SUPREME COURT OF QUEENSLAND

CITATION:	*400 George Street (Qld) Pty Limited & Ors v BG International Limited* [2010] QCA 245
PARTIES:	**400 GEORGE STREET (QLD) PTY LIMITED** ACN 114 251 491 (plaintiff/first appellant) **TRINKAUS AUSTRALIEN IMMOBILIEN-FONDS NR 1 TREUHAND GmbH** ARBN 128 822 328 (plaintiff/second appellant) **LEIGHTON PROPERTIES PTY LIMITED** ACN 009 765 379 (plaintiff/third appellant) **GROSVENOR AUSTRALIA INVESTMENTS PTY LIMITED** ACN 107 277 592 (plaintiff/fourth appellant) **v** **BG INTERNATIONAL LIMITED** ARBN 114 818 825 (defendant/respondent)
FILE NO/S:	Appeal No 3780 of 2010 SC No 13481 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	20 August 2010
JUDGES:	Muir and Fraser JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal be dismissed with costs**
CATCHWORDS:	DEEDS – WHAT AMOUNTS TO A DEED – GENERALLY – agreement for lease drafted in terms of a contract but signing page indicated document executed as a deed – indicia of a deed – whether agreement for lease a deed DEEDS – DELIVERY – agreement for lease signed by respondent and forwarded to appellants' solicitors – earlier correspondence indicated parties intended to become bound

contemporaneously – whether agreement for lease delivered when forwarded to appellants' solicitors – whether principles applicable to subject to contract arrangements relevant to deeds

Property Law Act 1974 (Qld), s 45, s 47

Ashville Investments Ltd v Elmer Contractors Ltd [1989] QB 488; [1988] 3 WLR 867, cited
Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd (1988) 18 NSWLR 540, cited
Bank of Scotland v Henry Butcher & Co [2003] EWCA Civ 67; [2003] All ER (Comm) 557, cited
Bolton Metropolitan Borough Council v Torkington [2003] EWCA Civ 1634; [2004] Ch 66, cited
Comptroller of Stamps v Associated Broadcasting Services Ltd [1990] VR 335, cited
Interchase Corporation Ltd (in liq) v Commissioner of Stamp Duties (Qld) (1993) 27 ATR 154; [1993] QCA 485, cited
Longman v Viscount Chelsea (1989) 58 P & CR 189, cited
Manton v Parabolic Pty Ltd (1985) 2 NSWLR 361, cited
McCann v Switzerland Insurance Australia Limited (2000) 203 CLR 579; [2000] HCA 65, cited
Meredith Projects Pty Ltd v Fletcher Construction Australia Ltd [2000] NSWSC 493, considered
Rose v Commissioner of Stamps (SA) (1979) 22 SASR 84; (1979) 10 ATR 222; (1979) 79 ATC 4499, considered
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52, cited

COUNSEL: J McKenna SC, with J Bradley, for the appellants
B O'Donnell QC, with K A Barlow, for the respondent

SOLICITORS: Freehills for the appellants
Mallesons Stephen Jaques for the respondent

[1] **MUIR JA: Introduction**
The first and second appellants were the registered owners of land in Brisbane on which an office building was to be constructed. The third and fourth appellants agreed with the first and second appellants to construct the building and during construction were responsible for introducing potential tenants. The respondent was one such tenant. It was interested in leasing a number of floors in the building.

[2] After negotiations, in which the parties were represented by large commercial firms of solicitors, the solicitors for the appellants sent a document entitled "Agreement for Lease" (the Instrument) and a document entitled "Lease" to the solicitors for the respondent for execution. The documents were executed on behalf of the respondent and returned by the respondent's solicitors to the appellants' solicitors on 15 October 2008 in the expectation that the appellants would execute them promptly. One of the appellants delayed in executing the documents. On 27 November 2008 the solicitors for the respondent wrote to the solicitors for the appellants stating that there was no binding and concluded agreement between the parties and advising of the respondent's instructions to "formally withdraw its offer to lease the Premises …".

[3] The appellants maintained that the respondent was contractually bound and commenced proceedings in the Supreme Court claiming, amongst other relief, a declaration that the appellants and the respondent had entered into a binding contract on the terms of the Instrument and a declaration that the lease was a deed, binding on the parties.

[4] On 16 March 2010, the primary judge dismissed the appellants' claim. The appellants appealed against that decision. The principal issues for determination on the appeal are:

(a) Whether the Instrument is a deed;

(b) If the Instrument is a deed, was it delivered when forwarded to the appellants' solicitors on 15 October 2008 so that it then bound the respondent or was the deed to become binding on the respondent, only when the other parties to it became bound.

Background facts

[5] Before considering the issues for determination, it is desirable to say something of the background facts. It is convenient to extract most of them from the reasons of the primary judge. In the reasons, "BG" is a reference to the respondent and "plaintiffs" is a reference to the appellants.

> "[7] On 18 April 2008 a letter was written to BG on behalf of the third and fourth plaintiffs. It was described as a 'letter of offer'. It set out 'the revised terms available to BG', including the area to be leased, the term, the options to renew, the commencement date and the rental. Towards the end of the letter was this:
>
> > '37 Special Condition:
> >
> > No legally binding agreement is made by this offer. All documentation is subject to a mutually agreed legal document by both parties.
> >
> > This offer is made subject to the approval of the Boards of the Joint Venture companies [the third and fourth plaintiffs].'
>
> [8] BG was asked to indicate its concurrence by signing and returning the letter. BG did so by its Mr Maxwell, whose signature was dated 23 April 2008. At the same time BG amended that clause 37 and added a further condition, clause 38, as follows:
>
> > '37 No legally binding agreement is made by the parties' execution of this letter. All documentation is subject to a mutually agreed legal document by both parties.
> >
> > 38 Exclusivity
> >
> > In consideration of the Lessee entering into this agreement, the Lessor agrees with the Lessee that the Lessor will not negotiate or enter into any agreement with any person in relation to the lease or occupation of the Premises from the date of this agreement until the earlier of:

(a) 31 May 2008; and

(b) the Lessee withdraws from negotiations with the Lessor; and

(c) execution of a formal agreement for lease between the Lessor and the Lessee for the lease of the premises.

