SUPREME COURT OF QUEENSLAND

CITATION:	*Perpetual Trustee Company Limited v Aspley Specialist Centre Pty Ltd & Anor* [2010] QSC 232
PARTIES:	**PERPETUAL TRUSTEE COMPANY LIMITED ACN 000 001 007** (Plaintiff) **v** **ASPLEY SPECIALIST CENTRE PTY LTD ACN 129 109 397** (First Defendant) and **JOHN PATRICK WOODWARD** (Second Defendant)
FILE NO/S:	9594/09 9595/09
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	11 May 2010
JUDGE:	McMurdo J
ORDER:	**These proceedings be consolidated and the plaintiff is to deliver an amended statement of claim within three weeks of this judgment. The application filed in each proceeding on 21 April 2010 is otherwise dismissed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – SUMMARY JUDGMENT – where the plaintiff agreed to lease parts of a premises which it owns to the defendants – where the defendants were obliged to provide a bank guarantee of the performance of the lease – where the parties agreed that failure to provide the bank guarantee would result in the defendants being liable to pay the plaintiff a set amount – where the defendants purported to terminate the lease and did not provide the bank guarantee – whether the plaintiff is entitled to summary judgment for the set amount.

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – TRANSFERS AND CONSOLIDATIONS – where the plaintiff agreed to lease parts of a premises which it owns to the defendants – where there was a lease for part of the first floor of the premises and a separate lease for part of the ground floor of the premises – where the first proceedings was for rent owing for the first floor premises and the second proceedings was for rent owing for the ground floor premises – whether the proceedings should be consolidated.

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – PENALTIES AND LIQUIDATED DAMAGES – GENERAL PRINCIPLES – where the defendants acknowledged that they owed the plaintiff a certain amount of money – where the plaintiff agreed to accept a lesser sum than the amount acknowledged to be owing if the defendants complied with certain conditions – where the defendants were liable to pay the acknowledged debt in full if those conditions were not met – whether the provision whereby the acknowledged debt would be paid in full if the conditions were not met was penal.

Patrick Parkinson (ed), *The Principles of Equity* (1996).
Patrick Parkinson (ed), *The Principles of Equity* (2nd ed, 2003)

Acron Pacific Limited & Ors v Offshore Oil NL & Ors (1985) 157 CLR 514
Cameron v UBS AG (2000) 2 VR 108
Dunlop Pneumatic Tyre Company Limited v New Garage & Motor Company Limited [1915] AC 79
General Credits (Finance) Pty Limited v Fenton Lake Pty Ltd [1985] 2 Qd R 6
Masters & Anor v Cameron (1954) 91 CLR 353
O'Dea & Ors v Allstates Leasing System (WA) Proprietary Limited & Ors (1982) 152 CLR 359
Spencer v Cali [1986] 2 Qd R 456
Tropical Traders Limited v Goonan & Anor (1963) 111 CLR 41
Walton Stores (Interstate) Limited v Maher & Anor (1987) 164 CLR 387
Zenith Engineering Pty Ltd v Queensland Crane and Machinery Pty Ltd [2001] 2 Qd R 114

COUNSEL: M H Hindman for the plaintiff
G D Beacham for the defendants

SOLICITORS: McCullough Robertson Lawyers for the plaintiff
Crilly Lawyers for the defendants

[1] The plaintiff applies to have these two proceedings consolidated and then for summary judgment. The defendants do not oppose consolidation but they argue, upon several grounds, that there should be a trial.

The facts

[2] The plaintiff is the owner of the freehold premises known as the Aspley Village Shopping Centre. It made written agreements to lease parts of the centre to the first defendant. An agreement dated 12 June 2008 provided for the lease of part of the first floor and an agreement dated 23 December 2008 provided for a lease of part of the ground floor. The second defendant guaranteed the performance by the first defendant of each lease.

[3] Each of these proceedings was commenced on 1 September 2009. The claim in 9594/09 was for $337,096.84 as rent owing for the first floor premises. The claim in 9595/09 was for $103,125 as rent owing for the ground floor premises. Defences were filed in each case on 25 September 2009, denying any liability to the plaintiff. In relation to the first floor claim, it was pleaded that rent had not accrued because the lease had not commenced, due to works required to be performed by the plaintiff not having reached practical completion. In relation to the ground floor claim, it was alleged that the plaintiff had not completed some required works and that the agreement for lease had been validly terminated prior to the rent accruing due.

