SUPREME COURT OF QUEENSLAND

CITATION:	*Wharf St P/L & Anor v Amstar Learning P/L & Ors* [2004] QCA 256
PARTIES:	**WHARF ST PTY LTD** ACN 090 998 673 (plaintiff/first respondent) **BECKETT SERVICES PTY LTD** ACN 010 101 792 (plaintiff/second respondent) **v** **AMSTAR LEARNING PTY LTD** ACN 074 494 250 (formerly ADROIT HUMAN RESOURCES PTY LTD) (defendant/first appellant) **NARENDRA JAIN** (defendant/second appellant) **GEOFFREY GRAHAM BATT-RAWDEN** (defendant/third appellant)
FILE NO/S:	Appeal No 2229 of 2004 DC No 922 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	30 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	21 June 2004
JUDGES:	McPherson JA, Williams JA, Jerrard JA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed** **2. Judgment varied by reducing the amount (including interest) for which it was given from $72,605.75 to $33,573.36** **3. No order as to costs of appeal**
CATCHWORDS:	CONTRACTS – OFFER AND ACCEPTANCE – where parties agreed to terms of lease in letter but formal contract never executed – whether binding contract CONTRACTS– VAGUENESS AND UNCERTAINTY – whether lease void for not specifying area of lease CONTRACTS – CONSTRUCTION AND INTERPRETATION – where term of lease provided for

lessee to pay to lessor six months rent in the event of early termination – whether lessee "terminated" the lease

GUARANTEES – CONSTRUCTION AND EFFECT – EXTENT OF LIABILITY – where lease terminated early - whether guarantee of directors extended to rent payments due for period after the termination of the agreement

Akot Pty Ltd v Rathmines Investments Pty Ltd [1984] 1 Qd R 302, applied
Citicorp Australia Ltd v Hendry (1985) 4 NSWLR 1, cited
Masters v Cameron (1954) 91 CLR 353, applied
Moschi v Lep Air Services Ltd [1973] AC 331, distinguished
Ontario Marble Co Ltd v Creative Memorials Ltd (1963) 39 DLR (2d) 149, approved
Slade's Case (1602) 76 ER 1074, cited
Smith v Eldridge (1854) 15 CB 236, applied
Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR 245, applied
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418, applied

COUNSEL: B DeBuse for the second and third appellants
P W Hackett for the respondents

SOLICITORS: Maloney Lawyers as town agents for Turner Freeman for the second and third appellants
Fox Lawyers for the respondents

[1] **McPHERSON JA**: The first and second plaintiffs, which are the respondents to this appeal, are companies controlled respectively by Mr Peter Benson and his father that own a registered allotment of land with a two storey building on it at Wharf Street in the city. It is convenient to refer to them as the Benson companies. In about the middle of 2000 they let Howto.com Pty Ltd into possession of part of the first level (ie above ground floor) of the building pending the execution of a lease for five years. The lease was never executed, but Howto remained in occupation of the premises after paying rent for only the first couple of months. By about February 2001, the Benson companies were threatening to institute proceedings for specific performance against Howto, whose principals and directors are, or at the time were, the second defendant Jain and the third defendant Batt-Rawden. They, or one or other of their companies, were seeking to extend from Sydney into Queensland their business of training young people in the hospitality field. At one time, they had hopes of a contract with the Queensland Education Department, but they were never fulfilled.

[2] In the end, however, instead of taking proceedings against them, Peter Benson entered into negotiations with the second and third defendants resulting in a tenancy agreement, as it is described in Jain's affidavit, in favour of another company which he and Batt-Rawden control and which is a subsidiary of Howto. Its name was Adroit Human Resources Pty Ltd, but, by the time of the proceedings which give rise to this appeal, its name had been changed to Amstar Learning Pty Ltd. That was the name in which the first defendant was sued, and in which, with the other two

defendants, it and they have appealed to this Court from a judgment given against them in the District Court. We were informed by Mr DeBuse of counsel for the appellants that on the appeal he appeared only for Jain and Batt-Rawden, Amstar having in the meantime gone under voluntary administration.

