SUPREME COURT OF QUEENSLAND

CITATION:	*Wan & Anor v Merlot Gordon & Ors; Merlot Gordon & Ors v Olsen Lawyers* [2019] QSC 142
PARTIES:	**In Matter No. S904 of 2018** **RINA LIM SIEW WAN and JORDAN NEO BENG CHYE** (plaintiffs) **v** **MERLOT GORDON PTY LTD ACN 616 412 732** (first defendant) AND **AARON WILLIAM EDWARD GORDON** (second defendant) AND **ALEXANDER JAMES GORDON** (third defendant) **MARK ALEXANDER GORDON** (fourth defendant) **In Matter No. S13922 of 2018** **MERLOT GORDON PTY LTD ACN 616 412 732** **(**first plaintiff) AND **AARON GORDON, ALEXANDER GORDON & MARK GORDON** (second plaintiffs) AND **OLSEN LAWYERS PTY LTD ACN 131 233 648** (defendant)
FILE NO/S:	Rockhampton No. S904 of 2018 Brisbane No. S13922 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application

ORIGINATING COURT:	Supreme Court at Rockhampton and Brisbane
DELIVERED ON:	5 June 2019
DELIVERED AT:	Rockhampton
HEARING DATE:	17 May 2019
JUDGE:	Crow J
ORDER:	In Matter No. S904 of 2018:

1. Judgment be given for the plaintiffs against the defendants under Rule 292 UCPR for part of the plaintiffs' claim in the sum of $109,058.40 as follows:

   (a) for rent due and owing under Lease No 717064310 (the Lease) for the period ending 8 October 2018 in the sum of $91,596.80;

   (b) for outgoings due and owing under the Lease for the period ending 8 October 2018 in the sum of $12,080.70; and

   (c) for those costs incurred by the plaintiffs at termination of the Lease in the sum of $5,380.90 being the total of the costs particularised at paragraph 19 of the plaintiffs' Statement of Claim less $3,071.51 for the plaintiff's travel expenses.

2. The defendants pay the plaintiffs interest in accordance with the Lease in the sum of $4,744.54.

3. The defendants pay the plaintiffs' costs of the proceeding and the application fixed in the sum of $14,372.62.

4. Pursuant to Rule 79 of the Uniform Civil Procedure Rules 1999 ("UCPR") the proceeding in this matter be heard together with Brisbane Supreme Court no. S13922/18, Merlot Gordon Pty Ltd and Anor and Olsen Lawyers Pty Ltd with the following directions:

   (a) Olsen Lawyers Pty Ltd have leave to defend the plaintiffs' claims against the defendants;

   (b) Olsen Lawyers Pty Ltd be bound by any further judgment given by the court in

proceedings between the plaintiffs and defendants;

(c) the evidence in the proceedings between the plaintiffs and the defendants be evidence in the proceedings S13922/18 between the defendants and Olsen Lawyers Pty Ltd; and

(d) Olsen Lawyers Pty Ltd, subject to further order of the court, have leave to cross-examine the plaintiffs and any witnesses called in the plaintiffs' case.

5. Pursuant to Rule 221 of the UCPR, the plaintiffs disclose documents to the defendants and Olsen Lawyers Pty Ltd on or before 17 June 2019.

6. This matter and Brisbane Supreme Court no. S13922/18, Merlot Gordon Pty Ltd and Anor and Olsen Lawyers Pty Ltd proceed to a joint mediation to be conducted on or before 30 September 2019.

7. The Plaintiffs, the Defendants and Olsen Lawyers Pty Ltd equally share the costs of the mediation.

8. These proceeding and the proceeding of Brisbane Supreme Court no S13922/18 be listed for trial at Rockhampton Supreme Court in the week commencing on 29 October 2019.

9. Liberty to apply.

In Matter No. S13922 of 2018:

1. The proceedings be transferred to the Supreme Court at Rockhampton.

2. Pursuant to Rule 79 of the Uniform Civil Procedure Rules 1999 ("UCPR") the proceedings in this matter be heard together with Rockhampton Supreme Court no. 904/18, Rina Lim Siew Wan and Jordan Neo Beng Chye and Merlot Gordon Pty Ltd and Anor with the following directions:

(a) the defendant have leave to defend the plaintiffs in S904/18 against the defendants in S904/18;

(b) the defendant be bound by any further

judgment given by the court in S904/18 proceedings;

(c) the evidence in the S904/18 proceedings be evidence in these proceeding; and

(d) the defendant, subject to further order of the court, have leave to cross-examine the plaintiff in S904/18 and any witnesses called in the plaintiffs' case in S904/18.