[4] On 21 December 2009, there was a mediation of both proceedings which resulted in a document entitled "Heads of Agreement" being signed on that day. The document contained an acknowledgement by the defendants of a present indebtedness to the plaintiff in a total sum of $585,416. It provided for that to be satisfied by a payment of a lower sum and over time. It required the defendants to immediately execute leases for the first floor and ground floor tenancies and to provide bank guarantees to support their obligations. And it provided that in certain events, which the plaintiff says have occurred, the whole of the debt which had been acknowledged as due, less specified credits, would be payable. It is necessary to set out most of this document in full:

> 1 ASC and Woodward acknowledge that they are presently indebted to Perpetual in the sum of Five Hundred and Eighty Five Thousand Four Hundred and Sixteen Dollars ($585,416) (**Debt**), comprised as follows:
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> | | | |
> |---|---|---|
> | (a) | First floor rent arrears for 2009 (5 May to 31 October) | $236,666.00 |
> | (b) | First floor fit out costs | $130,000.00 |
> | (c) | Ground floor rent arrears to 31 December 2009 | $218,750.00 |
>
> 2 Subject to paragraph 5 below, ASC and Woodward agree:
>
> (a) to pay Perpetual the sum of Two Hundred and Ninety Thousand Dollars ($290,000) in settlement of the first floor rent arrears for 2009 and the first floor fit out costs, which amount is payable by sixty (60) equal monthly instalments, including interest

on the balance outstanding from time to time calculated at daily rests at the rate of 9% per annum, the first such instalment to be paid on or before 1 February 2010;

(b) that the capital incentive of $250,000 payable by Perpetual on the signing of the ground floor lease be applied towards the amount owing by ASC and Woodward in respect of the ground floor rental to 31 December 2009, with the balance to be applied towards the rental payable by ASC for the month of January 2010.

3 ASC and Woodward are to immediately execute the leases for the first floor and ground floor tenancies, together with supporting personal guarantees, with the leases expressed to commence effective from 5 May 2009 and 1 June 2009 respectively.

4 Within two (2) months of the execution of this Heads of Agreement, ASC and Woodward will provide bank guarantees to Perpetual in respect of both leases, being a bank guarantee for $475,000 in respect of the ground floor tenancy and a bank guarantee of $100,000 in respect of the ground floor tenancy.

5 Time is to be of the essence in respect of each parties' obligations under this Heads of Agreement. In the event that ASC and Woodward fail to meet their obligations on or before the due date, Perpetual will give ASC and Woodward seven (7) days' written notice, requiring them to remedy the breach on the expiration of that period of notice. If, after the expiration of that notice period, the obligation still remains unsatisfied, the full amount of the Debt (less any amounts paid pursuant to this Heads of Agreement), will become payable immediately (together with interest thereon calculated at 9% per annum) as a debt to Perpetual by ASC and Woodward who will be jointly and severally liable for that debt, PROVIDED that if the relevant breach occurs after January 2010, the Debt will not include the arrears in respect of the ground floor tenancy and will be reduced by $250,000.

…

7 On the provision of the bank guarantees referred to in paragraph 5 hereof, Perpetual will cause notices of discontinuance to be filed in the two proceedings by Perpetual against ASC and Woodward (being Supreme Court actions 9594/2009 and 9595/2009) with no order as to costs.

8 …

> 9 The terms of this Heads of Agreement are to be committed to a formal settlement deed, which will also contain mutual releases in respect of any claims which any party might have against the others in respect of loss or damage suffered as a result of the matters the subject of this dispute.

[5] Although cl 9 provided for "a formal settlement deed", this Heads of Agreement was in terms which were consistent only with an intention that the parties be immediately bound by it. It is a case within the first category referred to in *Masters v Cameron*.[1]

[6] By a letter dated 10 February 2010, the plaintiff's solicitors forwarded to the defendants' solicitors a draft entitled "Settlement Agreement", apparently intended to be the further document to which the Heads of Agreement had referred. It was not in the form of a deed, but nothing comes of that. It was in terms which recorded that the parties had reached an agreement to settle the proceedings upon entering into the Heads of Agreement on 21 December 2009 and that they had agreed to "formalise the terms of the Heads of Agreement on the terms set out in this document". Again, there was an acknowledgement of an indebtedness. The defendants acknowledge that they were jointly and severally indebted to the plaintiff for "the Debt" which was a term defined to mean "the sum of $585,416, being the amount acknowledged as owing by ASC and Woodward to Perpetual as at 21 December 2009 comprised of the amounts identified in paragraph 1 of the Heads of Agreement".