Despite clause 37, the parties intend that the exclusivity arrangements under this clause 38 will constitute a legal and binding agreement between the parties in relation to exclusivity.'

The case for BG strongly relies upon this document. For BG it is said that once this letter was countersigned by BG, the parties negotiated upon a 'subject to contract' premise, meaning that each understood, or should have understood, that a party could withdraw before all of the parties had executed and exchanged the formal documents.

...

[12] Over the next five months or so, the parties negotiated the terms of the proposed agreement for lease and the lease itself. Drafts were prepared by Freehills, the solicitors for the plaintiffs, and sent to and discussed with Mallesons Stephen Jaques, the solicitors for BG. The proposal became one for the lease of four floors with a right of first refusal over a fifth floor. Ultimately the solicitors reached a point where it seemed that there was nothing further to be resolved by them in the drafting process. That point was reached on 7 October 2008, when Mallesons sent to Freehills pages from the then current drafts containing certain handwritten amendments. They wrote that

> 'BG has been through the documents but asked if we can have updated, clean versions to sign ... If that will be a problem, can you email ... copies of the documents [to] compile at this end so that we can get the documents executed'.

[13] On the same day Freehills delivered those 'clean' versions of the documents, under cover of this letter:

'We refer to previous correspondence and attach:

1. Agreement for lease (3 copies); and
2. Lease (3 copies),

for execution where indicated. Once executed please return the documents to us together with:

1. a copy of the power of attorney; and
2. bank guarantee complying with clause 14 of the Agreement or Lease.

We look forward to receipt of the executed documents....

…

[26] As requested, each of the three copies of the agreement for lease and the lease instrument was executed for BG and returned to Freehills. They were executed by BG's duly appointed attorney, Mr Maxwell, on 9 October 2008. He was the managing director of the Australian office of BG. He had extensive background in mining and industrial management and engineering. He was not a lawyer and had no understanding of the law relating to obligations under deeds. He signed the agreement for lease on a page at the end of the document. It was there typed that the document was 'signed, sealed and delivered' by him. And below his signature appeared these words: 'by executing this deed the attorney states that the attorney has received no notice of revocation of the power of attorney'. This was two pages after that referred to already as the so called "Signing page", where there appeared the words 'Executed as a deed'.

[27] In the signing pages, there were provisions for the application of the common seals of the third and fourth plaintiffs. As to the first plaintiff, the document was to be executed by it against these typed words:

> 'Signed by
> 400 George Street (Qld) Pty Limited
> in accordance with its constitution and section 127 of the Corporations Act 2001 in the presence of'.

Section 127 of the *Corporations Act 2001* (Cth) provides for the execution by a company of a document without the use of a common seal and by s 127(3), a company may execute a document as a deed if the document is expressed to be executed as a deed and is executed in one of the ways specified in the section. Thus this proposed execution by the first plaintiff would have sufficed for the purposes of the document being its deed. But s 127 serves a wider purpose than providing for the execution of deeds and this reference to the section was not consistent only with this document being a deed.

[28] There was a further page on which Trinkaus [the second appellant] was to sign next to these words:

> 'Signed sealed and delivered by
> Trinkaus Australien Immobilien-Fonds Nr 1
> Treuhand GmbH by its attorney'.

The letter from Freehills of 7 October 2008 had requested provision of a power of attorney. This was the authority by which Mr Maxwell was to execute the documents. It was emailed by Mallesons to Freehills on 8 October 2008.

…

> [30] On 15 October 2008, Freehills delivered the documents to the first and fourth plaintiffs under cover of a letter which included this:
>
> 'We confirm that the documents:
>
> 1. are based on the pro forma Agreement for Lease and Lease for the building previously settled with you;
> 2. the pro forma documents have been amended to reflect the commercial terms agreed with the Tenant and otherwise amended in accordance with your instructions;
> 3. contain no unusual terms and are appropriate for a transaction of this nature; and
> 4. are in order for execution by 400 George Street (QLD) Pty Limited as Landlord and Grosvenor Australia Investments Pty Ltd as Developer.
>
> Please contact us should you have any queries, otherwise we look forward to receipt of the executed documents in due course.'"[1]

[6] On 27 November 2008, Mallesons wrote to Freehills as earlier described. By that time, or at least by the end of that day, all appellants had executed the documents but the respondent had not been informed of the execution by the appellants prior to the receipt by Freehills of Mallesons' letter.

The primary judge's findings

[7] The primary judge found that although the Instrument contained the wording recorded in paragraph [26] of the reasons, that wording was not decisive. In his Honour's view, the following matters (which have been stated in an abbreviated form) were sufficient to show that the Instrument was not a deed:

- The Instrument stated that the parties agree "in consideration of, among other things, the mutual promises contained in this agreement". This statement of consideration would not have been necessary had the parties intended the Instrument to operate as a deed.
- The respondent did not insert a date as "the date of this agreement". That left undefined an element of some of the promises made or to be made by the respondent, such as the provision of a bank bond. That indicated that the respondent was not intending to be then bound.
- The operative part of the Instrument did not use the language of deeds, eg, by referring to covenants, whereas the proposed instrument of lease consistently did so.
- At no stage in the dealings between the parties or the solicitors was there any suggestion that the Instrument was to operate as a deed. Had the respondent intended that it be a deed, it was probable that it or its solicitors would have expressly stipulated the conditions upon which it was to be delivered. In this regard, the primary judge said:

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1 *400 George Street (Qld) Pty Limited & Ors v BG International Limited* [2010] QSC 66.

