty Ltd v Council of the City of Logan [2017] QCA 288

McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457

National Australia Bank v Heart [2002] QSC 051

Presmist Pty Ltd v Turner Corp Pty Ltd (1992) 30 NSWLR 478

Queensland Pork Pty Ltd v Lott [2003] QCA 271

Sargent v ASL Developments Ltd (1974) 131 CLR 634

Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd [2009] QCA 254

Swain v Hillman [2001] 1 All ER 91

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165

Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1988) 165 CLR 107

Tynan v Filmana Pty Ltd [2013] QSC 32

Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd (1936) 54 CLR 361

White and Carter (Councils) Ltd v McGregor [1962] AC 413

Willmott v McLeay [2013] QCA 84

COUNSEL: A Brown (Director) for the plaintiff
M J Downes for the defendant

SOLICITORS: The plaintiff appeared self-represented (by its director)
Gibbs Wright Litigation Lawyers for the defendant

Introduction

[1] The plaintiff, Sandy's Swim Pty Ltd, commenced proceedings on 24 September 2021 against the defendant, Lance Morgan, by way of claim for damages for breach of a lease in respect of a swimming pool situated at the defendant's property at Rochedale South.

Application

[2] The plaintiff, by application filed 11 April 2022, seeks the following orders:-

1. Pursuant to the *Uniform Civil Procedure Rules 1999* (Qld) ('UCPR') r 5, 292 and 690,[1] the plaintiff seeks an order for summary judgment, for the full amount of the claim (or if the court chooses, damages to be assessed with the Affidavit of Alex Sandy Brown sworn 14 November 2021);[2]

2. Costs incurred during the matter to be costs to the party that incurred them, or of the defendant's solicitors (as the court sees fit);

3. A bar against all further claims or actions against the plaintiff and Alex Brown, from the defendant Lance Morgan, solicitors Rebekkah Hallberg, Spencer Wright, Melany Dowse and Gibbs Wright Litigation Lawyers;

4. A bar against any further claims or actions against the defendant Lance Morgan, solicitors Rebekkah Hallberg, Spencer Wright, Melany Dowse and Gibbs Wright Litigation Lawyers from the plaintiff and Alex Brown; and

5. The plaintiff seeks no order for costs for this application.

[3] In a cross application, filed 19 April 2022, the defendant seeks the following orders:-

1. Pursuant to r 670(1) of the UCPR or s 1335 of the *Corporations Act 2001* (Cth),[3] the plaintiff gives security for the defendant's costs of the proceeding in the sum of $151,809.31 or such other amount as determined by the court;

2. The plaintiff pay the defendant's costs of the application; and

3. Such further or other orders as the court sees fit.

[4] The plaintiff seeks the following orders by way of (effectively) a cross-application filed 21 April 2022, namely:-

1. Pursuant to UCPR r 5 and 389A,[4] the plaintiff seeks an order to:

---

1 *Uniform Civil Procedure Rules 1999* (Qld) ('UCPR') rr 5, 292, 690.
2 Affidavit of Alex Sandy Brown sworn 14 November 2021.
3 UCPR r 670(1); *Corporations Act 2011* (Cth) s 1335.
4 UCPR rr 5, 389A.

(a) dismiss the defendant's application of 19 April 2022 for abuse of process;

(b) as there is no trial scheduled for any security of costs application, and there is not even any request for trial date filed (which could take at least 21 days to complete); and

(c) the plaintiff seeks no order for costs for this application.

[5] As a matter of convenience, all applications were heard before me at the Brisbane District Court on 28 April 2022.

Plaintiff's applications

[6] The plaintiff appeared at the hearing represented by its sole director, Alex Sandy Brown.[5] It is convenient to deal initially with paragraphs [3] & [4] of the plaintiff's application filed 11 April 2022,[6] which, in paragraph [3], seeks a bar against all further claims or actions against the plaintiff and Alex Brown by the defendant and three nominated solicitors as well as the law firm Gibbs Wright Litigation Lawyers; and in paragraph [4], a bar against any further actions against the defendant, those three named solicitors and the law firm, Gibbs Wright Litigation Lawyers by the plaintiff and Alex Brown.