[7] The Settlement Agreement contained further terms which included the following:

> **2.2 ASC and Woodward to pay Discounted Debt**
>
> (a) ASC and Woodward agree to pay Perpetual the Discounted Debt by 60 equal monthly instalments commencing on 1 February 2010.
>
> (b) ASC and Woodward agree to pay interest at a rate of 9% per annum on the outstanding balance of the Discounted Debt from time to time calculated at daily rests.
>
> **2.3 Capital Incentive Amount to be applied to Ground Floor Rent Arrears**
>
> (a) The Parties acknowledge that the Capital Incentive Amount payable by Perpetual to ASC on the signing of the Ground Floor Lease will not be paid to ASC.
>
> (b) The Capital Incentive Amount will be applied towards the Ground Floor Rent Arrears with the balance to be applied towards the rent payable by ASC for the Ground Floor Premises for January 2010.

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[1] (1954) 91 CLR 353, 360.

(c) To the extent that the balance of the Capital Incentive Amount is insufficient to fully cover the rent payable by ASC for the Ground Floor Premises for January 2010, ASC must pay Perpetual the outstanding balance rental payable for January 2010.

2.4 Commencement of leases

(a) The Parties acknowledge that the First Floor Lease commenced on 5 May 2009.

(b) The Parties acknowledge that the Ground Floor Lease commenced on 1 June 2009.

2.5 Execution of documents

ASC and Woodward agree to execute the First Floor Lease and the Ground Floor Lease as soon as practicable after the Heads of Agreement Date.

2.6 Bank guarantees

(a) On or before 21 February 2010, ASC and Woodward agree to provide bank guarantees to Perpetual as follows:

(i) in respect of the First Floor Lease, a bank guarantee for the amount of $475,000; and

(ii) in respect of the Ground Floor Lease, a bank guarantee for the amount of $100,000.

(b) When Perpetual has received from ASC or Woodward, the bank guarantees identified in paragraph 2.6(a) above, Perpetual agrees to cause notices of discontinuance to be filed in the Proceedings with no order as to costs.

(c) ASC and Woodward shall cause their solicitors to sign the notices of discontinuance referred to in paragraph 2.6(b) above indicating their consent to the discontinuance.

2.7 Failure of ASC and Woodward to meet obligations under this agreement

(a) In the event that ASC or Woodward fail to meet any of their obligations on or before the date by which the obligation must be fulfilled, Perpetual will provide ASC and Woodward with written notice identifying the failure of ASC or Woodward

to fulfil the obligation and requiring ASC or Woodward to rectify the failure within the Notice Period.

(b) If, after the Notice Period has expired, either ASC and Woodward have failed to rectify the unfilled obligation identified in the relevant notice provided by Perpetual, ASC and Woodward will become immediately, jointly and severally liable for the Debt (less any amounts already paid under this agreement) together with interest calculated on the Debt at 9% per annum.

(c) If a breach identified in paragraph 2.7(b) above occurs after 31 January 2010, the Debt will be reduced by $250,000 and will not include the Ground Floor Rent Arrears.

…

2.9 Time of the essence

Time is of the essence of this agreement.

…

3.1 Release by Perpetual and AVT

In consideration of ASC and Woodward agreeing to:

(a) pay the Discounted Debt in accordance with clause 2.2 above;

(b) execute the First Floor Lease and the Ground Floor Lease in accordance with clause 2.5 above; and

(c) provide the bank guarantees to Perpetual in accordance with clause 2.6 above,

Perpetual and AVT:

(a) release and discharge ASC and Woodward from any Claim which, except for this document, they may have been able to make against ASC and Woodward or any officer, employee or agent of ASC and Woodward; and

(b) agree that except for proceedings to enforce the terms of this document, this document operates as an absolute bar to all Claims Perpetual and AVT have against ASC and Woodward.

3.2 Release by ASC and Woodward

In consideration of Perpetual and AVT agreeing to accept the Discount Debt instead of the Debt in accordance with clause 2.2 above, ASC and Woodward:

(a) release and discharge Perpetual and AVT from any Claim which, except for this document, they may have been able to make against Perpetual and AVT or any officer, employee or agent of Perpetual or AVT; and

(b) agree that except for proceedings to enforce the terms of this document, this document operates as an absolute bar to all Claims ASC and Woodward have against Perpetual and AVT.