> "[60] At no stage in the dealings between the parties or their solicitors was there any suggestion that the agreement for lease should operate as a deed. Had this been the intention of for example, the lessors, their solicitors would have been expected to refer to that matter and to have drafted the agreement for lease in terms which more closely resembled a deed. And had it been BG's intention that it be a deed, probably BG or its solicitors would have expressly stipulated the conditions upon which it was delivered, because on no sensible view could it be thought that this was not only a deed, but one which was delivered unconditionally by BG. Now the conditions of an escrow need not be expressed, but may be inferred. But the fact that such conditions were not expressed in this case is an indication that BG did not intend this to be a deed."

- The April 2008 letter indicated that the respondent intended that the parties would become bound contemporaneously.
- There was no need for the Instrument to be a deed as there was ample consideration for the respondent's promises. Also, there was no indication of any circumstances which, from the appellants' perspective, would have made it important to have the respondent in a position where it was unable to withdraw unilaterally while the documents were with the appellants for execution.

[8] The primary judge concluded this aspect of his reasons as follows:

> "[64] On one level of course, it can be said that BG intended to execute this instrument as a deed, because this was typed next to or near Mr Maxwell's signature and he is presumed to have read it. But the question is whether BG intended that it should have *effect* as a deed, or in other words, BG intended to place itself in a position from which it could not withdraw whilst the other parties were not so bound. Its only means of withdrawal might have arisen on the expiry of a reasonable time for execution by the other parties, when it could have sought to obtain equitable relief discharging it from the deed. That is unlikely to have been BG's intended position. And it was not asked to assume it by the other parties: the negotiations had proceeded upon the commercially realistic and not uncommon basis that the parties would become contemporaneously bound. In my conclusion, the references upon the execution pages to a deed and to sealing and delivery of the document should be regarded as surplusage and not representing BG's true intention, and this should have been apparent to the other parties."

[9] The significance of identification of the Instrument as a deed as opposed to a mere agreement in writing was explained by the primary judge in the following non-controversial terms:

> "[46] The essential difference between BG's executing the document as a deed, rather than as a mere agreement for

lease, was that if it was a deed, BG was unable to withdraw from the transaction whilst waiting for the other parties to execute the document. In *Vincent v Premo Enterprises (Voucher Sales) Ltd*, Lord Denning MR said:

> 'A deed is very different from a contract. On a contract for the sale of land, the contract is not binding on the parties until they have exchanged their parts. But with a deed it is different. A deed is binding on the maker of it, even though the parts have not been exchanged, as long as it has been signed, sealed and delivered.'" (footnote omitted)

[10] It is convenient to record the following further extracts from the reasons, which were not criticised on appeal and which helpfully explain relevant principles and concepts:

> "[47] A document may be executed as a deed but be delivered as an escrow, that is to say upon the condition that the obligations of the maker of the document are not to be performed until some condition is satisfied. In that event the document becomes a deed which that party is bound to perform once the condition is satisfied, without the need for any further delivery. But even in such a case, the party which has executed the instrument cannot withdraw pending the satisfaction of the condition. In *Beesly v Hallwood Estates Ltd*, Harman LJ said:
>
> > '[I]f you do deliver a document as an escrow it is your act and deed and it is not recallable by you. If, of course, the condition be never performed, it never becomes binding, and I suppose there must come a time, if there be unreasonable delay in the performance of the condition, when, in these days at any rate where equitable principles govern the actions of the court, the person or firm that has executed the escrow would be released from its obligation.'
>
> In the same case, Lord Evershed MR said:
>
> > '[T]here is an important distinction in this respect between an instrument in writing, which may be executed conditionally, and a deed. For in the case of the former, until the condition is performed, there is nothing at all. The position is not the same in the case of an instrument under seal executed and delivered, for in the latter case ... when the time has arrived or the condition has been performed the delivery becomes absolute and the maker of the deed is absolutely bound by it whether he has parted with its possession or not.'
>
> [48] In *Xenos v Wickham*, in a passage frequently cited, Blackburn J said:

> 'I can, on this part of the case, do little more than state to your Lordships my opinion, that no particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to shew that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying: 'I deliver this as my deed;' but any other words or acts that sufficiently shew that it was intended to be finally executed will do as well.'

…

[53] With one possible exception, the effect of the authorities, in my view, is well summarised in Butt, *Land Law* as follows:

> 'Although all deeds must comply with the relevant statutory and (to the extent that they survive) common law formalities, not all instruments that comply with those formalities are deeds. Whether an instrument is a deed depends on whether the parties intended it to be a deed. That intention is gleaned from considering the instrument's form, substance and object as a whole. Important factors include whether the instrument reflects the phraseology and structure commonly found in deeds, and whether it is cast in the most solemn form of documentation appropriate for that particular transaction. Generally, an unregistered Torrens title dealing is not a deed (although nothing prevents the parties from amending its form to make it one), but it becomes one on registration.
>
> For this purpose, extrinsic evidence is admissible in determining the parties' intention when executing the instrument. The parties' subjective intention is relevant – the court is not restricted to deducing their intention solely from the instrument itself. The instrument's self-description as a 'deed' or as a mere 'agreement' is also relevant, but not decisive: for the cases show that an instrument calling itself an agreement may be a deed and that an instrument calling itself a deed may be a mere agreement.'