[7] The plaintiff's submissions are at times disjointed, irrelevant, and lacking legal substance (perhaps understandable given that Mr Brown, who appears for the plaintiff, is not legally qualified).[7] Relevantly, in respect of paragraphs [3] & [4] of the plaintiff's application, the thrust of the submission appears to be an assertion that the defendant's solicitors (including the three solicitors named in the application as well as the law firm) have, in some way, by their conduct of the proceedings for the defendant, allegedly committed some form of misconduct, taken away the plaintiff's right to a fair hearing and (in the plaintiff's submission) should be joined to the proceedings. In that respect, the plaintiff purports to rely on s 17 of the *Civil Proceedings Act 2011* (Qld) which provides:-

"17 **Interested person may become a party and may be bound by outcome**

---

5 Statement of Claim filed 24 September 2021 [1.2].

6 Application filed 11 April 2022.

7 Exhibit 2 – Plaintiff's submissions, p 7.

> (1) This section applies if the court considers—
>
> > (a) not all persons interested in the subject matter of a proceeding or the relief sought in a proceeding are before the court; and
> >
> > (b) the proceeding ought not to proceed, or relief ought not to be given, without particular persons being given notice of the proceeding.
>
> (2) However, this section does not apply to a representative proceeding under part 13A.
>
> (3) The court may—
>
> > (a) order that the particular persons be included as parties to the proceeding; or
> >
> > (b) stay the proceeding until notice of the proceeding has been given, as the court may direct, to the particular persons.
>
> (4) If a person given notice does not elect to be included as a party to the proceeding, the person is bound by the outcome of the proceeding in relation to any subject matter or relief in which the person was interested."

[8] Having clarified with the plaintiff's representative, Mr Brown, in oral submissions, that the application was not seeking to add the three named solicitors and the law firm as parties, but rather was seeking an order against them for a bar against claims for actions, Mr Brown was then unable to point to any specific legislation which would entitle a judge of the District Court, as a court of limited jurisdiction, to make such an order barring named persons, and/or a law firm, from bringing claims or actions against the plaintiff and/or Alex Brown. Mr Brown, in his oral submissions, appeared to assert that the orders that he sought were in the context of seeking to achieve finality in judgments, but, apart from an understandable expression of a wish for proceedings to be concluded, he was unable to identify any legislative basis for the orders sought in respect of paragraphs [3] & [4] of the application of 11 April 2022. It is clear, in respect of paragraphs [3] & [4], that those aspects of the application should be refused, as this court has no jurisdiction to consider them.

[9] In respect of the plaintiff's application of 21 April 2022,[8] the defendant, correctly in my view, identifies that application as "misconceived on its face."[9] In any event,

---

[8] Application filed 21 April 2022.
[9] Exhibit 4 – Defendant's outline of argument [7].

during the course of argument, Mr Brown, on behalf of the plaintiff, conceded that the plaintiff's application of 21 April 2022 reflected the plaintiff's opposition to the defendant's application seeking security for costs.[10]

Overview

[10] The following summary prepared by the defendant is a useful and accurate overview of these proceedings:

> "[1] According to the plaintiff's pleaded case, on 23 April 2020, Mr Morgan [the defendant] entered an informal lease as lessor relating to a swimming pool for a swim school. There is a debate whether the plaintiff company (which was not then incorporated) or its controlling mind, Mr Brown, was the lessee.
>
> [2] The lease ended in August 2021. There is a debate whether Mr Morgan repudiated the lease or the lease was determined by mutual agreement.
>
> [3] The further amended statement of claim (which repleads allegations struck out by Porter QC, DCJ) seeks damages allegedly caused by seven repudiations of the lease.
>
> …
>
> [8] The plaintiff company's pleaded case is a lease was made on 23 April 2020. The lease was informal – it is constituted by an exchange of emails.
>
> [9] On 27 May, 2020, Mr Brown incorporated the plaintiff company.
>
> [10] Their landlord-tenant relationship was troubled from the start. The plaintiff company's first pleaded repudiation was on 28 April 2020. The plaintiff alleges seven repudiations in total, the remaining allegedly occurring on 4 January 2021; 23 July 2021, 14 August 2021; 15 August 2021; 22 August 2021. The only alleged acceptance of the repudiation was in the filing of the proceedings.
>
> [11] The lease ended … following an exchange of angry emails on 14 and 15 August 2021. The emails culminated with Mr Morgan saying:
>
> > *'As you have been so rude and threatening don't bother showing up tomorrow. The gates will be locked.*
> >
> > *To which Mr Brown replied;*
> >
> > *As mentioned, I have already removed my key items yesterday, I have no wish to see you again.'*

---

[10] Transcript T1-17, ll 24-28.