[8] On 1 March 2010, the plaintiff's solicitors wrote to the defendants' solicitors making two complaints. The first was that there had been no indication of whether the terms of the draft Settlement Agreement were acceptable. The second was that the bank guarantees, which were to have been provided pursuant to the terms of the Heads of Agreement on or before 21 February 2010, had not been provided. The plaintiff's solicitors advised that "[i]n the event that these outstanding items are not finalised by 5.00pm on Friday, 5 March 2010, we will seek our client's further instructions with respect to enforcing their rights in this matter".

[9] On the same day the defendants' solicitors replied as to the proposed Settlement Agreement. They wrote simply that their comments would follow shortly. As to the bank guarantees, they wrote that the delay had been caused by their clients' bank being concerned by something which the plaintiff had required in a document called a Deed of Right of Entry. In the hearing of this application, it was not said that there was some breach by the plaintiff in that respect. This letter concluded with a request for confirmation of an extension of time said to have been requested in an earlier letter from the defendants' solicitors. But no such request appears from the evidence.

[10] On 4 March 2010, the plaintiff's solicitors wrote again, requiring the Settlement Agreement to be signed by the defendants, the bank guarantees to be delivered and all moneys payable under the Heads of Agreement and the Settlement Agreement "to be paid up to date" by 5 March 2010.

[11] On 5 March, the defendants' lawyers wrote to say, amongst other things, that their clients were not obliged to sign the Settlement Agreement in its then form (which they did not explain) and again they attributed the difficulty with the provision of bank guarantees to the complications involving the so-called Right of Entry document.

[12] On 9 March, the plaintiffs' solicitors wrote in these terms:

… We have sought our client's instructions and advise as follows:

1 our client requires the immediate return of the Deed of Settlement signed on behalf of your clients and accordingly we **attach** a word version of the document sent to you on 10

> February 2010 (we note that this document was delivered to you for comment approximately 1 month ago and your clients have not provided any comments or expressed any dissatisfaction with this document);
>
> 2 our client is prepared to allow a **short** extension for the return of the bank guarantees, accordingly, please advise how long your client will require in order to deliver these documents;
>
> 3 our client has instructed the Aspley Village Centre Manager to issue your client with invoices for the payment of the arrears in accordance with the Heads of Agreement / Deed of Settlement; and
>
> 4 in the event that the Deed of Settlement is not finalised and returned to our office by your clients by **12.00pm Friday 12 March 2010**, we hold strict instructions to immediately issue your clients with a formal notice to remedy breach, which is a necessary step before the commencement of litigation to enforce the terms of the Heads of Agreement. Please advise whether you have instructions to accept service of this notice on behalf of your clients.
>
> Our client considers that it has been extremely patient in this matter and will not tolerate any further delays.

[13] On 23 March 2010, the defendants' solicitors returned the Settlement Agreement, signed by their clients, without any amendment.

[14] On 6 April, the plaintiffs' solicitors wrote to the defendants' solicitors alleging that the defendants had failed to comply with cl 2.6 of the Settlement Agreement, in that they had not provided the bank guarantees required by that clause. Because the document had not been amended from the terms of the draft submitted on 10 February, it provided still for the provision of bank guarantees on or before 21 February. The letter gave notice pursuant to cl 2.7(a) of the Settlement Agreement to rectify that breach within the so-called Notice Period, ie seven days ending on 14 April. They advised that if the breaches were not remedied by then, the plaintiff would "take steps to enforce payment of the entire debt, which will become immediately due and payable, together with interest".

[15] On 9 April, the defendants' solicitors delivered three letters. One was in respect of the first floor lease, in which they enclosed a bank guarantee in the required amount of $475,000. The second letter related to the ground floor lease. It referred to clause 8.1 of that lease, under which the plaintiff was obliged to ensure that the premises were weatherproof and that all leaks in the roof and walls were rectified. It complained that the problems which had existed over the past 18 months in this respect had not been rectified with the consequence, so it was alleged, that the plaintiff had breached an essential term, or at least an intermediate term, of the contract within the lease. The letter concluded with the purported termination of the lease and a reservation of the defendants' rights. The third letter explained that the defendants would not provide a bank guarantee in respect of the ground floor lease, upon the basis that they had terminated that lease. The letter stated that as there was

"now no requirement for our client to provide your client with a bank guarantee in the amount of $100,000, our client has complied with the terms of settlement". The letter called for notices of discontinuance of these two proceedings.