[54] The qualification is that, as already mentioned, there is a difference of judicial opinion as to the relevance of evidence of a party's own understanding of the effect of the document which is said to be its deed. …" (footnotes omitted)

Was the Instrument a Deed?

[11] A deed is defined in *12 Halsbury's Laws of England*[2] in these terms:

> "A deed is an instrument which complies with the following requirements. First, it must be written on parchment or paper. Secondly, it must be executed in the manner specified below by some person or corporation named in the instrument. Thirdly, as to subject matter, it must express that the person or corporation so named makes, confirms, concurs in or consents to some assurance (otherwise than by way of testamentary disposition) of some interest in property or of some legal or equitable right, title, or claim, or undertakes or enters into some obligation, duty or agreement enforceable at law or in equity, or does or concurs in some other act affecting the legal relations or position of a party to the instrument or of some other person or corporation.
>
> To be executed by a party as his deed, the instrument must be … delivered as his act and deed. … Delivery by a party is constituted by any words or conduct expressly or impliedly acknowledging that he intends to be bound immediately and unconditionally by the provisions of the deed." (footnotes omitted)

[12] It is stated in *Odgers' Construction of Deeds and Statutes*[3] that:

> "Any act of the party which shows that he intends to deliver the deed as an instrument binding on him is enough [to constitute delivery]. He must make it his deed and recognise it as presently binding on him. …
>
> Delivery is nonetheless complete and effective because the grantor retains the deed in his own possession, so that it was early recognised that the deed need not be actually delivered to the other party to the deed."

[13] Section 45(2) of the *Property Law Act* 1974 (Qld) provides, relevantly, that an instrument expressed "to be sealed, shall, if it is signed and attested by at least 1 witness not being a party to the instrument, be deemed to be sealed …". Section 45(3) provides that "No particular form of words shall be requisite for the attestation".

[14] Section 47(1) of the *Property Law Act* provides that "execution of an instrument … in the form of a deed … shall not of itself import delivery, nor shall delivery be presumed from the fact of execution only, unless it appears that execution of the document was intended to constitute delivery of the document".

[15] Section 47(2) of the *Property Law Act* provides that "… delivery may be inferred from any fact or circumstance, including words or conduct, indicative of delivery". Delivery is defined as "the intention to be legally bound either immediately or subject to fulfilment of a condition".

[16] In *Interchase Corporation Ltd (in liq) v Commissioner of Stamp Duties (Qld)*[4] it was said by the Court that s 47(1) "displaces a common law presumption that execution of

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2 4th ed, para 1301.

3 5th ed, Sweet & Maxwell, London, 1967.

4 (1993) 27 ATR 154.

an instrument in the form of a deed imports delivery … Nevertheless the section contemplates that a document may evince an intention that delivery should be inferred from execution".

[17] Counsel for the respondent embraced the primary judge's reasons. In oral and written submissions the Instrument was analysed in meticulous detail in order to identify matters which were more consistent with the Instrument being an agreement in writing rather than a deed. It was pointed out that the Lease expressly provided in cl 1.13 that "this Lease is a deed …" and that the expression "covenants" was used in the Lease but not in the Instrument. It was submitted that such a "sharp contrast between two instruments negotiated between the same parties at the same time" was treated as significant by the Victorian Full Court in *Comptroller of Stamps v Associated Broadcasting Services Ltd*.[5]

[18] The respondent's counsel referred the Court to many cases in which courts had determined whether particular instruments were deeds. Submissions were made in relation to such authorities to the following effect. In many cases the question of whether a document was a deed or an agreement in writing has turned on the form and language of the document.[6] Emphasis has been placed on whether or not the document uses language indicative of a deed, such as the term "covenant". Regard has been had to whether the operative words of the document are in the conventional language of a simple agreement (e.g. "whereby it is agreed as follows …") or in the language of a deed ("now this deed witnesses as follows …").[7]

[19] Counsel for the respondent cited *Manton v Parabolic Pty Ltd*,[8] in which, following an extensive review of authority, Young J concluded:

> "The history of solemn deeds and the authorities above referred to make it plain that the essential element of a deed is that it be the most solemn act that a person can perform with respect to a particular piece of property or other right."[9]

[20] It was submitted that the role of the Court when confronted with conflicting indications in an instrument is to determine "the actual intention" by balancing those indications. That is what the primary judge did and authority supports this approach.[10]

[21] Reliance was placed on the existence of a confidentiality clause, cl 13.14, in the Instrument. It was submitted that the presence of a confidentiality clause in an instrument has been held inconsistent with the Instrument being a deed as it is contrary to the usual purpose of a deed.[11]

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5 [1990] VR 335 at 347.

6 For example see *Morley v Spencer* [1994] 1 NZLR 27, *Midaz Pty Ltd v Benberg Pty Ltd & Ors* [1999] TASSC 66, *Rose v Commissioner of Stamps (SA)* (1979) 22 SASR 84 at 86, *Dean v Lloyd* (1991) 3 WAR 235, *Meredith Projects Pty Ltd v Fletcher Construction Australia Ltd* [2000] NSWSC 493 at [133] -[136].

7 *Midaz* at [1], [2]; *Morley* at 31, 36, *Meredith* at [134], [135].

8 (1985) 2 NSWLR 361.