[3] From about February or March 2001, discussions took place and correspondence passed between the parties culminating in a letter dated 5 April 2001, in which Amstar offered to pay a month's rent in advance from 1 April for the right to occupy an area on the first floor for one year from that date; if for any reason Amstar was unable to continue the lease after 31 March 2002, the directors would guarantee payment of a lump sum of 6 months rent on termination "to compensate you for the rent-free period enjoyed to date". By letter dated 9 April 2001, which was returned after being signed as "agreed to" by Jain and Batt-Rawden in the spaces provided in the letter for their signatures, Benson proposed the following terms:

> "1. [Amstar] agrees to occupy the area for one year from April 1, 2001.
> 2. Rental to be $3,500 per month plus GST, payable in advance.
> 3. The Directors of [Amstar] to guarantee the payment of the rent for the twelve month period.
> 4. From April 1, 2002 the arrangement will revert to a month to month tenancy, however if [Amstar] terminate the arrangement at any time prior to March 31, 2003, then a lump sum payment of $21,000 will be due on termination as compensation for the rent free period enjoyed to date. Such payment will be guaranteed by the company's Directors.
> 5. Execution of a tenancy agreement and director's guarantee embodying the above terms which will be forwarded upon receipt of your acknowledgment of this fax.
>
> If you are in agreement with the above, please sign the bottom of the fax where indicated and arrange for the other director of the company to sign as well and fax back to us."

The letter concludes by giving the name and number of the Benson companies' bank account and saying "please deposit April's rent into this account and advice (*sic*) by facsimile that this has been attended to".

[4] The rent for April 2001 was paid, as was that for May; but, after that, Amstar failed to make any further payments. After various warnings and threats, the Benson companies purported to terminate the tenancy on 24 August 2001 and early in September 2001 retook possession of the premises arranging for the sale of property found there. Peter Benson said in evidence that they took this step in the belief that they had a "lien" on that property. He may have been intending to refer to the landlord's right of distress at common law; but distress was abolished in Queensland by the *Property Law Act 1974* by s 103, which has since been helpfully repealed the better to conceal that step from those who may not know of it or of s 20(2)(a) of the *Acts Interpretation Act 1954*. In the proceedings at first instance, the defendants raised a counterclaim for damages based on the plaintiffs' removal and sale of the chattels left on the premises by Amstar; but it failed for want of proof and was dismissed. It is not the subject of the appeal to this Court.

[5] On appeal, the defendants Amstar, Jain and Batt-Rawden confined their submissions to challenging the judgment at trial in favour of the Benson companies, which was for a sum of $72,605.75, consisting of $59,431.50 plus interest at 9% amounting to $13,174.25. The principal sum for which judgment was given included the amount of $21,000 mentioned in the letter of 9 April 2001 for which liability is disputed on appeal. In other respects, the quantum of the amount for which judgment was given against Amstar and against Jain and Batt-Rawden on their guarantees has not been questioned on the appeal. The appellants do, however, deny liability for it on several grounds. Essentially their submissions are that there was no lease or tenancy, either because its terms were uncertain or because it was subject to the execution of a formal instrument of lease that was never signed; that, for that reason also, no guarantee was in fact given by the two individual defendants; and that the amount of $21,000 never became due and payable, the tenancy having been terminated not in the terms of the letter of 9 April 2001 by Amstar, but by the Benson companies themselves. It is acknowledged in their written outlines that each of these issues involve construction of the correspondence and a consideration of the surrounding circumstances. The findings of the learned trial judge on credibility, which went in favour of the plaintiff's witnesses, have not been challenged on appeal.