[16] On the same day the solicitors for the plaintiff replied, denying the validity of the purported termination of the ground floor lease upon the basis that any complaint in respect of the state of those premises had been resolved by the Heads of Agreement and the Settlement Agreement.

[17] On 15 April, the defendants' solicitors wrote to the effect that the ground floor lease had been terminated for the plaintiff's alleged failure to comply with its obligations under clause 8.1 of that lease. The lease had been delivered on behalf of the defendants on 1 February 2010, apparently pursuant to the agreement in clause 3 of the Heads of Agreement. Clause 8.1 relevantly provided as follows:

> The Landlord will ensure that the Premises are weatherproof and will at its cost rectify any leaks to the roof and walls of the Premises as soon as is reasonably practicable once notified in writing by the Tenant.

The solicitors argued that the settlement had not put paid to the operation of that term and that the defendants had complained of leaks to the roof and walls of the premises, not only before, but after the mediation.

[18] On 16 April, the plaintiff's solicitors wrote asserting that the defendants had breached the Heads of Agreement and Settlement Agreement in two respects. The first, which is now argued, was that they had failed to provide a bank guarantee for the ground floor lease. The second, which is not argued on this application, was that the bank guarantee for the other lease, which had been provided on 9 April, was not compliant in that the ACN number for the first defendant was incorrect and that the expiry date on the bank guarantee was not in accordance with the requirements of the lease.

The plaintiff's claim

[19] The plaintiff filed an application for summary judgment in each of these proceedings on 21 April. Its pleadings have not been amended, but it argues that it is appropriate that it be given relief in the existing proceedings because, so it is said, there are no substantial factual questions to be determined and further interlocutory steps are unnecessary. The defendants concede that there is a power to enforce a settlement of a proceeding by way of summary application in the same proceeding.[2] But it is submitted that this is not an appropriate case for that procedure.

[20] The plaintiff's argument is focused upon the fact that a bank guarantee of the ground floor lease was not provided. On its case this was a breach of cl 2.6(a)(ii) of the Settlement Agreement, which entitled the plaintiff to give the notice as it did on 6 April. Because the guarantee was not provided within the seven days stipulated by that notice, it says that the defendants are jointly and severally liable under cl 2.7(b) for "the Debt" subject to the adjustments provided in cl 2.7. At the hearing, the amount said to be then owing was $335,416, calculated by deducting the sum of $250,000 referred to in cl 2.7(c) from the amount of the Debt, which was defined in the Settlement Agreement as $585,416. In subsequent written

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[2] *General Credits (Finance) Pty Limited v Fenton Lake Pty Ltd* [1985] 2 Qd R 6, 10.

submissions, I was informed that it is agreed that the defendants had made further payments, totalling $4,833, for which credit should be given if the plaintiff is otherwise successful.

The defendants' arguments

[21] The defendants argue that the provision by which the entire amount of the arrears which had been claimed in the proceedings (the Debt) would be payable in the event of any non-performance of the Settlement Agreement constitutes a penalty, in that the amount of the Debt is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach: *Dunlop Pneumatic Tyre Company Limited v New Garage & Motor Company Limited*.[3] On the defendants' argument, any debt owed to the plaintiff prior to the settlement became replaced by the entitlement to payments according to the Heads of Agreement and subsequently the Settlement Agreement. By cl 3.1 of the latter, the plaintiff released the defendants from any claim which it might have been able to make against them in consideration for the agreement of the defendants to pay the Discounted Debt ($290,000), execute the leases and provide the bank guarantees. Accordingly, the effect of cl 2.7 is to require the payment of a far higher sum in the event of a failure to pay or otherwise perform the Settlement Agreement.