9 At 369. That statement and another expression of the same principle have been applied consistently in subsequent cases, eg. *F.J. Richards Pty Ltd v Mills Pty Ltd* [1995] 1 Qd R 1 at 7, *Comptroller of Stamps v Associated Broadcasting Services* [1990] VR 335 at 347, *Morley* at 30, *Dean* at 254, *Meredith* at [161] and following, *Westraint Resources Pty Ltd v BHP Iron Ore Pty Ltd (No 3)* [2008] WASC 265 at [26], *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 195 CLR 636 at [48].

10 Eg *Interchase, Meredith, Rose, Morley, Dean, Manton, Re Wilson (deceased)* [1958] QWN 12.

11 *Westraint* at [38].

[22] Issue was taken with the submission made by the appellants' counsel that there had been no previous case where a clear testimonium of the present kind had been treated by the Court as mere surplusage. *Meredith Projects Pty Ltd v Fletcher Construction Pty Ltd* and *Rose v Commissioner of Stamps (SA)*[12] were said to be such cases.

[23] In *Meredith*, the execution clause of an instrument entitled "Articles of Agreement" to which a building contract was annexed, commenced: "IN WITNESS whereof the parties hereto have hereunder set their hands the day and year first above written". An attorney for each party executed the document on the party's behalf. One attestation clause commenced with "SIGNED, SEALED AND DELIVERED" and included the words, "By executing this deed the attorney states …" The signing clause of another signatory stated merely, "Signed by Rae Edwina Cottle in the presence of - …".

[24] The attestation clauses of two other signatories stated that their common seals were affixed in accordance with their Articles of Association. Unlike the attestation clause in the Instrument, the instrument in *Meredith* contained no statement, other than that of one of the signatories, that the instrument was a deed.

[25] The instrument in *Rose* was a loan agreement. It commenced, "An AGREEMENT made this … day of …" and relevantly provided:

> "IN WITNESS whereof the parties hereunto have set their hands and or seals on the day and year first hereinbefore written.
>
> …
>
> SIGNED SEALED AND DELIVERED by
>
> [Lender]
>
> SIGNED SEALED AND DELIVERED by
>
> [Borrower]"

[26] Again, there was no assertion or acknowledgement that the instrument had been executed as a deed. Neither case was of much assistance to the respondent's argument.

[27] Counsel on both sides analysed many other cases concerned with the issue of whether the subject instrument was a deed. Those authorities provided support for the view that the indicia referred to by the primary judge and relied on by the respondent were relevant but, for the reasons given later, were far from determinative of the issue under consideration.

[28] Counsel for the appellants took issue with the relevance of the statement of consideration in the Instrument. He identified numerous authorities where instruments recording mutual promises, expressed to be given in consideration of the other, have been held to be binding deeds. He pointed out that there were legal and practical reasons for such a practice, namely:

(a) Equitable remedies, including specific performance, are generally not available to enforce voluntary promises.[13]

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12 (1979) 22 SASR 84.

13 *Commissioner of Stamp Duties (Q) v Hopkins* (1945) 71 CLR 351 at 369; *Dean v Lloyd* (1990) 3 WAR 235.

(b) Parties conventionally wish to identify their transaction as not being voluntary in nature – but provided for good consideration – because of the special legal rules which apply to voluntary transactions.[14]

(c) If the instrument fails, for some technical reason, to have its intended effect as a deed, it can still operate as a binding contract.

(d) Modern drafting practices often involve neutral forms of agreement which is adaptable for use – either as a simple contract or a deed – by a change in testimonium and execution clauses.

[29] The matters to which counsel for the appellants referred, in my opinion, show that depending on the circumstances, little weight may be attached to a statement of consideration as an indicator of a deed. However, like the language adopted (covenant, signed, sealed and delivered and the like), it cannot be said to be irrelevant. The weight to be attributed to each such matter needs to be assessed by reference to all other indicia in the document, applying conventional canons of contractual construction, and having regard to the question of delivery.

[30] The Instrument is a commercial document. The meaning of a commercial document is to be determined objectively by what reasonable persons in the position of the parties would have understood the document to mean:

> "That requires consideration not only of the text of the documents, but also the surrounding circumstances known to [the parties] and the purpose and object of the transaction".[15]

[31] Referring to a bilateral contract, it was said in the judgment of the Court in *Toll (FGCT) Pty Limited v Alphapharm Pty Ltd*:[16]

> "This Court, in *Pacific Carriers Ltd v BNP Paribas*, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction." (footnotes omitted)

[32] These statements of principle were directed to the meaning of contractual terms but, in my view, they have application to the question of whether the Instrument was intended to take effect as a deed. The numerous authorities to which this Court was referred, as one might suspect, support the conclusion that this question is to be decided principally by reference to the contents of the instrument under consideration. I put aside, for the moment, the question of whether delivery was effected.

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14 Megarry & Wade, *The Law of Real Property* (7th ed, 2008) at 8-042.

15 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 462.

16 (2004) 219 CLR 165 at 179.

[33] The words "Executed as a deed" at the top of the signing page are unambiguous. They, in effect, declare that the Instrument, once executed, has been executed as a deed. The execution clause used by the respondent's attorney utilised the language traditionally employed when an instrument is executed as a deed: "SIGNED, SEALED AND DELIVERED". The attorney further acknowledged that the instrument was executed as a deed by signing above the words "by executing this deed …". Those words also indicated that the words "signed, sealed and delivered" were used advisedly.

[34] The words "Executed as a deed" do not occur in the operative part of the Instrument but I can discern no difference in substance between the insertion of those words at the top of the testimonium and a clause which states, "This instrument is executed as a deed". Plainly, that is what the subject words in the Instrument were designed to convey. The words "Executed as a deed" are not mere surplusage and misleading surplusage at that. They were intended to inform the parties and any other relevant entity of the legal nature of the Instrument.