[6] Whatever else may be said about the transaction between the Benson companies and Amstar, it plainly gave rise to a liability of some kind. The reference in para 4 of the letter of 9 April from Benson to its "reverting" from April 1 2002 to a tenancy from month to month implies, as do paras 1 and 2, that the arrangement with Amstar was to create a tenancy or lease for a year certain to 1 April 2002. As from 1 April 2001 Amstar had exclusive possession of the premises at a rent payable in advance of $3,500 per month plus GST, two instalments of which were paid before the lease was terminated in August of that year. This left Amstar indebted for unpaid rent and GST for the months of June, July and August. Quite apart from other considerations, the Benson companies were entitled to a use and occupation rent for the period during which Amstar (or, for that matter, Howto) was in possession, there being no demise by deed and, on Amstar's defence, no effective agreement at all for a lease of any kind. See *Smith v Eldridge* (1854) 15 CB 236; 139 ER 412; and 27 Halsbury §257 (4th ed), as well as the discussion by Sholl J in *Specktor v Lees* [1964] VR 10, 16-19. This would, however, not without more sustain the Benson companies' claim to recover the agreed amount of $21,000 or damages against Amstar, or against Jain and Batt-Rawden on their alleged guarantees. For the latter, an express agreement is needed, as well as a written guarantee to satisfy s 56 of the *Property Law Act*.

[7] Among other deficiencies alleged in respect of the agreement of 9 April 2001 are that it fails to delineate or describe with any certainty the land to be let. In the agreement the premises are referred to simply as "the area". In an earlier letter dated 5 December 2000 from Peter Benson, they were described as being on the "2nd floor/168 Wharf Street, Brisbane", the ground floor being occupied by Mr Benson's own business. By itself, that may not be a sufficient designation of the premises; but proof is always admissible of every material fact that will aid the court in identifying the person or thing mentioned in a written instrument so as to place the court in the situation of the parties to it. See *Akot Pty Ltd v Rathmines Investments Pty Ltd* [1984] 1 Qd R 302, 306, where the authorities are referred to. Here the parties were from their own knowledge, beginning in June 2000, well aware what area was being occupied and, by inference, that was to be leased. For over a year,

one or other of the defendants' two companies used the area for the purposes of their business activities. At no time did any difficulty arise about the area being occupied or its limits.

[8] The submission that no immediately binding contract was intended by the parties is rested on the requirement in para 5 of the letter of 9 April 2000 that:

> "5. Execution of a tenancy agreement and director's guarantee embodying the above terms which will be forwarded upon receipt of your acknowledgment of this fax."

In disposing of this point at first instance, the learned trial judge characterised the transaction here as falling within the first and not the third of the three classes identified in *Masters v Cameron* (1954) 91 CLR 353, 360; that is, as being one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.

[9] His Honour was plainly correct in that conclusion. There are compelling reasons for it. One is that para 5 of the letter of 9 April speaks of the document to be executed as "embodying" the "above terms", which exactly conveys the conception in *Masters v Cameron* of having those terms restated in a form that will be fuller or more precise but not different in effect. Another is that the agreement of 9 April was intended to take effect immediately on signature and return of the agreement and the payment of the April rent into the Benson companies' bank account. The lease was expressed to take effect from 1 April, which had already passed, and was intended to bind the parties from that date and not from some later date when a formal lease was executed. There was no occasion for suspending the obligations of the parties pending execution of a formal contract even if one was contemplated in the future (cf *Commercial Bank of Australia Ltd v G H Dean & Co Pty Ltd* [1983] 2 Qd R 204, 210). Indeed, having regard to the defendants' Fabian tactics in the past and the circumstances which had led to the making of the agreement of 9 April 2001, any further suspension of their obligations would have been the last thing, objectively speaking, that the parties would have had in mind. Benson had been told that the defendants' business in Queensland was in difficulties. Predictably of course, each of Amstar, Jain and Batt-Rawden failed to sign the draft lease and guarantee forwarded to them in late April 2001 by Benson's solicitors.

[10] On appeal, it was sought to make something of the fact that the respondents have given "no explanation" of the effect that the agreement of 9 April would have had on the earlier agreement for a five year lease to Howto. It is surprising to find it now being confessed that the arrangement with Howto had attained the status of a lease; but, if so, it was never more than an agreement in equity, which was to be followed by a periodic tenancy at law from month to month. It was impliedly surrendered once the year's lease to Amstar was agreed and took effect from 1 April 2001. No writing was needed to give effect to the short lease to Amstar; but, in any event, the agreement of 9 April sufficed for that purpose. The same individuals Jain and Batt-Rawden controlled the affairs of both of their companies and the only rational interpretation of the parties' conduct and intentions was that Howto ceased to be the tenant of the premises when Amstar took its place as agreed. His Honour accepted that the despatch of a single invoice for rent addressed to Howto was an act of inadvertence in Benson's office due to a failure to up-date their software.