> [12] These proceedings were commenced in September 2021. A defence was filed in December 2021 (after a default judgment was set aside), and the parties were ordered to participate in mediation by March 2021. The mediation was not successful.
>
> [13] On 1 March 2021, Mr Morgan's solicitors wrote to Mr Brown to identify the plaintiff company's impecuniosity, invited Mr Brown to identify any realizable assets of the plaintiff company from which a costs order could be paid, and foreshadowed a security for costs application. There was no response to this letter."[11]

Application for summary judgment – the law

[11] The application proceeds under UCPR r 292(2) which relevantly provides:-

> "**292 Summary judgment for plaintiff**
>
> (1) A plaintiff may, at any time after a defendant files a notice of intention to defend, apply to the court under this part for judgment against the defendant.
>
> (2) If the court is satisfied that—
>
> (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and
>
> (b) there is no need for a trial of the claim or the part of the claim;
>
> the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."[12]

[12] The leading case on the application of UCPR r 292 is *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232, where Williams JA, with whom McMurdo P agreed, stated:[13]

> "[11] … rule 292 and r 293 brought about significant changes in the law and procedure relating to summary judgment. The wording of r 292 and r 293 is clearly based on the drafting used in part 24 of the *Civil Procedure Rules* (UK) which came into force in the United Kingdom in 1999. In *Swain v Hillman* [2001] 1 All ER 91, the Court of Appeal had to consider rule 24.2, the equivalent of rule 292. Lord Woolf MR said at 92:
>
> > 'The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word real distinguishes fanciful prospects of success, or… they direct the

---

[11] Exhibit 4 – Defendant's outline of argument [1]-[3], [8]-[13].

[12] UCPR r 292(2).

[13] *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232.

> court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success.'"

Later, again speaking of the rule, he said at 94:

> 'It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible.'" [*Swain v Hillman* [2001] 1 All ER 91].

In his reasons at 95, Pill LJ accepted that the term "real" was used in contradistinction to "fanciful." The third member of the court, Judge LJ, whilst recognising that summary judgment was a "serious step," went on to say at 96:

> "This is simple language, not susceptible to much elaboration, even forensically. If there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable."[14]

[13] In the same case, McMurdo P, in agreeing with Williams JA stated:[15]

> "[2] UCPR r 292 and r 293 should be applied using the clear and unambiguous language and keeping in mind the purpose of the UCPR to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
>
> [3] Nothing in the UCPR, however, detracts from the well-established general principle that issues raised in proceedings will be determined summarily only in the clearest of cases."[16]

[14] More specifically, the case law on summary judgment indicates the following propositions:[17]

> "(a) The court is not required to engage in a trial of a claim on a summary judgment application. The depth of analysis required to satisfy r 292 will vary based on the nature of the case. The assessment of whether there is a reasonable prospect of successfully defending the proceeding must depend upon the evidence and the pleading the subject of the application.[18] A

---

14 *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232 [11].

15 Ibid [2].

16 Ibid [2]-[3].

17 Exhibit 4 – Defendant's outline of argument [19].

18 *BAS (Qld) Pty Ltd v Complete Taxi Management Pty Ltd* [2016] QDC 54 [18] (Kingham DCJ) citing *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd* [2006] FCA 1352 [48] (Rares J).

similar proposition – the process is not to engage in a 'mini trial' – was stated in *Swain v Hillman* [2001] 1 All ER 91.[19]

(b) The court can give judgment on all or part of the claim.[20]

(c) The onus is on the applicant to prove the claim, but once a prima facie case has been made out entitling the applicant to judgment, then an evidentiary onus shifts to the respondent.[21]

(d) Relatedly, the absence or inadequacy of supporting material from the defendant can mean there is no real evidence before the court to demonstrate that there was an issue to be tried. 'there was an onus on the appellant to demonstrate that there was some issue to be tried or some other good reasons for the matter to go to trial.'[22]

(e) Both subparagraphs of r 292(2)(a) & (b) must be satisfied. However even if they are both satisfied, the court retains a residual discretion not to grant summary judgment."[23]

Discussion

[15] Despite a careful perusal of the plaintiff's submissions, it is difficult to identify specifically the basis on which the plaintiff submits that each of the relevant tests is satisfied, namely the "no real prospect of successfully defending all or part of the plaintiff's claim,"[24] and that "there is no need for a trial of the claim."[25]

[16] Mr Brown, in his written submissions, clearly articulates that he wishes to bring the matter to a conclusion,[26] which of course is commendable. However, he then seeks to assert that, in some way, the defendant's solicitors have misconducted themselves, by failing to facilitate the litigation proceeding expeditiously and at a minimum of expense, in accordance with UCPR r 5. Mr Brown asserts that this has taken away the plaintiff's right to a fair hearing in breach of the *Human Rights Act 2019* (Qld) s 1.[27] The plaintiff further asserts that the affidavit evidence shows that the parties had a six

---

19 *Swain v Hillman* [2001] 1 All ER 91, 95 (Woolf MR).