[35] It is unlikely, I think, that, subject to the matters discussed later, a reasonable person in the position of the respondent, having perused the Instrument, would not understand from these words that the contractual intention was that the Instrument be a deed.

[36] I accept that there are many matters to which one can point in the Instrument which are not normally found in a deed, and that some of the considerations which proved decisive in favour of the conclusion that the subject instrument was a deed in cases to which the Court was referred are to be found here. The Instrument is entitled "Agreement for Lease"; it has a confidentiality clause, consideration is recited, and it is probable that the purpose of the document could have been achieved without making it a deed, and so on. However, except to the extent that principles may be extracted from the cases, there is not a great deal to be gained from a detailed analysis of their respective facts for present purposes. The task at hand is to decide what was meant by the words under consideration in the Instrument when viewed in the context in which it was entered into.

[37] The following observations of May LJ in *Ashville Investments Ltd v Elmer Contractors Ltd*,[17] although directed to the meaning of contractual terms, are pertinent:

> "However, I do not think that there is any principle of law to the effect that the meaning of certain specific words in one arbitration clause in one contract is immutable and that those same specific words in another arbitration clause in other circumstances in another contract must be construed in the same way. This is not to say that the earlier decision on a given form of words will not be persuasive, to a degree dependent on the extent of the similarity between the contracts and surrounding circumstances in the two cases. In the interests of certainty and clarity a court may well think it right to construe words in an arbitration agreement, or indeed in a particular type of contract, in the same way as those same words have earlier been construed in another case involving an arbitration clause by another court. But in my opinion the subsequent court is not bound by the doctrine of stare decisis to do so.

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17 [1989] QB 488 at 495.

> If I were wrong, then in any event it must be necessary to compare the surrounding circumstances in each case to ensure that those in the latter case did not require one to construe albeit the same words differently when used in the different context."

[38] The parties enjoyed freedom of contract. They could elect for reasons good, bad, sufficient or insufficient, that their bargain be recorded by deed. If the instrument reflected their objective intention that it be a deed it would not matter that they failed to describe the Instrument as a deed or to use language more commonly associated with deeds.

[39] I acknowledge the force of the primary judge's careful reasoning in this regard but, with respect, I am unable to accept that the clear election of the respondent to execute the Instrument as a deed, manifested in the words "Executed as a deed" and "By executing this deed", are overwhelmed by the matters referred to by the primary judge and the additional considerations relied on by counsel for the respondent. Those words are not merely general indicia of an intention that the Instrument be a deed: they unequivocally express that intention. If the many cases to which we were referred by counsel for the respondent have more direct relevance than I apprehend, they are plainly distinguishable. As counsel for the appellants submitted, this Court's attention was not drawn to any case in which a clear testimonium of the present kind has been disregarded as mere surplusage or drafting error. It is appropriate to consider, I accept, the consequences for the parties of the Instrument being a deed. Commercial documents must be construed commercially but, equally, as Gleeson CJ said in *McCann v Switzerland Insurance Australia Limited*,[18] "Interpreting a commercial document requires attention to the language used by the parties …".

[40] An intention to make the Instrument a deed could not be described as improbable. Counsel for the appellants explained that there was a practical reason for executing the Instrument as a deed. They submitted, in substance, that the Lease could not be completed in a number of important respects until the building was finished and surveyed. The matters left to be inserted included the rent, outgoings, commencement and expiry dates. Provision was made in the Instrument for the third and fourth appellants to complete the Lease in accordance with the requirements of the Instrument and to deliver it to the first and second appellants.

[41] The Lease was in the form of a deed. It was not contemplated that it would be returned to the respondent for delivery by it and there was reason to be concerned that the blanks in it could not be validly completed except by a person authorised by deed.[19] Also, there was reason for concern that a deed could be validly delivered by an agent only if that authority was given by deed.[20]

[42] The primary judge considered and rejected a submission that it was necessary for the Instrument to be a deed for the reasons put forward by the appellants. Counsel for the appellants argued that the primary judge erred in this regard and, in particular, in concluding that it was possible to deliver a valid deed with material terms left uncompleted on the basis that they may be completed by an agent under seal.

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18 (2000) 203 CLR 579 at 589.

19 *Hibblewhite v M'Morine* (1840) 6 M & W 200 at 387-388 and *12 Halsbury's Laws of England*, 4th ed, para 1326.

20 *Scook v Premier Building Solutions Pty Ltd* (2003) 28 WAR 124 at [42]-[43] and *Hooker Industrial Developments Pty Ltd v Trustees of Christian Brothers* [1977] 2 NSWLR 109 at 119-120.

The main thrust of the argument in this regard, however, was that from the parties' perspective, there was a rational reason to believe it desirable that the Instrument take effect as a deed. In my opinion, there is force in that submission.

[43] In paragraph [64] of his reasons quoted above, the primary judge concluded, in effect, that it would not have been commercially realistic for the respondent, by executing the Instrument as a deed, to place itself in a position from which it could not withdraw whilst the other parties were not so bound. That point was pressed by counsel for the respondent who submitted that if the Instrument was intended to operate as a deed, its delivery to the appellants would result, in practical terms, in the granting of an option to the appellants to enter into the Lease and to execute the Instrument. The Instrument, it was said, would have been delivered as an escrow, the appellants would not be required to execute it within any specified time and the respondent could only be released from its obligations by court order.

[44] In my respectful opinion, these considerations are more relevant to the question of whether the Instrument was delivered as a deed than whether the respondent intended to execute it as a deed. There was no reason why the respondent could not have parted with the Instrument for execution by the parties in such a way as to ensure that it was not to be regarded as having been delivered until all prospective parties were bound. On one view of the facts, the respondent's predicament arose, not from the nature of the Instrument, but from a failure to advert to the consequences of its being delivered before providing it to the solicitors for the first and fourth appellants.