3. This matter and Rockhampton Supreme Court no. S904/18, proceed to a joint mediation to be conducted on or before 30 September 2019.

4. The Plaintiffs, the Defendants and the plaintiffs in S904/18 equally share the costs of the mediation.

5. The proceeding and the proceeding of Rockhampton Supreme Court no S904/18 be listed for trial at Rockhampton Supreme Court in the week commencing on 29 October 2019.

6. Liberty to apply.

7. Costs reserved.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – GENERALLY – where plaintiffs instituted proceedings in the Rockhampton Registry of the Supreme Court for rent owing, damages and costs arising from a breach of a lease agreement - where plaintiffs seek judgment against the defendants pursuant to r 190 or r 292 of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether the defendants have no real prospect of successfully defending part of the plaintiffs claim – whether summary judgment ought to be given for part of the claim

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JOINDER OF CAUSES OF ACTION AND OF PARTIES – PARTIES – GENERALLY – where the defendants in the Rockhampton proceedings instituted professional negligence proceedings in the Brisbane Registry of the Supreme Court against their former lawyers for failing to advise of relevant matters prior to entry into the lease – where an application was brought to transfer the professional negligence proceedings to the Rockhampton Registry of the Supreme Court to be heard together with the lease litigation pursuant to r 39 and 79 of the *Uniform Civil*

Procedure Rules 1999 (Qld) – whether orders should be made to have the proceedings heard together

Uniform Civil Procedure Rules 1999 (Qld) r 5, r 166, r 190, r 292, r 79, r 39
Bishop v Bridgelands Securities (1990) 25 FCR 311
Ghose v CX Reinsurance Company Ltd & Ors [2010] NSWSC 110
Humphries v Newport Quays Stage 2A Pty Ltd [2009] FCA 699
Clark v Ernest Henry Mining Pty Ltd [2018] QSC 253
Manasse v Shine Lawyers Pty Ltd [2019] QSC 123
Equititrust Limited v Gamp Developments P/L and Ors [2009] QSC 115

COUNSEL: A M Arnold for the plaintiffs in S904/2018
M K Stunden for the defendants in S904/2018 and plaintiffs in S13922/2018
G J Handran for the defendant in S13922/2018

SOLICITORS: Grant & Simpson for the plaintiffs in S904/2018
BT Lawyers for the defendants in S904/2018 and plaintiffs in S13922/2018
McInnes Wilson for the defendants in S1392/2018

[1] By application filed in Rockhampton on 1 May 2019 in S904/2018 ('the lease litigation') the plaintiffs Messrs Wan and Chye ('the lessors') seek the following orders against Merlot Gordon Pty Ltd, Aaron Gordon, Alexander Gordon, and Mark Gordon ('the Gordon defendants'):

1. That pursuant to Rules 190 and 292 of the Uniform Civil Procedure Rules there be judgment given for the plaintiffs against the defendants for:-

   (a) monies owing of one hundred and twelve thousand one hundred and twenty-nine dollars and ninety-one cents ($112,129.91);

   (b) interest on the monies owing pursuant to the *Civil Proceedings Act 2011*; and

   (c) damages to be assessed.

2. The defendants pay the plaintiffs' costs of and incidental to this application and for the proceeding.

3. Such further or other order the Court deems appropriate.

[2] In the Brisbane file S13922/2018 ('the professional negligence litigation') the first plaintiff, Merlot Gordon Pty Ltd, and second plaintiffs, Aaron Gordon, Alexander Gordon and Mark Gordon seek the following orders:

1. Pursuant to Rule 79 of the Uniform Civil Procedure Rules 1999 ("UCPR") this matter be heard together with the assessment of damages in the Rockhampton Supreme Court matter no. S904 of 2018, Wan and Chye v Merlot Gordon and Others.

2. Pursuant to Rule 39 of the UCPR, the matter be transferred to the Rockhampton Supreme Court Registry.

3. No order as to costs.

4. Further or other such order as the Court deems fit.

[3] In the lease litigation by statement of claim filed in the Rockhampton Registry of the Supreme Court on 14 November 2018 the lessors sought the following relief against each of the Gordon defendants:

1. Overdue rent under a lease for the period 1 August 2017 to 1 October 2018 in the sum of $91,596.80;

2. Overdue Outgoings under a lease of $12,080.70;

3. Damages for the loss of rent from 1 November 2018 in the sum of $972,660.85;

4. Damages for loss of future outgoings in the sum of $50,279.81;

5. Costs to the date of the claim in the amount of $8,452.41;

6. Interest pursuant to the *Civil Proceedings Act* 2011;

7. Costs on the indemnity basis from the date of the claim to the date of judgment.

[4] A short summary of the lease litigation is that the plaintiffs are the owners of Lot 1 on SP 198266 Title Reference 50763717 being the restaurant at The Edge Apartments, 102 Victoria Parade, Rockhampton. Prior to 21 March 2017, the lessee of the restaurant was I & H Jones Pty Ltd under a registered lease. The registered lease[1] provided for a term of the lease of 10 years from 29 January 2016 until its expiry on 28 January 2026 together with two five year option periods.