20 *Tynan v Filmana Pty Ltd* [2013] QSC 32 [47]–[49] (Jackson J); affirmed on appeal: *Filmana Pty Ltd v Tynan* [2013] QCA 256.

21 *Queensland Pork Pty Ltd v Lott* [2003] QCA 271 [41] (Jones J); *LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd* [2011] QCR 105 [22] (White JA, with whom M Wilson AJA and A Lyons J agreed).

22 *Clyde Contractors Pty Ltd v Northern Beaches Developments Pty Ltd* [2001] QCA 314 [17]–[18] (Williams JA with whom McMurdo P and Phillippides J agreed).

23 *Willmott v McLeay* [2013] QCA 84 [16] (Holmes JA with whom Fraser and White JA agreed); *National Australia Bank v Heart* [2002] QSC 051 [38] (Mullins J); *Denbrook Constructions Pty Ltd v CBA Developments Pty Ltd* [2021] QDC 325 [5] (Porter QC DCJ).

24 UCPR r 292(2)(a).

25 Ibid r 292(2)(b).

26 Exhibit 2 – Plaintiff's submissions, p 1.

27 Exhibit 2 – Plaintiff's submissions, p 3; *Human Rights Act 2019* (Qld) s 1.

year lease, which was transferred to the plaintiff with the defendant's consent, and no affidavit material had been filed to deny "those facts."[28] The plaintiff also appears to assert that in some way there has been unconscionable conduct by the solicitors for the defendant;[29] that there is a lack of equality of arms as between himself and the defendant; and that the proceedings would be fairer if the defendant self-represented.[30] That latter submission, of course, ignores the entitlement of every litigant to be legally represented if they choose and the core proposition, namely that these proceedings were commenced by the plaintiff and the defendant, as is his right, has chosen to brief lawyers to defend himself in that litigation.

[17] The plaintiff's substantive submissions in respect of the summary judgment application are diffuse and difficult to follow. In essence, the plaintiff argues that the filed affidavit evidence shows that the parties had a six year lease, which was transferred to the plaintiff with the defendant landlord's consent and assistance, and no affidavit evidence has been filed to deny those facts;[31] that the defendant landlord admits he locked out the plaintiff with less than a day's notice and without using a Form 7 and adhering to the procedures of the *Queensland Property Act 1974* s 124 [an apparent reference to the *Property Law Act 1974* (Qld)] for any alleged breach by the lessee;[32] and that this amounts to a breach of fiduciary duties by the defendant.[33]

[18] The defendant, in response, submits firstly that there is a clear dispute as to who the lessee is in respect of the lease. The defendant identifies that the Amended Statement of Claim pleads,[34] and the defendant admits, a lease was entered into on 23 April 2020,[35] and it is because of the alleged repudiation of that lease that the plaintiff company claims to be entitled to relief. However, the plaintiff company was not incorporated until 27 May 2020 and consequently could not have been a party to the lease made on 23 April 2020, and ratification is not pleaded, so the agreement is not

---

28 Exhibit 2 – Plaintiff's submissions, p 5.
29 Ibid pp 6-7.
30 Ibid pp 7-8.
31 Ibid p 9.
32 Ibid p 10.
33 Ibid.
34 Amended Statement of Claim filed 10 December 2021.
35 Further Amended Statement of Claim filed 13 December 2021 [15].

a pre-incorporation contract.[36] Similarly, assignment is also not pleaded, although asserted by Mr Brown in affidavits filed on behalf of the plaintiff.[37]

[19] Consequently, it is submitted on behalf of the defendant that under the doctrine of privity of contract, only parties to a contract may sue or be sued on it.[38] The defendant's submission is that the pleaded lease was between Mr Brown, the plaintiff's director who appears in this application on behalf of the plaintiff, and the defendant.