[11] Turning to the guarantee, it is said that the agreement constituted by the 9 April letter did not contain a guarantee. On the appeal, several points were made about it. The first was that the offer comprised in that letter calls for acceptance by the Amstar directors, which, it was submitted, meant "presumably as agents of the company [and] not in their personal capacity". That is presumption indeed. The letter, which was addressed to Batt-Rawden personally and not to Amstar or any other company, provided spaces, which were completed by Jain and Batt-Rawden personally, for signatures in their own names as having been "agreed to" by each of them. There is nothing to suggest that they signed it in their own names yet on behalf of the company Amstar, as distinct from doing so in their individual capacities. Batt-Rawden was the managing director and his signature alone would have sufficed to authenticate the agreement on behalf of that company. There was no reason why Jain should also have signed it at all except to bind himself to the guarantee. A lease for no more than a year is not something that requires writing for its enforcement, whereas under s 56 of the *Property Law Act* a guarantee does. In any event, the decision, referred to by Mr Hackett, of Disberry J in the Saskatchewan Queen's Bench in *Ontario Marble Co Ltd v Creative Memorials Ltd* (1963) 39 DLR (2d) 149, 155, affords authority that an individual's signature may be affixed in more than one capacity; that is, both personally and as authenticating officer of the corporation. If (which I doubt) it is necessary to do so, I would apply that decision here.

[12] Above all, it would be absurd to suppose that the directors were acting on behalf of the corporation in signing a guarantee of its liabilities. The concept of a guarantee of one's own liabilities makes no sense at all. What are sometimes described as "directors' guarantees" refer to guarantees by persons who are directors but who give them in their personal capacities as individuals and not as officers or "agents" of the corporation whose liabilities are being guaranteed. The form of the agreement of 9 April and the form in which the signatures of Jain and Batt-Rawden are appended to it, with their own names subscribed beneath, are clear indications of the intention in this case. There is in fact nothing to suggest that, when they signed the guarantees, they were doing so on behalf of the company Amstar.

[13] The other point relied on in this context is simply a restatement of the issue previously disposed of. It is that the agreement of 9 April was by the terms of para 5 not intended to be binding until a formal instrument of guarantee was executed, which never happened. It is answered in the same way as in the case of the lease itself. The agreement was specific about what was being guaranteed. It was: (1) payment of the rent for the twelve month period of the lease; and (2) payment of the lump sum of $21,000 due as compensation on termination of the lease. It is to the latter I now turn.

[14] On the hearing of the appeal, Mr DeBuse of counsel for the appellants raised two issues about the claim to the sum of $21,000, which is the subject matter of para 4 of the letter of 9 April. The first concerned its recoverability in light of the fact that it was, so it was said, not Amstar but the Benson companies who terminated the "arrangement". The second, which was not raised at trial and for which counsel sought leave to amend, was that the provision for its payment was a penalty against which equity would relieve. We reserved a ruling on the application for leave to amend the pleadings and notice of appeal pending a decision whether there was substance in the point now sought to be litigated.

[15] It is convenient to set out para 4 of the agreement once again. After agreeing in para 1 that Amstar would occupy the area for one year from April 1, 2001 at a rental of $3,500 per month plus GST payable in advance, the defendant directors agreed in para 2 to guarantee payment of the rent for that twelve month period. It then goes on:

> "4. From April 1, 2002 the arrangement will revert to a month to month tenancy, however if [Amstar] terminate the arrangement at any time prior to March 31, 2003, then a lump sum payment of $21,000 will be due on termination as compensation for the rent free period enjoyed to date. Such payment will be guaranteed by the company's directors."

The effect was to create an immediate lease for a term of one year from 1 April 2001, to be followed by a periodic tenancy from month to month. Being in the first instance for a fixed term, the lease would not have been determinable at the option of either party. They were both bound by the lease for a year unless one of them repudiated it. Only after the first year was it to become a monthly tenancy determinable by either party on giving one month's notice, subject to the payment by Amstar of $21,000 if it did so at any time before 31 March 2003.