[5] On 21 March 2017, a Deed of Covenant on Assignment of Lease[2] was entered into between Messrs Wan and Chye as lessors, I & H Jones Pty Ltd as assignor, Merlot Gordon Pty Ltd as assignee, Ian David Jones as assignor's guarantor, and Aaron William Edward Gordon, Alexander James Gordon and Mark Alexander Gordon as guarantors.

[6] Clause 15 of the Deed provides as follows:

> "15. GUARANTEE AND INDEMNITY
>
> IN consideration of the Lessor at the request of the New Guarantor hereinafter in this clause called 'the Guarantor' which expression shall mean

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1 Exhibit JC5 to the Affidavit of Jordan Neo Beng Chye sworn 22 April 2019.
2 Exhibit JC6 to the Affidavit of Jordan Neo Beng Chye sworn 22 April 2019.

> and include the said person or corporation its respective executors administrators successors and permitted assigns entering into this Deed and consenting to the assignment of the Lease subject to the terms and conditions contained in this Deed which request is evidenced by the execution by the Guarantor of this Deed the Guarantor hereby undertakes covenants and agrees with the Lessor as follows:-
>
> (a) the Guarantor hereby guarantees to the Lessor that he will be with the Assignee jointly and severally liable to the Lessor for the due and punctual performance and observance by the Assignee of all the covenants terms and conditions of the Lease on the part of the lessee to be performed and observed and the due and punctual performance and observance of all the liabilities and obligations the lessee contained in the Lease including any liability of the Assignee to the Lessor of and incidental to the Assignee's occupation of the Demised Premises and whether such occupation is under the Lease or on any other basis and without limiting the generality of the foregoing the Assignee's obligations to pay rental and other moneys and any obligation to indemnify the Lessor as if the Guarantor was named as the guarantor in item 24 of the schedule to the lease."

[7] Mr Chye attests in his affidavit that in early 2018 the lessee was falling behind in the rent. Correspondence concerning that arrears of rent as well as the service of a Notice to Remedy Breach has been exhibited. As the rent was not paid the lessors had recourse to the Bank Guarantee for the lease in the sum of $68,735.33 which was paid out by the ANZ Bank to the lessors on 18 July 2018. By 1 September 2018 the restaurant business had been abandoned. On 2 October 2018 the lessors formerly took repossession of the restaurant premises.

[8] That the Gordon defendants are in breach of their lease obligations is plain, the restaurant which occupies a public position on the banks of the Fitzroy River is closed. By their defence filed 12 December 2018 the Gordon defendants admit that which is plain, namely they are in breach of lease. Furthermore the Gordon defendants frankly concede the amount of rent owing to 2 October 2018 as $91,596.80, the outgoings which are owing until retaking of possession in $12,080.70 and $5,380.90 of the consequential costs. That is the Gordon defendants admit the current liquidated debt owing in the sum of $109,058.40.

[9] Accordingly in the lease litigation there is a minor issue concerning the proper quantification of consequential costs with the defendants disputing some $3,071.51 in travel related costs. What is in substantial issue in the lease litigation is the proper quantification of damages for future losses. The Gordon defendants admit that mathematically it is correct that from 2 April 2018 until January 2026, future rental loss (on the basis that the premises were never released) "could be $1,945,321.71" and similarly the future loss from outgoings "could be $100,599.82". In the lease litigation the lessor frames its loss as a loss of 50 per cent of those sums.

[10] In the lease litigation the Gordon defendants deny a liability to pay 50 per cent of the loss, assert the lessor has failed in its duty to mitigate its loss by attempting to acquire a new tenant for the property and alleges "[d]amages for the Plaintiff's loss have not yet

crystallised as the Plaintiff has failed to mitigate its loss by obtaining a new tenant; and [o]nce the Plaintiff obtains a new tenant, the future loss liable by the defendants will be reduced".

[11] Accordingly the real issue to be tried in the lease litigation is the proper quantification of the damages for loss of future rental and outgoings. In compliance with rules 5 and 166 of the *Uniform Civil Procedure Rules* 1999 (Qld) ('UCPR') and in a (commendably frank) series of concessions the Gordon defendants concede there is no reason why summary judgment would not be entered against them pursuant to r 190 and r 292 of the UCPR with respect to the liquidated sum of $109,058.40.