[20] At the very least, the threshold issue of identifying who the parties of the lease are, is a contestable issue of fact and law. This court could not possibly be satisfied that the defendant has no real prospect of successfully defending the fundamental issue as to who the parties to the lease were. That inevitably leads to a conclusion that the core of the dispute between the plaintiff and the defendant, in respect of the lease subject of this litigation, is a matter which requires a trial. This alone is sufficient, in my view, to conclude that the application for summary judgment fails at that point. However, it is also asserted by the defendant that he has reasonable prospects of success in respect of each of the seven repudiations, for the reasons which are set out below:

> "[23] The amended statement of claim pleads Mr Morgan repudiated the lease seven times. It ends with a plea that the plaintiff, by the pleading itself, accepts the repudiations.[39]
>
> [24] The first repudiation is alleged to arise by an email Mr Morgan sent on 28 April 2020.[40] However, the plaintiff pleads the alleged repudiation was withdrawn on the same day.[41] It is repudiation by anticipatory breach (i.e., evidencing an intention not to be bound, rather than failing to perform an obligation under the lease).[42]
>
> [25] In the famous words of Asquith LJ, "[a]n unaccepted repudiation is a thing writ in water and of no value to anybody; it confers no legal rights of any sort or kind".[43]

---

36 *Corporations Act 2001* (Cth) ss 131-133.
37 Affidavit of Alex Sandy Brown sworn 28 March 2022 [3]; Affidavit of Alex Sandy Brown sworn 15 March 2022 [7]-[26].
38 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 115 (Mason CJ & Wilson J).
39 Further Amended Statement of Claim filed 13 December 2021 [66].
40 Ibid [18].
41 Ibid [20].
42 *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, 427 (Reid LJ).
43 *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417, 421 (Asquith LJ).

That is because "the breach is only complete and enforceable at the time of rescission so that breach and termination of the contract are simultaneous".[44]

[26] Thus, the failure to accept the alleged repudiation is fatal.

[27] Further, the plaintiff continued to perform the lease until August 2021. Performance of the lease for another 16 months may constitute an election[45] or waiver.[46]

[28] On the face of the plaintiff's own pleading, there is a triable defence to the first repudiation.

[29] The second alleged repudiation arises from Mr Morgan saying "he wished to stop" the lease.[47] Again, the plaintiff's own pleading gives Mr Morgan a triable defence because, again, the plaintiff pleads the alleged repudiation was withdrawn.[48] Mr Morgan also relies upon waiver and election.

[30] The third alleged repudiation arises from Mr Morgan sending an email demanding payment not in accordance with the lease.[49] Again, the alleged repudiation was withdrawn, and the plaintiff did not accept the repudiation.

[31] The fourth alleged repudiation arises from a threat made by Mr Morgan during a conversation with Mr Brown on 14 August 2021.[50] Mr Morgan denies he ever made the threat alleged.[51] This is a contest of fact; a triable issue. Again, the plaintiff did not accept the repudiation.

[32] The fifth alleged repudiation arises from the failure of Mr Morgan to sign a lease document prepared by the plaintiff. The plaintiff alleges Mr Morgan was obliged in contract to sign the lease document. At the time the lease was entered into on 23 April 2020, that (replacement) lease was neither foreshadowed nor foreseen. More to the point, the terms of the document were unknown and unknowable. Accordingly, the obligation would be void for uncertainty – an agreement to agree. The promise is a nullity because there are "no

---

44 *Heyman v Darwins Ltd* [1942] AC 356, 382 (Wright LJ).

45 "The words or conduct ordinarily required to constitute an election must be unequivocal in the sense that it is consistent only with the exercise of one of the two sets of rights and inconsistent with the exercise of the other; thus for a lessor to continue to receive rent under a lease will be consistent only with his rights as lessor and inconsistent with the exercise of a right to determine the lease": *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 646 (Mason J).

46 An election to terminate the performance of a contract in reliance on an express right of termination must be made within a reasonable time. *Champtaloup v Thomas* [1976] 2 NSWLR 264, 273 (Mahoney JA); *Presmist Pty Ltd v Turner Corp Pty Ltd* (1992) 30 NSWLR 478, 485 (Cole J).

47 Further Amended Statement of Claim filed 13 December 2021 [36].

48 Ibid [37].

49 Ibid [39].

50 Ibid [45].

51 Affidavit of Lance Morgan affirmed 16 November 2021 [12].

identifiable criteria by which the content of the obligation to negotiate in good faith can be determined".[52]

[33] The sixth alleged repudiation arises from an email Mr Morgan sent to Mr Brown on 15 August 2021. By this time, their relationship was kaput, and the email exchange needs to be viewed in full to understand the meaning of what was said in each email.