[16] When regard is had to these considerations and to the previous history of the dealings between the parties, it seems to me that the expression "if [Amstar] terminate the arrangement …" should not be limited to its doing so during the first year by virtue of some express agreement with the Benson companies, but was intended to comprehend its repudiating at any time what the parties called the "arrangement" for a fixed lease of one year followed by a monthly tenancy for a further period of twelve months to 31 March 2003. Mr DeBuse submitted that for Amstar to "terminate" the fixed term lease required an act of acceptance by the Benson companies of that repudiation by Amstar before it became effective in law. It is true that, as Lord Asquith once remarked, an unaccepted repudiation is a thing "writ in water". But the parties were not engaged in the formal discourse of the jurisprudence of contract law. They were practical business men reaching an agreement aimed at satisfying the commercial needs of both, and so avoiding the litigation that the Benson companies were threatening. As Batt-Rawden assured Peter Benson in his letter of 5 April 2001, "it is not our intention to bale out of the premises ... Our next opportunity to gain the required registration to operate successfully in Queensland occurs next February", which was the beginning of the school year. Until then, they needed the premises as local headquarters from which to maintain their business venture in Queensland.

[17] The question then is whether the leasing arrangement was terminated by Amstar. There can in my opinion be only one answer to this question. The High Court in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 recognised that the ordinary principles of contract, including termination for repudiation or fundamental breach, apply to leases. In this case, as in that, there was an agreement for a lease under which the lessee entered but which was never registered. There the lessee's refusal to pay the rent until certain works were carried out was held to constitute a repudiation of both the agreement and the equitable lease resulting from it, so as to justify termination of the lease and recovery by the lessor of damages for breach of contract. In the present case, the Benson companies were entitled to re-enter in the exercise of the power implied by s 107(d) of the *Property Law Act*.

[18] They were in my view also entitled to treat Amstar as having by its conduct repudiated the agreement of 9 April 2001. It had already refused or failed to execute the form of lease sent to it by the Benson companies' solicitors in April. By the end of August 2001 it was in arrears with rent payments in advance for the previous three successive months out of the five that had elapsed since the agreement was made. The Benson companies had good reason to suppose that they were facing a repetition of the conduct by the same directors on behalf of Howto in relation to the premises in 2000 and 2001. Throughout the period from July 2000 to August 2001, the defendants' two companies had succeeded in occupying the premises without paying rent for a total of eight months out of the 12 or so that had elapsed.

[19] For the reasons given, I consider that this repudiatory conduct on the part of Amstar amounted to "a termination" by it of the arrangement "at any time prior to March 31, 2003" within the meaning of para 4 of the agreement of 9 April, bringing into operation the provision for the lump sum payment of $21,000 contemplated in that paragraph. It was to this element of the transaction that Mr DeBuse's application to amend on appeal was directed. The sum of $21,000 was, he submitted, payable irrespective of whether the breach or termination giving rise to it took place "at any time", whether early or late, in the course of the two years to 31 March 2003. It therefore bore no relation to the loss likely to be sustained by the Benson companies in the way of unpaid rent, and so could not have been a genuine pre-estimate of the damages expected to flow from its taking place. On the contrary, it was a penalty against which equity would relieve.

[20] There are, however, serious obstacles in the way of permitting this point to be taken for the first time now on appeal. The case is only superficially like *Citicorp Australia Ltd v Hendry* (1985) 4 NSWLR 1, in which a fixed sum was made payable on a single event irrespective of its significance and without any provision for an appropriate adjustment or discount according to the loss likely to be sustained. The critical feature of the provision in the April 9 agreement for the lump sum payment of $21,000 is that it arose out of the transaction between the same individuals concerning the same premises in the period immediately preceding that covered by the agreement. The sum of $21,000 represents the total six instalments of rent at the rate of $3,500 per month which was intended "as compensation for the rent free period enjoyed to date", as it is described in the agreement itself. It was described as such by Batt-Rawden in his letter of 5 April 2001, in which its payment was first proposed. Howto was, as I have said, already liable for that sum as compensation for its use and occupation of the premises for the period beginning in July 2000. Whether Jain and Batt-Rawden had also personally guaranteed the rent in respect of that period is a matter which, so far as I can see, does not clearly emerge from the material in the record. It did not become relevant until Mr DeBuse, who did not appear for the defendants at the trial, sought leave to make the amendments on this appeal.