[12] The lessors in the lease litigation seek judgment for part of the claim relating to that sum of $109,058.40. The Gordon defendants in the lease litigation agree to the interest calculations upon the admitted part of the claim in the sum of $4,744.54. Notably, the lessors in the lease litigation do not seek judgment for the entirety of the claim with an order for the assessment of damages but rather seek an order requiring the defendants to pay the plaintiffs' costs of the proceeding and the application fixed in the sum of $14,372.62 and seeking a further order that "the balance of the plaintiffs' claim against the defendants proceed in accordance with the UCPR". The Gordon defendants in the lease litigation frankly concede the costs sought of $14,372.62 is a modest claim but do not consent to the order being made due to a lack of particulars being provided in respect of the sum. The Gordon defendants in the lease litigation acknowledge that the balance of the lessors' claim ought to proceed in accordance with the UCPR however submit that such an order is unnecessary.

[13] The approach of the Gordon defendants in the lease litigation accords with the UCPR. In view of the concessions made, judgment can be entered under r 190 of the UCPR on admissions in the pleadings or under r 292 of the UCPR, the general power to award summary judgment. In particular under r 292 of the UCPR, I am satisfied, and it is conceded by the Gordon defendants, that the Gordon defendants have no real prospect of successfully defending part of the lessors' claim and there is no need for a trial of that part of the claim being the liquidated sum of $109,058.40. In my view it is appropriate to give summary judgment for that part of the claim together with the interest.

[14] With respect to costs, paragraph 8 of Mr Siganto's affidavit filed 17 May 2019 sets out the five components of the costs totalling $14,372.62. Each of those claims are modest. I am satisfied therefore that there ought to be an award of costs in terms of paragraph 3 of the draft provided by the lessors in the lease litigation. I accept the argument of counsel for the Gordon defendants in the lease litigation that paragraph 4 of the draft order seeking an order that "the balance of the plaintiffs' claim against the defendants proceeding in accordance with the UCPR" is unnecessary.

Professional negligence litigation

[15] The Gordon defendants in the lease litigation after filing a defence on 12 December 2018 instituted proceedings on 17 December 2018 in Brisbane against Olsen Lawyers Pty Ltd (Olsen). The Gordon defendants alleged a breach of express terms of a retainer, a breach of implied terms of the retainer and breach of a "concurrent duty of care … to, (*inter alia*), exercise the standard of care, diligence and skill reasonably to be expected of a solicitor holding himself out as having skill and expertise in providing legal services in the performance of the Retainer".

[16] The statement of claim pleads breaches of the provisions of the retainer and breaches of the "Olsen duty of care" including (paragraph 38(c)) a failure to advise the plaintiffs of the extent of a prior relationship. In paragraph 36 of the statement of claim it is alleged that Olsen had previously acted for I & H Jones Pty Ltd.

[17] In paragraph 39 of the statement of claim the Gordon defendants allege:

> "Had the Defendant not been in breach of the Olsen duty and in the event that the First Plaintiff had been advised of the matters pleaded at 6, 12 and 36 to 38 herein, the First Plaintiff would not have proceeded with the Contract and would have sought to terminate under Clauses 37 and 38."

[18] The Gordon defendants then by paragraphs 40 and 41 plead the damages said to flow from breach of the retainer and "Olsen duty". Importantly, the Gordon defendants claim a loss from Olsen particularised in paragraph 40(d)(iii) as "damages for future loss of rent in an amount of $972,660.85" and in paragraph 40(d)(iv) "damages for future loss of outgoings in the amount of $50,279.81". They are precisely the same amount of damages claimed by the defendants in the Rockhampton action against Gordon. Additionally, by paragraph 41(b) the Gordon plaintiffs claim as damages "an indemnity from the Defendant due to its breach as pleaded in paragraph 38 herein, for the claim brought against the First Plaintiff and the Second Plaintiffs by the Lessor, in Supreme Court No. 904/18 filed on 14 November 2018". Accordingly, on the face of the pleadings a substantial common issue arises in the lease litigation and the professional negligence litigation namely the proper quantification of damages which flow from any proven breach by the Gordon defendants of its obligations to the lessors.

[19] It is upon this background that the Gordon defendants seek orders that the professional negligence litigation proceeding filed in Brisbane be heard with the lease litigation proceeding filed in Rockhampton pursuant to r 79 of the UCPR. Consequently, and in order that the proceedings may be heard together, the Gordon defendants also seek an order pursuant to r 39 of the UCPR to transfer the professional negligence litigation from the Central Registry of the Supreme Court at Brisbane to the Central Registry of the Supreme Court at Rockhampton. That application is opposed by Olsen and also by the lessors.