[22] The argument therefore proceeds upon a comparison between the likely loss from even the most serious breach of the Settlement Agreement and a liability to pay the entirety of the Debt. In my view this argument overlooks the fact that within both the Heads of Agreement and the Settlement Agreement, there was an acknowledgement by the defendants that they were jointly and severally indebted to the plaintiff for the Debt. In substance, they agreed to pay the amount for which they acknowledged their indebtedness unless they met the conditions of the settlement. Accordingly, the case was of the kind referred to by Gibbs CJ in *O'Dea v Allstates Leasing System (WA) Proprietary Limited*,[4] which is where:

> … there is a present debt, which, by reason of an indulgence given by the creditor, is payable either in the future, or in a lesser amount, provided that certain conditions are met. The failure of the conditions does not mean that the creditor becomes entitled to damages; the consequence is that the sum which was always owed, but which the debtor was allowed to pay by instalments or in smaller amount, becomes recoverable at once or in full.

[23] In this context, the authorities have emphasised the need to look at the substance of the matter rather than "the manner of its drafting", as Buchanan JA said in *Cameron v UBS AG*.[5] In that case, the plaintiff had obtained a judgment against the defendant in Switzerland for the equivalent of A$8.4m. A proceeding to enforce the judgment in Victoria was settled by the defendant agreeing to pay $1m in five instalments. The deed of settlement provided that in default in payment of any instalment, the plaintiff would be at liberty to apply for reinstatement of the proceeding and entry of judgment for the full A$8.4m, less any payments made in the interim. In that case, there was no express acknowledgement of the defendant's indebtedness for the amount of the plaintiff's claim. The absence of that acknowledgement was relied upon by the defendant, who argued that it could not be said that before default

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3 [1915] AC 79, 86-87.
4 (1982) 152 CLR 359, 367.
5 (2000) 2 VR 108, [27].

occurred under the settlement deed, any sum was owing by him to UBS. In each of the judgments in the Court of Appeal, it was held that the relevant enquiry went wider than the precise terms of the settlement deed: the substance of the matter was that the bank had recovered judgment for $8.4m and that the proceedings to enforce that judgment had been defended only by an argument that it was not an enforceable judgment in Victoria.[6] Buchanan JA said:[7]

> The obligation to pay $8.4m was not one which sprang from the deed unheralded. Its genesis lay in the past dealings between the appellant and the respondent's predecessor. In my opinion the case is to be equated with those in which a creditor agrees to accept payment of part of his debt in full discharge if certain conditions are met but stipulates that if the conditions are not met, he will be entitled to recover the original debt.

[24] In *Acron Pacific Limited v Offshore Oil NL*[8], it was said that in this context, the operation of a contractual term said to be a penal provision is to be determined not in the light of circumstances existing before execution of the document of which it is part, but in the light of the legal rights and obligations which the document itself creates or confirms. In that case, as in the present case, there was an express acknowledgement of an indebtedness in certain amounts, together with a covenant by the creditors not to enforce the liabilities during a moratorium period, but with a provision that in certain events that moratorium could be terminated by the creditor. Accordingly, the operation of cl 2.7 of the Settlement Agreement must be considered in the light of the debts acknowledged as owing within the document itself.

[25] The present case is thereby distinguishable from *Zenith Engineering Pty Ltd v Queensland Crane and Machinery Pty Ltd*,[9] where proceedings to recover an alleged debt were compromised by the defendant's agreement to pay a lesser sum with a right in the plaintiff to enter judgment for its claim if the lesser sum was not paid. In that settlement, there was no acknowledgement of a debt as the plaintiff had claimed. Pincus JA said that in that case "the stipulated sum was neither in form nor in substance a present debt; it was merely an amount claimed"[10]. With the concurrence of White and Chesterman JJ, he said that the law was correctly stated in Professor Rossiter's chapter on relief against penalties in *The Principles of Equity*[11]:

> Where a stipulated sum is presently due and owing as a debt and the creditor grants the debtor an indulgence to pay the debt by instalments, it is not a penalty for the creditor to provide, as a condition of granting the indulgence, that the indulgence will be withdrawn if the debtor defaults in the payment of an instalment. However, this principle … has no application where, *having regard to the substance and notwithstanding the form of the transaction*, the stipulated sum is not owing as a present debt.[12]
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> (Emphasis added)

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6 Ibid, [20].
7 Ibid, [28].
8 (1985) 157 CLR 514, 519.
9 [2001] 2 Qd R 114.
10 Ibid, [9].
11 Patrick Parkinson (ed), *The Principles of Equity* (1996).
12 Ibid, 296, see also Patrick Parkinson (ed), *The Principles of Equity* (2nd ed, 2003) 308.