[21] In addition, the 9 April agreement has all the appearance of a compromise by which the Benson companies forewent their claim for specific performance of the agreement with Howto for a five year lease, which would if successful have carried the unpaid rent from June 2000, in return for the new agreement including the defendants' undertaking to pay the lump sum of $21,000 representing the value of the use and occupation for that earlier period in the event envisaged by the agreement of 9 April. We cannot be sure about this because the evidence does not fully reveal all the material circumstances leading to that agreement; and that is so

because the allegation that the provision for payment of the $21,000 is a penalty was not raised or investigated at the trial. Consistently with authorities like *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, 438, the point ought not to be entertained for the first time on appeal. The application to amend should therefore be refused.

[22] This leaves for consideration the point which, with the insolvency of Amstar, has in a practical sense become crucial to the outcome of these proceedings. It is whether the directors' guarantee contained in the agreement extends to all, or any and which, of the liabilities which went to make up the sum for which judgment was given against the defendants in the action. In respect of the unpaid rent accrued due before September 2001 and the compensation sum of $21,000, there can be no room for doubt. As directors of Amstar, Jain and Batt-Rawden agreed in para 3 to guarantee payment of the rent for the first period of 12 months. In para 4, they agreed to guarantee payment of the sum of $21,000. The question that remains is whether their obligation under the guarantee extends to Amstar's liability for damages arising from non-payment of rent from September 2001, when the agreement was brought to an end, until 31 March 2002 when it was due to revert to a periodic tenancy liable to determination on one months notice from either party. An additional sum was also claimed and awarded for expenses thrown away in advertising the premises for letting in an abortive attempt to find a substitute tenant.

[23] As I have said, the quantum of these claims has not been challenged on appeal. The question is, however, whether they are recoverable under the directors' guarantee of payment of the rent. Rent due is not the same as damages for its non-payment. But that first impression must be considered in the light of the decision of the House of Lords in *Moschi v Lep Air Services Ltd* [1973] AC 331. There Lord Diplock and Lord Simon gave reasons for regarding a guarantee as in substance an undertaking by the guarantor to "see to it" that the principal debtor performs his contract, thus enabling the creditor after termination of the contract on repudiation to sue for instalments not yet accrued due in the character of damages for the breach of the guarantee. However, in *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245, 256, Mason CJ, with whose reasons Deane, Dawson and Toohey JJ agreed, said his view accorded with that of Lord Reid in *Moschi v Lep Air Services* [1973] AC 331, 344-345, that the question turned on the terms of the guarantee itself. His Honour said:

> "There are … two common classes of guarantee of the payment of instalments by the principal debtor. The first is an undertaking by the guarantor that if the debtor fails to pay an instalment he will pay. This is a conditional agreement. The guarantor's obligation to pay arises on the debtor's failure to pay. The second is an undertaking by the guarantor that the debtor will carry out his contract. Then a failure by the debtor to perform his contract puts the guarantor in breach of his."

[24] Although it would be unwise to be dogmatic about it, I read his Honour's reasons, based as they are on his approval of what Lord Reid said in *Moschi*, as implying that, unless there is something enabling it to be regarded as in the second form rather than the first, a straightforward guarantee of a debt will ordinarily be construed as a simple undertaking to pay if the debtor does not. Whether a claim for damages can be sustained against the guarantor depends, as Lord Reid acknowledged in *Moschi v Lep Air Services* [1973] AC 331, 344-345, in turn on whether an obligation to pay continues to rest on the debtor himself. If it has been

terminated, and so has ceased to apply to debts which would have accrued only thereafter, the guarantor will not be liable for those debts any more than the debtor himself; and the guarantee cannot then be transformed into an undertaking to ensure or see to it that the debtor performs his promise to pay, so as to enable a claim for damages to be made for breach of it. This might seem to conflict with *Slade's Case*, the basis of which is that every executory contract imports in itself an assumpsit, enabling a promisee always to recover damages for failure to pay; but the explanation must lie in the fact that, approached in this way, the guarantor's obligation is in form conditional upon the debtor not paying an existing indebtedness.