[34] On 14 August 2021 at 7:30 pm, Mr Brown emailed to Mr Morgan a draft lease agreement and relevantly said in the cover email:

> I am in the midst of interviewing for a job at a nearby swim school….if I get that job, I will simply take most of the customers and staff there, where I know we will be treated well. (this other swim school approached me, I did not apply there, but it is a very timely opportunity)
>
> However, If you agree to the written Lease Agreement, I will stay at 2 Karalise Street, and continue to work hard to give you the easiest passive income in Brisbane !
>
> **Time is of the essence……..**
>
> **please sign and return the Lease Agreement by 8 pm Sunday August 15, 2021,**
>
> **OR…… I will start shutting down the swim school soon**............**(and move the customers)**
>
> (bold in original, [sic])

[35] Mr Morgan replied at 8:30 pm, relevantly:

> I will not sign your contract, if you want to continue leasing our pool, pay the rent owed and we can carry on as before, otherwise I am happy for you to leave.

[36] After an irrelevant email from Mr Brown again pushing for a new lease, Mr Morgan emailed Mr Brown at 5:38 on 15 August 2021 that relevantly said:

> As you have been so rude and threatening, don't bother showing up tomorrow. The gates will be locked

[37] Mr Brown then responded at 6:02 pm. He relevantly said:

> As mentioned, I have already removed my key items yesterday, I have no wish to see you again

[38] Objectively ascertained, a reasonable person in the position of the parties reading the email exchange would have understood[53] Mr Brown and Mr Morgan to have mutually

---

[52] *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 [33] (Kirby P with whom Handley and Waddell JJA agreed).

[53] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 [35]–[36], [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

agreed to end the lease. Accordingly, the parties were discharged from their rights and obligations under the lease and any inchoate rights – relevantly, any unaccepted rights to terminate for repudiation – are discharged.[54]

[39] The seventh alleged repudiation is the defendant's refusal to mediate.[55] Assuming mediation was a term of the lease, the lease was discharged on 15 August 2021. Accordingly, each party was discharged of the obligation to mediate.[56]

[40] Thus, Mr Morgan has triable defences to each of the alleged repudiations."

[21] Again, in setting out the detailed reasons articulated above in the defendant's written submissions, it is clear, in my view, that the defendant does have a genuine prospect of successfully defending all of the plaintiff's claim, even if the threshold issue as the relevant parties to the lease was decided in the plaintiff's favour. It follows, clearly, that there is a need for a trial to determine the claim. In those circumstances, the application for summary judgment must fail.

Security for costs

[22] UCPR r 671 relevantly provides:

"**671 Prerequisite for security for costs**

The court may order a plaintiff to give security for costs only if the court is satisfied—

(a) the plaintiff is a corporation and there is reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them."[57]

[23] *Corporations Act 2001* (Cth) s 1335 provides:

"**Costs**

(1) Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for

---

54 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 476-7 (Dixon J); *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd* (1936) 54 CLR 361, 379-80 (Dixon and Evatt JJ).

55 Amended Statement of Claim filed 10 December 2021 [65].

56 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 476-7 (Dixon J); *Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd* (1936) 54 CLR 361, 379-80 (Dixon and Evatt JJ).

57 UCPR r 671.

> those costs and stay all proceedings until the security is given.
>
> …
>
> (2) The costs of any proceeding before a court under this Act are to be borne by such party to the proceeding as the court, in its discretion, directs."[58]

[24] As the defendant correctly identifies, the threshold issue is to identify, in circumstances where the plaintiff is a corporation, that there is a "reason to believe the plaintiff will not be able to pay the defendant's costs if ordered to pay them."

[25] In that respect, the defendant relies on the following facts established on the evidence:

(a) The plaintiff company has $3 of paid-up capital;[59]

(b) The plaintiff company does not own any real property;[60]

(c) Despite request, the plaintiff company has not produced evidence of its ability to pay a costs order; [61] and

(d) In different litigation, a company controlled by Mr Brown was wound up when it failed to do so.[62]

[26] It is submitted, and I accept, that the defendant has discharged the onus to enliven this court's discretion to order security for costs.