[26] For the defendants it is submitted that the present case is not of the kind referred to in that passage from *O'Dea v Allstates Leasing System*, because the Debt did not remain owing but instead was replaced by the defendants' promises to pay the Discounted Debt. Clause 3.1 of the Settlement Agreement provides that in consideration of the defendants agreeing to pay the Discounted Debt (and execute the leases and provide the bank guarantees) the plaintiff was to release and discharge them from any claim (as defined) which, except for the Settlement Agreement, might have been made against them. This is expressed to be an immediate release in discharge of the defendants in consideration of their agreement to do those things. The term "Claim" is widely defined within the Settlement Agreement and it would appear to include the plaintiff's entitlements which together constituted the Debt as acknowledged by the defendants. On this basis, it is said that there was no longer a debt for the larger sum, for which the obligation to pay was merely suspended pending fulfilment of the conditions of the settlement.

[27] I am not persuaded that that is the effect of cl 3.1. There are other parts of the Settlement Agreement which are indicative of an intention that the amount acknowledged to be owing should remain owing pending performance of the conditions. The first is the acknowledgement of the Debt within cl 2.1. This is expressed in terms of a present indebtedness, rather than a statement of what had been the position prior to the agreement which was there being recorded. Secondly, there are the references to the Ground Floor Rent Arrears, a term defined to mean the sum of $218,750 as "rent due and owing by [the first defendant] in respect of the Ground Floor Premises to 31 December 2009". By cl 2.3(b), it was agreed that the Capital Incentive Amount would be applied towards the Ground Floor Rent Arrears. The amount owing for the ground floor was distinguished from the Discounted Debt, to be paid under cl 2.2. The distinction is explained by reference to the Heads of Agreement, which counsel for the defendants agreed might be used in the construction of the Settlement Agreement. As appears from cl 2 of the Heads of Agreement, the sum of $290,000 which became described as the Discounted Debt in the Settlement Agreement was entirely referrable to the first floor premises. The result is that it cannot be said that there was something substituted for the cause of action represented by the arrears for the ground floor premises. As appears from cl 1 of the Heads of Agreement, those arrears formed part of the sum of $585,416, ie what is described in each document as the Debt. Accordingly, the Debt could not be said to have been extinguished by the Settlement Agreement. Rather, it remained owing, as the defendants acknowledged by the first of its terms.

[28] But in any case, the defendants' argument ignores the substance of the transaction, which was that the creditor agreed to accept a lesser sum than the amount acknowledged to be owing if the debtors complied with the conditions of settlement. Accordingly, the provision whereby the acknowledged debt would be paid in full if those conditions were not met, was not penal.

[29] Next the defendants argued that by the plaintiff's solicitors' letter of 9 March 2010, the plaintiff became precluded from relying upon the deadline of 21 February for the provision of the bank guarantees. In particular, the argument refers to the statement that the plaintiff was "prepared to allow a short extension for the return of the bank guarantees". By reference to what was said by Connolly J in *Spencer v Cali*,[13] it was said that this was an extension of the time for provision of the bank

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[13] [1986] 2 Qd R 456, 466 citing *Tropical Traders Limited v Goonan & Anor* (1963) 111 CLR 41, 55.

guarantees constituting at least a promise not to act upon their non-provision before the expiry of the extended time. That may be accepted; but what was allowed was but "a short extension". Some four weeks passed from that letter of 9 March before the notice to remedy was given on 6 April. That was more than was allowed by a "short extension".

[30] It was suggested for the defendants that there should be a trial to investigate whether the plaintiff is precluded from relying upon this default by an estoppel. This case was also based upon the solicitors' correspondence as to the provision of the bank guarantees. However, one difficulty in that argument was that the defendants could suggest nothing which they did or abstained from doing in reliance upon any assumption or expectation which the plaintiff may have induced in relation to bank guarantees.[14] It was submitted that the defendants should be given an opportunity to explore and plead an estoppel case; but although the facts would be within the defendants' knowledge, they were unable to formulate a case to be pleaded.

[31] The next of the defendants' arguments was that there was no default in complying with any obligation for the provision of a bank guarantee. At the hearing, counsel for the plaintiff said that no point was then taken about the bank guarantee which was provided for the first floor lease. The plaintiff's case was limited to the non-provision of the guarantee for the ground floor lease. The defendants say that they were relieved from the obligation to provide that guarantee because they validly terminated the ground floor lease. The plaintiff argued that the validity of that purported termination is presently irrelevant, because the obligation to provide the guarantee came from the Settlement Agreement and that obligation survived any termination of the lease.