[45] The respondent argues, however, that it had taken precautions to ensure that it was not bound by any documents executed by it until the appellants were also bound. If this was so, the argument based on lack of commerciality just addressed, has even less force.

[46] For the above reasons, I respectfully differ from the primary judge's conclusion that the references in the execution pages to "Execute as a deed", "Signed sealed and delivered", and "By executing this deed…" should be regarded as surplusage.

Was the Instrument delivered and did the respondent become contractually bound?

[47] The primary judge made important findings regarding the April 2008 letter. He held that it made clear that the respondent did not intend to be bound until there was a "mutually agreed legal document" or "execution of a formal Agreement for lease between the Lessor and the Lessee". He held that cl 38, which the respondent included in the letter, should have indicated to the appellants that, at least in April 2008, the respondent "was proceeding upon the basis that it would not be bound until the parties had executed a formal contract". Additionally, he held that the effect of the letter was that clear words or conduct from the respondent would be necessary to demonstrate that change.

[48] Later in his reasons, the primary judge said of the April 2008 letter, by reference to the time at which the executed Instrument and Lease were sent by the respondent to the appellants, "It indicates that [the respondent] intended that the parties would become bound contemporaneously".[21] That finding is consistent with an earlier finding that "Nothing had passed between the solicitors, or between the parties, to suggest that [the respondent's] position had altered from the April letter".[22]

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21 Para [61].

22 Para [42].

[49] The appellants advanced the following arguments in relation to these findings. The parties made clear their intention that the terms of the letter of offer were intended to be superseded by a formal instrument but did not agree that the parties, in future, were not to be bound until an instrument of agreement was executed by all of them. The form of the instrument and how and when it would be binding was being left to be "mutually agreed … by both parties". This construction of the letter is confirmed by the fact that the respondent had twice proposed that the second sentence of cl 37 read "all documentation subject to **execution** of legal documentation" but the proposals had not been accepted by the third and fourth appellants.

[50] It was further submitted that the letter of offer amounted to no more than a mere statement of mutual intention as at 23 April 2008 which was apt to be superseded "once the parties, with the assistance of their solicitors, came to formulate more precisely the legal mechanism to be adopted for the transaction". And by the time of execution of the Instrument, it was, in fact, the "mutually agreed legal document" which the letter of offer contemplated.

[51] Reliance was placed on the reasons of Munby J, with whose reasons Aldous LJ agreed in *Bank of Scotland v Henry Butcher & Co*, said:[23]

> "The intention of the grantor may be of the greatest importance — may indeed be determinative — in a case, such as *Beesly v Hallwood Estates Ltd* [1961] 1 All ER 90, [1961] Ch 105 or *D'Silva v Lister House Development Ltd* [1970] 1 All ER 858, [1971] Ch 17, where it is being said that the grantor has delivered a document as a deed even though it has not been sent to the other side at all and indeed has never left his custody. **But different considerations must apply where, as in the present case, the executed document is sent to the other party. In my judgment, a person who has executed a document containing on its face, as the guarantee did in the present case, a clear statement that it has been 'executed and delivered as a deed', and who then sends that document to the other party without any expressed indication that the document is being delivered otherwise than as a deed, simply cannot set up some private mental reservation or uncommunicated intention as the basis of a contention that the document was in fact delivered not as the deed it purported to be but merely in escrow.**" (emphasis added)

[52] It is clear from s 47(1) of the *Property Law Act* that execution of an instrument in the form of a deed will not, necessarily, import delivery. For the execution of a document to import delivery it must appear that execution was intended to constitute delivery. Both under the Section and the Common Law, the intention of the executing party is the critical matter.[24]

[53] In my view, cl 37 of the April 2008 letter, when construed with cl 38, signified an understanding that the parties would not be bound until such time as their bargain was recorded in a formal document agreed by all parties. No doubt that was the intention at the date of the letter but the point of the clauses was to state the basis on which the

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23 [2003] EWCA Civ 67 (CA) at 589.

24 *Bolton Metropolitan Borough Council v Torkington* [2004] Ch 66 at 80; *Macedo v Stroud* [1922] 2 AC 330 (PC) at 337; *Federal Commissioner of Taxation v Taylor* (1929) 42 CLR 80 at 88-89.

parties would conduct their negotiations. That makes the primary judge's finding, in effect, that nothing had happened to change this basis, of particular significance. The finding was not shown to be wrong.

[54] The Instrument and the Lease were not the "mutually agreed legal document" referred to in cl 37. "Mutually agreed" means just that. The words are not referable to an instrument binding on one party but not on the others. As the primary judge explained, the forwarding of the documents by the appellants' solicitors to the respondent's solicitors for execution by the respondent did not constitute an offer by the appellants which was accepted by the return of the documents executed by the respondent. As the primary judge held, there was no evidence that the solicitors for the appellants had authority to contract on the appellants' behalf.

[55] Arrangements such as that recorded in the April 2008 letter are commonly referred to as "subject to contract". Under such an arrangement, the negotiating parties are not bound until their agreement is recorded in an instrument or instruments to which all parties are bound.[25]

[56] There is no reason on the facts of this case to suppose that the execution of the Instrument by the respondent, intending that it have contractual effect only when all other parties were bound by it, resulted in the respondent being bound by the Instrument because it took the form of a deed. If authority in support of that proposition is needed, it may be found in *Longman v Viscount Chelsea*;[26] *Bolton Metropolitan Borough Council v Torkington*;[27] and *Woodfall's Landlord and Tenant*.[28]

[57] It follows, I think, from the conclusion just reached that the Instrument, although executed by the respondent with the intention that it become of contractual force and that it take effect as a deed when the other parties were bound by it, was never delivered. There was no "intention to be legally bound either immediately or subject to the fulfilment of a condition". No "condition" existed. The basis on which the parties dealt was that no legal obligations would arise under any instruments executed by them until all were bound.