[27] UCPR r 672 then provides:

> "**672 Discretionary factors for security for costs**
>
> In deciding whether to make an order, the court may have regard to any of the following matters—
>
> (a) the means of those standing behind the proceeding;
>
> (b) the prospects of success or merits of the proceeding;
>
> (c) the genuineness of the proceeding;
>
> (d) for rule 671(a)—the impecuniosity of a corporation;
>
> (e) whether the plaintiff's impecuniosity is attributable to the defendant's conduct;

---

58 *Corporations Act 2001* (Cth) s 1335.

59 Affidavit of Rebekkah Hallberg affirmed 19 April 2022 [4](a), exhibit RHH2 pp 1-3.

60 Ibid [4](b), exhibit RHH2 pp 4-12.

61 Ibid [4](c), exhibit RHH2 pp 22-23

62 Ibid [28], [35]-[38], exhibit RHH2 pp 92, 96**.**

(f) whether the plaintiff is effectively in the position of a defendant;

(g) whether an order for security for costs would be oppressive;

(h) whether an order for security for costs would stifle the proceeding;

(i) whether the proceeding involves a matter of public importance;

(j) whether there has been an admission or payment into court;

(k) whether delay by the plaintiff in starting the proceeding has prejudiced the defendant;

(l) whether an order for costs made against the plaintiff would be enforceable within the jurisdiction;

(m) the costs of the proceeding."[63]

[28] Relevantly, the defendant submits in respect of UCPR r 672(a),[64] that Alex Brown is the person who stands behind the plaintiff company, does own real property but does not offer a personal undertaking.[65]

[29] In that respect, the defendant relies on the Court of Appeal decision in *Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd* [2009] QCA 254 where Muir JA held:

> "A corporate plaintiff wishing to avoid an order that it give security for costs on the ground that the making of the order will prevent the continuation of the litigation, at least as a general proposition, must establish that those 'who stand behind it and who will benefit from the litigation if it is successful are also without means.'"[66]

[30] The defendant's submission is that, although the plaintiff company is impecunious,[67] Alex Brown is the person who stands behind the proceeding, owns real property in the jurisdiction and is therefore not without means.[68]

---

63 UCPR r 672.
64 Ibid r 672(a).
65 Affidavit of Rebekkah Hallberg affirmed 19 April 2022 [6]-[7], exhibit EHH2 pp 24-30.
66 *Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd* [2009] QCA 254 [45].
67 Exhibit 4 – Defendant's outline of argument [57]; Affidavit of Rebekkah Hallberg affirmed 19 April 2022 [6]-[7], exhibit RHH2 pp 24-27.
68 Affidavit of Rebekkah Hallberg affirmed 19 April 2022 [6]-[7], exhibit RHH2 pp 24-27.

[31] In respect of UCPR r 672(e) (whether the plaintiff's impecuniosity is attributable to the defendant's conduct), it is for the plaintiff company to prove "both the adequacy of their financial position before their dealings with the opponents and that the opponents' actions have caused or at least materially contributed to the claimants' inability to meet an order for security for costs."[69] The plaintiff company must prove "the allegation with relevantly straightforward and unambiguous evidence of a fairly compelling nature, because otherwise the hearing of the issue of security might become a trial within a trial."[70]

[32] It is submitted, and I accept, that the plaintiff company has not discharged this onus.

[33] UCPR r 672(g)–(h) raises the issue as to whether the order for security for costs would be "oppressive" or "would stifle the proceeding." Oppression is primarily concerned with a disparity of financial resources between the parties. As Daubney J identified in *Hyperion Technology Pty Ltd v Queensland Motorways Ltd* [2013] QSC 20, "… the relative financial standing of the parties may be a factor of relevance to be weighed in the mix in an appropriate case,"[71] but in that particular decision, his Honour did not ascribe much weight to that disparity.

[34] The defendant identifies that he is a retired man of modest means with a family home at Rochedale South, a boat with an estimated value of $18,000 and shares worth $64,000.[72] It is submitted, and I accept, that there is no basis to refuse an application for security on the basis that the application is oppressive. Conversely, although the plaintiff company is impecunious, Mr Brown owns real property in the jurisdiction and stands behind the proceeding, and accordingly, I conclude, is unwilling but not, on the face of it, unable to meet an order.[73]

[35] The application for costs for security for costs has been brought shortly after an unsuccessful attempt at mediation.[74] Clearly a delay to permit mediation to proceed is appropriate in the circumstances.