[20] Rule 79 of the UCPR provides:

> "The court may order that 2 or more proceedings be heard together or in a particular sequence."

[21] In *Bishop v Bridgelands Securities*[3] Wilcox J said:

> "The basic principle, as it seems to me, is that the Court should take whatever course seems to be most conducive to a just resolution of the disputes between the parties, but having regard to the desirability of limiting, so far as practicable, the costs and delay of the litigation. Considerations of costs and delay may often support the grant of leave under subr (b); but, in my opinion, leave ought not to be granted

[3] (1990) 25 FCR 311, 314.

unless the Court is affirmatively satisfied that joinder is unlikely to result in unfairness to any party."

[22] In *Ghose v CX Reinsurance Company Ltd & Ors*[4] Austin J said:

> "[27] Although his Lordship speaks of consolidation, in my view the same principles apply where the application is for a joint hearing. His Lordship's observations make it clear that the Court's essential task is to work out pragmatically whether the most efficient course consistent with the requirements of fairness would be consolidation, a joint hearing, immediately sequential hearings, entirely separate hearings, or something else (such as determination of separate questions prior to or after the hearing of the remainder of the proceedings). A pragmatic approach requires close attention to the nature of the claims in each set of proceedings and the likely course of the litigation if the proceedings are consolidated or jointly heard, compared with the course of litigation if the proceedings remain separate. A pragmatic approach involves the Court bringing to bear its experience in the conduct of hearings and case management, taking into account such matters as the potential savings of time and expense of one outcome compared with the other, and also the basic imperative that every litigant is entitled to a fair opportunity to present his or her case to the Court. I was referred to s 56(1) of the Civil Procedure Act 2005 (NSW), but in my view the articulation of the overriding objective of facilitating the just, quick and cheap resolution of the real dispute between the parties simply confirms the approach to be taken to such matters as consolidation or joint hearing of proceedings."

[23] In *Humphries v Newport Quays Stage 2A Pty Ltd*[5] Besanko J said:

> "11. There is no dispute that the eight proceedings engage O 29 r 5(a). The critical question then is whether it is appropriate that the proceedings be tried together. In determining this question, the relevant factors are as follows:
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> 1. Are the proceedings broadly of a similar nature?
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> 2. Are there issues of fact and law common to each proceeding?
>
> 3. Will witnesses (lay and expert) in one proceeding be witnesses in one or more of the other proceedings?
>
> 4. Has there been an alternative proposal put forward that there be a test case and have the parties agreed to abide the outcome, or, at least, the determination of common issues of fact and law?
>
> 5. Is there a prospect of multiple appeals with substantial delays if the proceedings are not tried at the same time?

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4 [2010] NSWSC 110 [27].
5 [2009] FCA 699 at [11].

6. Will there be a substantial saving of time if the proceedings are tried at the same time, compared with each proceeding being tried separately?

7. Will an order that the proceedings be tried at the same time create difficulties in terms of trial management, complexity of procedural issues and difficulties in determining cross-admissibility of evidence?

8. Is one proceeding further advanced in terms of preparation for trial than the others?

9. Are there parties to one or some only of the proceedings who will be inconvenienced if all of the proceedings are tried at the same time?"

[24] It is plain that r 79 of the UCPR confers a broad and unfettered discretion upon a court to order two or more proceedings to be heard together. Convenience to the parties and the court, the desirability of avoiding a multiplicity of actions, and a saving of time and expense are all important matters when considering such an unfettered discretion. It is important that the interests of the plaintiffs in the lease litigation are not prejudiced by the making of an order for joinder with the professional negligence litigation.

[25] With respect to the nine factors listed by Besanko J in *Humphries,* I would conclude that the proceedings are not broadly similar in nature however there are substantial issues of fact, common to both proceedings, namely, the proper damages which flow with respect to future losses from the Gordon defendants' breach of lease. Importantly, with respect to that significant issue, the same lay and expert witnesses would be expected to be called. Mr Chye deposes that following the vacation of the premises numerous pragmatic steps were undertaken to attempt to relet the premises. Mr Chye had discussions with Mr Grant Cassidy OAM, director of the managing company of the Edge Apartments who resides in Rockhampton. Mr Chye engaged Mr McArthur a real estate agent employed in Rockhampton and also had dealings with other firms based in Rockhampton, namely, Ray White Rockhampton, LJ Hooker Rockhampton, and Knight Frank Rockhampton. With respect to the issue of failure to mitigate and the value of future losses, there are several witnesses based in Rockhampton who are likely to be called to give evidence. In addition Aaron, Alexander and Mark Gordon are all based in Rockhampton.