[58] It is permissible to consider conduct after the date of the alleged contract in order to determine whether a contract has been formed[29] but not to construe its terms.[30] I can see no reason why regard may not be had to such conduct in order to determine whether a document ultimately intended to take effect as a deed, has been delivered.

[59] The primary judge noted that a number of provisions of the Instrument operated by reference to "the date of this Agreement". These provisions included cl 14 and cl 19.

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25 *Marek v Australasian Conference Association Pty Ltd* [1994] 2 Qd R 521 at 527; *Longman v Viscount Chelsea* (1989) 58 P & CR 189; *Bolton Metropolitan Borough Council v Tokington* [2004] Ch 66; *Masters v Cameron* (1954) 91 CLR 353 at 362, 363; and *Carruthers v Whitaker* [1975] 2 NZLR 667 at 671.

26 (1989) 58 P & CR 189.

27 [2004] Ch 66.

28 (2009) paras 4.008 and 4.009.

29 *Howard Smith & Co Ltd v Varawa* (1907) 5 CLR 68 at 77; *Barrier Wharfs Ltd v W Scott Fell & Co Ltd* (1908) 5 CLR 647 at 668, 669, 672; and *B Seppelt & Sons Ltd v Commissioner for Main Roads* (1975) 1 BPR 9147 at 9154-9156.

30 *Ryan v Textile Clothing & Footwear Union of Australia* [1976] 2 VR 235; *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [35], *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407 at [330]; *Fraser v The Irish Restaurant & Bar Company Pty Ltd* [2008] QCA 270 at [9].

Under cl 14, the respondent was required to obtain and deliver to the third and fourth plaintiffs a bond securing "the Guaranteed Sum" of $5,225,332 "on or by the date of this Agreement". The respondent had the obligation under cl 19 to give the Treasurer notice under s 26A of the *Foreign Acquisitions and Takeovers Act* 1975 (Cth) "within one week after the date of this Agreement" if it had not already done so.

[60] No bond was obtained or provided by the respondent and no mention was made by the solicitors for the appellants of any obligation to provide the bond after the Instrument and Lease were sent to them by the respondents' solicitors. Nor was there any communication between the solicitors regarding the dating of the Instrument.

[61] In addressing an argument which was not pursued on this appeal that the parties became contractually bound when the letter of 7 October 2008 from the solicitors for the appellants was accepted by the respondent, the primary judge concluded, in effect, that the conduct of the appellants' solicitors in relation to the above matters indicated that the appellants did not consider that the respondent was contractually bound at the time the documents were returned to them by the respondent's solicitors. Equally, it may be said that the conduct of the respondent's solicitors and of the respondent indicated that the respondent did not consider itself bound.

[62] Earlier, I referred to the primary judge's conclusion that it would not have been commercially realistic for the respondent, by executing the Instrument as a deed, to place itself in a position from which it could not withdraw whilst the other parties were not so bound. His Honour was of the view that if it had been the respondent's intention that the Instrument be a deed, it was probable that the respondent or its solicitors would have stipulated expressly the conditions upon which it was delivered.

[63] The only point at which I respectfully depart from his Honour's reasoning in this regard is that I consider that the matters just discussed assist the conclusion that the parties were proceeding under the "subject to contract" arrangement established by the April 2008 letter and that the respondent did not intend that execution and physical delivery of the Instrument and Lease would give rise to contractual obligations without more. I do not accept that these matters provide much support for the view that the respondent did not intend to execute the Instrument as a deed. But these matters also tend to show that it was unlikely that the respondent had an intention that the Instrument be delivered as a deed at any material time.

[64] There is another matter which I should mention. Counsel for the appellants argued, on the basis of the definition of "delivery" in s 47(3) of the *Property Law Act*, that evidence of the subjective intention of the parties was relevant to the determination of whether a deed had been delivered. It is convenient to repeat the definition: "… the intention to be legally bound either immediately or subject to fulfilment of a condition".

[65] The primary judge rejected this construction of s 47(3). His Honour pointed out that if the appellants' argument was correct, "the result could be that an instrument, unambiguously in terms of a deed and in all the circumstances apparently intended to be such, could be denied its efficacy by the revelation that the party which had executed the document intended it to be something else". I would add that s 47 is a provision which bears upon technical aspects of the law relating to deeds and contracts. There is no indication in the definition of "delivery" that the Legislature intended to depart from the long established principle governing the formation and interpretation

of contracts and deeds that the intention of the maker or makers of instruments and the meaning of the words used was to be determined objectively.[31] In *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd*,[32] Gleeson CJ, the other members of the Court agreeing, said, "the general test of objectivity is of persuasive influence in the law of contract".

[66] However, having regard to the conclusions expressed earlier, the question of whether regard can be had to the subjective intentions of the signatory of the Instrument has no bearing on the outcome of the case and I do not propose to pursue it further.

Conclusion

[67] For the above reasons, I would order that the appeal be dismissed with costs.

[68] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with those reasons and with the order proposed by his Honour.

[69] **MULLINS J:** I agree with Muir JA.

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31 *Gissing v Gissing* [1971] AC 886 at 906; *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441 at 502; and *Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540.

32 (1988) 18 NSWLR 540 at 549.