[25] In *Moschi v Lep Air Services Ltd* [1973] AC 331, the subject matter was a sum payable in instalments under a contract which the debtor repudiated, the creditor accepting the repudiation before the relevant instalments fell due. In that respect, it resembles the guarantee here in its application to rent falling due after the obligations of the lessee were brought to an end by termination of the lease agreement by the Benson companies' action in September 2001. But in *Moschi v Lep Air Services*, the relevant obligation was cast in the form of a personal guarantee "of the performance" by the debtor "of its obligations" to make the relevant instalment payments. Here it is a guarantee not of performance but of "payment" of the rent. Of course, in the case of a debt or money sum, non-payment *is* non-performance of the obligation to pay, so that superficially it might be supposed there is little real difference between those two ways of stating the guarantor's obligation. In *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245, the guarantee was of "the performance of all the terms … including the payment of all moneys payable … by the … purchaser". Mason CJ considered (166 CLR 245, at 257) that the promise fell within the second class above "except perhaps, in so far as the promise relates specifically to the payment of all moneys payable. In that respect the promise might well fall within the first category". Because in *Sunbird*, the obligation to pay arose only "upon settlement" of the contract, the time for which under an existing order for specific performance had not yet arrived, there could be no question of recovering damages on the guarantee for refusal to perform the contract while it remained on foot. The High Court therefore had no occasion to decide the precise question confronting us here.

[26] After more than one fluctuation of mind about the correct answer, I have come to the conclusion that the proper course is to adhere as closely as possible to what was said by Mason CJ in *Sunbird*, which received the explicit approval of three other Justices of the High Court in that case. It is true that his Honour was somewhat tentative in suggesting that the guarantee "might well" fall within the first class in so far as the promise related to the payment of all moneys payable under the contract. But the clear implication from his Honour's reasoning as a whole is that here the guarantor was to pay the rent if Amstar did not, which assumes that the rent continues to be payable. Instead, it ceased to be payable for the period after the Benson companies terminated the agreement and re-entered the premises. Rent is the compensation or consideration payable for use and occupation of property: *Black's Law Dictionary* (4th ed 1951). Once Amstar's use and occupation of the premises was terminated, it was no longer liable for amounts of rent which had not yet fallen due. Neither, therefore, were the defendant directors liable on their guarantees of that rent. The result in a case like this, suggests that if the landlord intends to sue on a guarantee for future rent, he would be well advised to keep the lease in being; or else to draw a broader form of guarantee.

[27] Of the sum for which judgment was given, $26,950 was attributed to "lost rent as a result of the defendants' repudiation", and a further $5,000 to "loss incurred in attempting to re-lease the premises". The conclusion reached here requires a variation in the principal sum of $59,431.50 for which judgment was given by reducing it to $27,481.50, on which interest at 9% per annum from 24 August 2001 to 9 February 2004 (which is the date on which judgment was given) amounts to $6,091.86 producing a total of $33,573.36. Since the defendants have succeeded on appeal as to part only, it is appropriate that there be no order as to the costs of the appeal. I would not disturb the existing order as to the costs of the trial.

[28] The appeal will be allowed by reducing the sum for which judgment (including interest) was given at trial to $33,573.36. The formal orders will be: (1) Appeal allowed. (2) Judgment varied by reducing the amount (including interest) for which it was given from $72,605.75 to $33,573.36. (3) No order as to the cost of the appeal.

[29] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of McPherson JA. I agree with all that he has said therein and with the orders proposed.

[30] **JERRARD JA:** In this appeal I have read and respectfully agree with the reasons for judgment and orders proposed by McPherson JA. I add the following comments.

[31] The appellants argued that the $21,000.00 referred to in Clause 4 of the agreement was payable only if Amstar terminated the arrangement, and that Amstar had not. It was the lessor who had terminated the contract in September 2001 when it retook possession.[1] The appellants' argument required this court to conclude that the parties should be presumed to have used the phrase "if [Amstar] terminate the arrangement" in the manner their counsel would have.