[26] With respect to *Humphries* factors 4 and 5, they are largely irrelevant to the current facts and there is certainly no undertaking by Olsen to "abide the outcome" of the determination of the common issue of fact namely the actual losses sustained by the breach of lease. In light of the fact that the proper valuation of damages for future loss of rental income and outgoings is the only substantial issue in the lease litigation and a substantial issue in the professional negligence litigation, in my view, there will be a significant saving of time if the proceedings are tried at the same time compared with each proceeding being tried separately.

[27] With respect to *Humphries* factor 7 it may be that there will be some difficulties in terms of trial management and complexity of procedural issues if the trials are heard together, however they may be managed as discussed below.

[28] Both proceedings are on a similar level in terms of preparation for trial. With respect to this factor and factor 9, on enquiry of counsel for the lessors as to when the matter would be available for trial, it was conceded that it could not be said when the matter would be ready for trial. Despite the likely need for expert valuation evidence no expert has been retained by any party, nor has Practice Direction 2 of 2005 concerning expert evidence been complied with.

[29] Counsel for the lessors object to orders that the matters be heard together principally on the basis of costs, inconvenience and delay. With respect to the last matter it cannot be concluded that there will be any delay. The extent, if any, of delay cannot be ascertained given that the lessors are unable to say when they will be ready to proceed to trial. Whilst I accept that joinder may cause some inconvenience to the lessors and potentially some additional costs, those matters can be managed with appropriate directions and in particular directions allowing the lessors to present their case in the first day or two of the trial. That is, the lease litigation will proceed first and conclude within a day or two before the professional negligence litigation trial between the Gordon defendants and Olsen occurs.

[30] In this regard paragraph 40(b) of the Olsen defence states in respect of paragraph 40(d) of the professional negligence statement of claim "further, to the extent it is alleged that the First Plaintiff has suffered certain losses, does not admit the quantum of those losses as the allegations are not within the Defendant's knowledge and despite reasonable enquiry the Defendant remains uncertain of the truth or otherwise of the allegations".

[31] The non-admission of the quantum by Olsen means Olsen does not, currently, have a right to bring evidence upon the issue of future losses. It is appreciated that Olsen may amend paragraph 40(b) to run a positive defence and/or call evidence on the "damages" issue and, if that is to occur, again inconvenience to the plaintiff can be managed by appropriate directions. I conclude that the factors in the present case support an order pursuant to r 79 of the UCPR, that the lease litigation and professional negligence litigation be heard together. I consider, that it is in accordance with a pragmatic approach to order the cases to be heard together.

[32] A conclusion that it is proper to hear the lease litigation and the professional negligence litigation together resolves the transfer application in favour of the Gordon defendants.

[33] Absent an order that the lease litigation and professional negligence litigation be heard together the matters concerning the transfer under r 39 are to be balanced. The principles have recently been stated in *Clark v Ernest Henry Mining Pty Ltd*[6] and *Manasse v Shine Lawyers Pty Ltd*.[7] The professional negligence litigation was instituted in Brisbane at a time when the lease litigation was already on foot in Rockhampton. The decision to issue the professional negligence litigation in Brisbane is unexplained but carries with it the onus on behalf of the Gordon defendants to satisfy a court that the matter ought to be transferred. Important among the considerations are the inconvenience and expense to parties and their witnesses in the conduct of the litigation.

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6 [2018] QSC 253.
7 [2019] QSC 123.

[34] In the present case, as identified above, it is likely in respect of the issue of quantum there were several witnesses resident in Rockhampton who would like to be called. They include Aaron Gordon, Alexander Gordon, Mark Gordon, Mr Cassidy OAM, Robin McArthur and responsible representatives of LJ Hooker Rockhampton, Ray White Rockhampton and Knight Frank Rockhampton. If the matter were to proceed in Brisbane then all of those witnesses would be put to additional expense and inconvenience. In Olsen's favour, Mr Olsen is a solicitor practising in Brisbane and it is asserted that the Olsen defendant may wish to call Mr Ian Jones, Mrs Helen Jones and Mr Josh Jones, all directors or officers of I & H Jones Pty Ltd who now reside on the Gold Coast. Olsen also rely upon the fact that the lessors are residents of Singapore and would be put to more inconvenience in travelling to Rockhampton rather than Brisbane. The inconvenience is an extra hour's flight and of little concern particularly when the lessors have chosen to litigate in Rockhampton. Importantly, if the trials were not heard together then the lessors would need to attend a trial at Rockhampton and also at the expense of the Gordon defendants returning to Brisbane for a second trial. It may cause the Gordon defendants irreparable damage if the lessors were unable or unwilling to attend at the second Brisbane trial. I conclude on balance that it is more convenient to the likely witnesses and less expensive to have the professional negligence litigation conducted in Rockhampton with the lease litigation.