---

69 *Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd* [2012] QCA 114 [26] (per Wilson AJA).
70 Ibid.
71 *Hyperion Technology Pty Ltd v Queensland Motorways Ltd* [2013] QSC 20.
72 Affidavit of Rebekkah Hallberg affirmed 19 April 2022 [3].
73 *Combined Property Holdings Pty Ltd v Galea* [2020] QSC 338 [56].
74 *Hyperion Technology Pty Ltd v Queensland Motorways Ltd* [2013] QSC 20 [25].

[36] The relevant principles for quantifying the security to be ordered are set out by Daubney J in *Aqua Blue (Noosa) Pty Ltd v Soil Surveys Engineering Pty Ltd* [2010] QSC 176.[75] This is an approach confirmed by the Court of Appeal in *Logan APZ Pty Ltd v Council of the City of Logan* [2017] QCA 288,[76] which requires the court to look at the whole case, take into account the chance of proceedings collapsing without coming to trial; order somewhat less if there is every prospect that the action will be fought to a finish; not give a complete and certain indemnity to a defendant; and assess the "feel" of the case after considering relevant factors.

[37] The affidavit of the cost assessor, Jeffrey Petersen, provides an estimate on a standard basis of the defendant's costs up to and including the first day of trial at $151,809.[77]

[38] In those circumstances, the defendant submits that security should be fixed at $60,000, for the following reasons:

(1) Mr Petersen's estimate includes costs already incurred and the reduced estimate of prospective costs is $72,655.75.

(2) Fixing security at $60,000 allows a generous discount to avoid overestimation.

(3) Mr Petersen has 25 years' experience in legal costs, is an officer of the court, has sworn his opinion which is genuinely held and has complied with his duty to the court.[78]

[39] In my view, the defendant applicant has satisfied all of the appropriate criteria for an order for security for costs.

[40] There is, however, one further issue to consider. The plaintiff, through its representative Mr Brown, submits that the matter should once again be referred to mediation, despite the failure of mediation earlier in 2022.[79] The defendant/applicant agrees.[80]

---

75 *Aqua Blue (Noosa) Pty Ltd v Soil Surveys Engineering Pty Ltd* [2010] QSC 176 [41].
76 *Logan APZ Pty Ltd v Council of the City of Logan* [2017] QCA 288 [45]-[46].
77 Exhibit 4 – Defendant's outline of argument [53]; Affidavit of Jeffrey Petersen sworn 22 March 2022 [8], exhibit JCP-1.
78 Exhibit 4 – Defendant's outline of argument [69] – [71]; Affidavit of Jeffrey Petersen sworn 22 March 2022 [9].
79 T1-42, l 43.
80 T1-45, l 4.

[41] In all of the circumstances, the appropriate way to progress these proceedings, ensuring the parties again seek to genuinely settle the matter at mediation, is to make an order for a payment of security for costs, but to require that payment for security for costs be made if, and only if, the matter fails to settle at mediation.

Orders

[42] In all of the circumstances, I make the following orders:

1. The plaintiff's application for summary judgment filed 11 April 2022 and the plaintiff's application filed 21 April 2022 are dismissed.
2. The defendant's application for security for costs is granted.
3. The parties are to participate in a mediation within 30 days of this order or such further period as the parties mutually agree, in writing, on the following terms:

    (a) The defendant's solicitor is to provide the names of two counsel to the plaintiff within 7 days of this order.

    (b) The plaintiff is to provide the names of two counsel to the defendant's solicitors within 7 days of this order.

    (c) The parties are to use best endeavours to negotiate the selection of a mediator within 10 days of this order.

    (d) The defendant's solicitor is to notify the mediator in writing (copied to the plaintiff) within 14 days of this order.

    (e) 7 days prior to mediation, the defendant's solicitor is to prepare a brief to the mediator containing the pleadings and up to five documents selected by the plaintiff's and up to five documents selected by the defendant.

    (f) The costs of the mediator is to be paid 3 days before the mediation in the following shares:

        (i) 50% - the plaintiff; and

        (ii) 50% - the defendant.

4. If the proceedings do not settle by mediation, then within 30 days of the filing of a mediator's certificate that parties have not resolved their dispute, the plaintiff shall give security for the defendant's costs of the proceeding in the sum of $60,000 in a form acceptable to the Registrar of the District Court of Queensland.

5. The plaintiff pay the defendant's costs of the plaintiff's applications filed 11 April 2022 and 21 April 2022 and the defendant's application filed 19 April 2022.