[32] There are two obvious difficulties with that argument. The first is that the circumstances in which their counsel submitted Amstar might have terminated either the agreed 12 month lease, or the agreed tenancy from month to month thereafter, were circumstances in which the lessor would be in default, such as by it interfering with Amstar's possession. The appellants' construction would then entitle the lessor to the lump sum payment of $21,000.00. Subject to the argument about the clause being a penalty, that is a curious result, mitigating against the appellants' construction.

[33] The second matter is that the pre-contract correspondence between the parties, relevant to the construction of the expression "if [Amstar] terminate", includes a letter dated 5 April 2001 under the hand of the appellant Batt-Rawden, which includes this suggestion:

> "If for any reason Adroit is unable to continue with the lease after 31st March 2002 the Directors will guarantee to pay a lump sum of 6 months rent payable on termination. This is to compensate you for the rent-free period enjoyed to-date."

---

1. *Sheville v Builders Licensing Board* (1981-1982) 149 CLR 620 at 625.

"Termination" was there being used by the appellants as synonymous with the lessee being unable to continue, realistically by being unable to pay rent; and thus synonymous with "fails to perform" or "repudiates". The respondents obviously adopted that usage. I consider those matters make the appellants' present construction unsupportable.

[34] Regarding the critical matter of what it was that the appellants actually guaranteed, I respectfully suggest that the majority approach in the House of Lords in *Moschi v Lep Air Services Ltd* would, if followed, result in the more consistent application of a general principle than does Lord Reid's approach, followed in *Sunbird Plaza Pty Ltd v Maloney*. The latter approach, binding on intermediate appellate courts until reconsidered, requires case by case construction of contractual terms to determine whether a guarantor has undertaken "no more than that if the principal debtor fails to pay any instalment he will pay it", as opposed to an undertaking "that the principle debtor will carry out his contract". Lord Reid's reasoning in the relevant part of *Lep Air Services* reads as follows:[2]

> "With regard to making good to the creditor payments of instalments by the principal debtor there are at least two possible forms of agreement. A person might undertake no more than that if the principal debtor fails to pay any instalment he will pay it. That would be a conditional agreement. There would be no prestable[3] obligation unless and until the debtor failed to pay. There would then on the debtor's failure arise an obligation to pay. If for any reason the debtor ceases to have any obligation to pay the instalment on the due date then he could not fail to pay it on that date. The condition attached to the undertaking would never be purified and the subsidiary obligation would never arise.
>
> On the other hand, the guarantor's obligation might be of a different kind. He might undertake that the principal debtor will carry out his contract. Then if at any time and for any reason the principal debtor acts or fails to act as required by his contract, he not only breaks his own contract but he also puts the guarantor in breach of his contract of guarantee. Then the creditor can sue the guarantor, not for the unpaid instalment but for damages. His contract being that the principal debtor would carry out the principal contract, the damages payable by the guarantor must then be the loss suffered by the creditor due to the principal debtor having failed to do what the guarantor undertook that he would do."

[35] The difficulties in following Lord Reid's dichotomy and in deciding where the line falls in any particular case are illustrated by Lord Reid's conclusion in *Lep Air Services* that the contract whereby that appellant "personally guaranteed the performance" by the company "of its obligation to make the payments at the rate of $6,000.00 per week" was of the second variety; by the hesitancy with which Mason CJ came to his ultimate conclusions on construction in *Sunbird Plaza Pty Ltd v Maloney* at CLR 257 (quoted in part in by McPherson JA herein); and by the observation of McPherson JA at [25] herein that in the case of a debt or money sum,

---

2. At [1973] AC 331 at 344-345.
3. The OED explains "prestable" as "capable of being paid or advanced; payable; capable of being performed or discharged".

the debtor's failing to pay instalments *is* the debtor's failure to carry out the contract. The approach mandated by *Sunbird Plaza* can also produce the uncommercial result described by McPherson JA in [26], namely that a lessor who accepts the lessee's repudiation and terminates the contract – as Lord Simon put it in *Lep Air Services*[4] - "would lose your guarantor at the very moment you most need him – namely, at the moment of fundamental breach by the principal promisor."

4. At [1973] AC 355.