[35] I am conscious that Olsen has a number of objections to the orders being sought for the proceedings to be heard together. It is submitted that the Gordon defendants applied "on short notice for orders against their former solicitor". That the orders have the effect of binding the solicitor to admissions which the plaintiffs made for the negligence action commenced and, thereupon, to a further process to determine issues raised elsewhere, in a proceeding to which it is not a party.

[36] In particular it is submitted that "in relation to the order sought under rule 79, [the order] has a vice of binding the solicitor to an admission which the plaintiffs made voluntarily before the negligence proceeding was served, denying the solicitor any opportunity, let alone a fair opportunity, to contest a liability which the plaintiffs willingly acceded to earlier".

[37] In my view the submission misconceives the true position. In the professional negligence litigation in paragraphs 40(d)(i) and (ii) the Gordon plaintiffs particularise damages suffered by them in respect of their obligation for "(i) overdue rent in the amount of $91,596.80 [and] (ii) overdue outgoings in the amount of $12,080.70" (and also in respect of item (v) costs at the lesser amount of $8,452.41).

[38] In the professional negligence litigation as set out above those allegations of damages are not admitted. The entry into the partial judgment in favour of the lessors as set out above at $109,058.40 does not bind Olsen. Olsen is free to litigate that issue if it so desires. Olsen has access to the notarised and sworn affidavit of Mr Chye specifying the damages and proof of the leased restaurant space being vacant now for some time.

[39] Rule 5 of the UCPR provides:-

> "**5 Philosophy—overriding obligations of parties and court**
>
> (1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.

> (2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.
>
> (3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.
>
> (4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.
>
> *Example—*
>
> The court may dismiss a proceeding or impose a sanction as to costs, if, in breach of the implied undertaking, a plaintiff fails to proceed as required by these rules or an order of the court."

[40] It is a matter for Olsen whether it considers that it is a real issue as to whether or not the Gordon defendants are in breach of the lease and have abandoned the lease, as has been sworn to by Mr Chye. However, a moment's investigation by Olsen will determine whether or not there is a "real issue" in respect of the past losses and if so Olsen will then be free to plead in respect of any "real issue" and litigate it.

[41] Olsen submits that "[t]he lessor's claim against the guarantors is for [a] sum of money payable under a collateral agreement in circumstances where no cause of action arises until the demand is made" citing McMurdo J (as he then was) in *Equititrust Limited v Gamp Developments P/L and Ors*.[8]

[42] The difficulty with this submission is the proper construction of clause 15 of the deed as set out above. Clause 15 not only binds the guarantors to the guarantor provision in the original clause (clause 28) which requires a demand (clause 28.2) but it also binds Aaron Gordon, Alexander Gordon and Mark Gordon as persons jointly and severally liable upon the primary obligations in the lease. That is why, in the lease litigation the proceedings are framed as a direct breach of lease by Aaron Gordon, Alexander Gordon and Mark Gordon and not with reference to a breach of guarantee. Furthermore, as McMurdo J said at paragraph 20 of *Equititrust,* the failure to plead a demand although an essential requirement of a claim for a guarantee so framed (as to require a demand) is essentially a technical matter for which leave would be granted to enable that simple fact to be pleaded and proved if indeed it occurred.

[43] Again with reference to UCPR 5 the real issues ought to be litigated and in the present case where there is a direct basis for liability pursuant to Clause 15, I reject the submission that the lessor's claim against Gordon is defective.

[44] The claimed basis for a lack of liability, namely, the failure to provide a demand as required, is however, a good example of the necessity of providing Olsen with leave to defend the claim by the lessors against the Gordon defendants. *Coote v Richards*[9] sets out the types of orders which may be provided to ensure there is a fair trial. As recorded in *Coote* the orders were made at the commencement of trial. As the Court of Appeal said, a common order is the granting to a party with leave to defend, which has the effect of allowing a third party (or in the present case the defendant Olsen) to,

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8 [2009] QSC 115 at [19].
9 [2001] 2 Qd R 20; [2000] QCA 112.

subject to considerations of fairness and the conduct of the trial, act as if it were a defendant in the proceedings being brought by the lessors.[10]

[45] Granting leave to defend to Olsen provides Olsen with the full ability to contest the significant issue of the proper quantification of future damages in the lease litigation and to assert, if they wish, that the lessee was not in breach. As the lessors have received the benefit of a partial judgment in respect of past losses, (that is, losses to the date of possession of the property on 2 October 2018), should the Gordon defendants as plaintiffs in the professional negligence litigation seek to prove that loss, it will not be a difficult matter.