[32] But the first defendant was obliged to provide a bank guarantee also by the terms of the lease itself. Clause 4.5(a) of the lease was a covenant by the first defendant to immediately deliver and maintain with the plaintiff a bank guarantee so that at all times the amount guaranteed equalled $100,000. Clause 2.6 of the Settlement Agreement required the defendants to provide, in the case of the ground floor lease, a bank guarantee in that same amount. It cannot be thought that two guarantees were to be provided: one pursuant to the lease and another by the Settlement Agreement. The lease required the provision of the bank guarantee "immediately", whereas the Settlement Agreement fixed a specific date for its provision. That provides an explanation for the specific promise within the Settlement Agreement to provide a bank guarantee. The apparent intention was to more precisely agree the time for the provision of that document, rather than to require its provision irrespective of whether the ground floor lease was binding upon the first defendant.

[33] An agreement which would require, even after a valid termination of the lease by the tenant, the provision of a bank guarantee of what had been the tenant's obligations would, in my view, require a clearer expression than appears from the Settlement Agreement or the Heads of Agreement. Now a termination of the ground floor lease would not have relieved the tenant from any liability which by then had accrued. In that way, a bank guarantee might still be useful to the landlord. But the guarantee was to be in the amount of $100,000 in respect of a lease for which the monthly rent appears to have been about $31,000.[15] By the Heads of Agreement, there was an acknowledged amount of arrears to 31 December

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14 *Walton Stores (Interstate) Limited v Maher & Anor* (1987) 164 CLR 387, 429.

15 755 square metres x $500 per square metre per annum.

2009 for the ground floor rent of $218,750. It was agreed that the so-called Capital Incentive Amount of $250,000, payable by the plaintiff on the signing of the ground floor lease, would be applied towards the $218,750 with the balance towards the rent for January 2010. In those circumstances, a bank guarantee, in an amount of $100,000, was well in excess of any amount which might have then accrued by 21 February 2010. In other words, the apparent and more likely intention was that the obligation to provide the bank guarantee was dependent upon the continuing existence of a binding lease. Accordingly, the obligation to provide a bank guarantee of the performance of the ground floor lease was, by necessary implication, dependent upon the then existence of a lease.

[34] There is evidence which shows a triable issue as to the plaintiff's compliance with its covenant, in cl 8.1 of the lease, to ensure that the ground floor premises were weatherproof. Thus, there is a triable issue as to whether the defendants' purported termination of the lease was valid. As I have said, there was no contrary submission for the plaintiff. It follows that there is a triable issue as to whether, from 9 April 2010, the defendants were obliged to provide the bank guarantee for the ground floor lease. Clause 2.7 of the Settlement Agreement provided for a Notice Period during which the defendants were to "fulfil the obligation". If that obligation did not continue through the Notice Period, cl 2.7 was not engaged. Accordingly, the basis argued in this application for the recovery of the Debt, which is the engagement of cl 2.7(b) of the Settlement Agreement, is not so clearly established that there is no need for a trial.

[35] There was also argument as to the proper interpretation of the Settlement Agreement, in so far as the quantification of the amount under cl 2.7(b) was concerned, having regard to cl 2.7(c) which provided that if the relevant breach occurred after 31 January 2010, the Debt was to be reduced by $250,000 and it was not to include the Ground Floor Rent Arrears. The plaintiff's submission was that the sum of $250,000 to be deducted under cl 2.7(b) was the Capital Incentive Amount to be applied towards the Ground Floor Rent Arrears under cl 2.3(b). Accordingly, the amount owing under cl 2.7 was the amount of the Debt, defined to be $585,416, less that sum of $250,000, equalling $335,416. The defendants' argument was that the relevant calculation is to subtract from the Debt, both that sum of $250,000 and also the Ground Floor Rent Arrears of $218,750. The plaintiff's interpretation seems to be the better one, but it is unnecessary to express a concluded view.

Conclusion

[36] It is appropriate to consolidate these proceedings. There was no reason for separate proceedings to have been commenced. It will be ordered that they be consolidated and that the plaintiff deliver an amended statement of claim within three weeks of this judgment. The application filed in each proceeding on 21 April 2010 is otherwise dismissed. I will hear the parties as to costs.