[46] A matter of significance which cannot be currently ascertained due to the inability of the lessors to state when they will be ready for trial is the potential prejudice caused to Wan and Chye by being "saddled to" the professional negligence litigation. Although there is trial dates available both in June and July in Rockhampton, counsel for the lessors have made it plain that their case is not ready to proceed at that early juncture. That is understandable. I can foresee no reason however why the matter cannot be made ready for the sittings commencing 21 October 2019 and in particular to be listed in the second week being 28 October 2019. In order to ensure there are no time pressures suffered by the lessors, the trial of both proceedings will be set for the sittings commencing 21 October 2019 and not prior to 28 October 2019. That is almost five months hence.

[47] Accordingly in respect of the lease litigation I make the following orders:

1. Judgment be given for the plaintiffs against the defendants under Rule 292 UCPR for part of the plaintiffs' claim in the sum of $109,058.40 as follows:

   (a) for rent due and owing under Lease No 717064310 (the Lease) for the period ending 8 October 2018 in the sum of $91,596.80;

   (b) for outgoings due and owing under the Lease for the period ending 8 October 2018 in the sum of $12,080.70; and

   (c) for those costs incurred by the plaintiffs at termination of the Lease in the sum of $5,380.90 being the total of the costs particularised at paragraph 19 of the plaintiffs' Statement of Claim less $3,071.51 for the plaintiff's travel expenses.

2. The defendants pay the plaintiffs interest in accordance with the Lease in the sum of $4,744.54.

3. The defendants pay the plaintiffs' costs of the proceeding and the application fixed in the sum of $14,372.62.

4. Pursuant to Rule 79 of the Uniform Civil Procedure Rules 1999 ("UCPR") the proceeding in this matter be heard together with Brisbane Supreme Court no. S13922/18, Merlot Gordon Pty Ltd and Anor and Olsen Lawyers Pty Ltd with the following directions:

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[10] *Coote v Richards* [2001] 2 Qd R 20, 21 at [3].

(a) Olsen Lawyers Pty Ltd have leave to defend the plaintiffs' claims against the defendants;

(b) Olsen Lawyers Pty Ltd be bound by any further judgment given by the court in proceedings between the plaintiffs and defendants;

(c) the evidence in the proceedings between the plaintiffs and the defendants be evidence in the proceedings S13922/18 between the defendants and Olsen Lawyers Pty Ltd; and

(d) Olsen Lawyers Pty Ltd, subject to further order of the court, have leave to cross-examine the plaintiffs and any witnesses called in the plaintiffs' case.

5. Pursuant to Rule 221 of the UCPR, the plaintiffs disclose documents to the defendants and Olsen Lawyers Pty Ltd on or before 17 June 2019.

6. This matter and Brisbane Supreme Court no. S13922/18, Merlot Gordon Pty Ltd and Anor and Olsen Lawyers Pty Ltd proceed to a joint mediation to be conducted on or before 30 September 2019.

7. The Plaintiffs, the Defendants and Olsen Lawyers Pty Ltd equally share the costs of the mediation.

8. These proceeding and the proceeding of Brisbane Supreme Court no S13922/18 be listed for trial at Rockhampton Supreme Court in the week commencing on 29 October 2019.

9. Liberty to apply.

[48] In the professional negligence litigation, I make the following orders:

1. The proceedings be transferred to the Supreme Court at Rockhampton.

2. Pursuant to Rule 79 of the Uniform Civil Procedure Rules 1999 ("UCPR") the proceedings in this matter be heard together with Rockhampton Supreme Court no. 904/18, Rina Lim Siew Wan and Jordan Neo Beng Chye and Merlot Gordon Pty Ltd and Anor with the following directions:

(a) the defendant have leave to defend the plaintiffs in S904/18 against the defendants in S904/18;

(b) the defendant be bound by any further judgment given by the court in S904/18 proceedings;

(c) the evidence in the S904/18 proceedings be evidence in these proceeding; and

(d) the defendant, subject to further order of the court, have leave to cross-examine the plaintiff in S904/18 and any witnesses called in the plaintiffs' case in S904/18.

3. This matter and Rockhampton Supreme Court no. S904/18, proceed to a joint mediation to be conducted on or before 30 September 2019.

4. The Plaintiffs, the Defendants and the plaintiffs in S904/18 equally share the costs of the mediation.

5. The proceeding and the proceeding of Rockhampton Supreme Court no S904/18 be listed for trial at Rockhampton Supreme Court in the week commencing on 29 October 2019.

6. Liberty to apply.

7. Costs reserved.