SUPREME COURT OF QUEENSLAND

CITATION:	*Thomas v Balanced Securities Limited* [2011] QCA 258
PARTIES:	**DAVID LIONEL THOMAS** (appellant) **v** **BALANCED SECURITIES LIMITED** ACN 083 514 685 (respondent)
FILE NO/S:	Appeal No 10588 of 2010 DC No 1453 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	27 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	22 March 2011
JUDGES:	White JA, Margaret Wilson AJA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant leave to the respondent to file its Notice of Contention.** **2. Dismiss the appeal.** **3. The appellant pay the respondent's costs assessed on the standard basis.**
CATCHWORDS:	ESTOPPEL – ESTOPPEL BY JUDGMENT – PARTIES – IDENTITY OF PARTIES – PRIVITY – GENERAL PRINCIPLES – where earlier proceedings against company of which appellant was sole director and secretary – where the primary judge concluded that company was the alter ego of appellant – where appellant participated in earlier proceedings as the guiding mind of company in respect of identical terms in the same instrument company which he sought to re-litigate in guarantee proceedings – whether such conduct amounts to an abuse of process PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where respondent sued appellant on the contract of guarantee to recover costs assessed on indemnity basis against company – whether appellant entitled to a costs statement pursuant to r 705 *Uniform Civil Procedure Rules* 1999 (Qld) – whether s 335 of the *Legal*

Profession Act 2007 (Qld) applied – nature of the proceedings

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where appellant contended that the primary judge erred in concluding that he had no real prospect of success in defending all or part of the claim – where the primary judge could have declined to grant summary judgment in light of the complexity of the issues – whether any error has been demonstrated in the primary judge granting summary judgment

Australian Securities and Investment Commission Act 2001 (Cth), s 12GF, s 12GM
Corporations Act 2001 (Cth), s 12C, s 991A
Legal Profession Act 2007 (Qld), s 335
Uniform Civil Procedure Rules 1999 (Qld), r 292, r 293, r 679, r 680, r 705

420093 BC Ltd v Bank of Montreal (1995) 128 DLR (4th) 488; [1995] CanLII 6246 (AB CA), cited
Ann Street Mezzanine Pty Ltd (in liq) v Beck (2009) 175 FCR 532; [2009] FCA 333, cited
Australian Can Co Pty Ltd v Levin & Co Pty Ltd [1947] VLR 332; [1947] VicLawRp 47, cited
Australian Competition and Consumer Commission (ACCC) v C G Berbatis Holdings Pty Limited and Others (2003) 214 CLR 51; [2003] HCA 18, cited
Begley v Attorney-General of New South Wales (1910) 11 CLR 432; [1910] HCA 69, cited
Bradford & Bingley Building Society v Seddon [1999] 1 WLR 1482; [1999] EWCA Civ 944, cited
Canon Australia Pty Ltd v Patton (2007) 244 ALR 759; [2007] NSWCA 246, cited
Champerslife Pty Ltd v Manojlovski (2010) 75 NSWLR 245; [2010] NSWCA 33, cited
Clambake Pty Ltd v Tipperary Projects Pty Ltd [No 5] [2009] WASC 141, cited
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337; [1982] HCA 24, cited
Coldham-Fussell & Ors v Commissioner of Taxation [2011] QCA 45, cited
Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225; [1993] FCA 536, cited
Deputy-Commissioner of Taxation v Salcedo [2005] 2 Qd R 232; [2005] QCA 227, cited
Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (In liq) (1993) 43 FCR 510; [1993] FCA 342, cited
Equuscorp Pty Ltd v Glengallan Investments Pty Ltd (2004) 218 CLR 471; [2004] HCA 55, cited
Gleeson v J Wippel & Co Ltd [1977] 1 WLR 510, cited

Glenwood Homes Pty Ltd v Eberhard [2009] 1 Qd R 127; [2008] QSC 192, cited
Harris v Commissioner of Taxation [2006] 2 Qd R 445; [2006] QSC 108, cited
Henderson v Henderson [1843-1860] All ER Rep 378; (1843) 3 Hare 100; [1843] EngR 917, cited
Jamieson v Gosigil Pty Ltd [1983] 2 Qd R 117, cited
Jeans v Bruce [2004] NSWSC 539, cited
Joelco Pty Ltd v Balanced Securities Limited [2009] QSC 236, cited
Joelco Pty Ltd v Balanced Securities Limited [2009] QSC 304, cited
Johnson v Gore Wood & Co [2001] 2 WLR 72; [2000] UKHL 65, cited
Knight v FP Special Assets Ltd (1992) 174 CLR 178; [1992] HCA 28, cited
Legal Services Commissioner v Wright [2010] QCA 321, cited
Platinum United II Pty Ltd & Anor v Secured Mortgage Management Limited (in liq) [2011] QCA 229, cited
Ramsay v Pilgram (1968) 118 CLR 271; [1968] HCA 34, cited
Re Adelphi Hotel (Brighton) Ltd [1953] 1 WLR 955, cited
State Bank of New South Wales Ltd v Stenhouse Ltd (1997) Aust Torts Reports 81-423, cited
Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR 245; [1988] HCA 11, cited
Theseus Exploration NL v Foyster (1972) 126 CLR 507; [1972] HCA 41, cited

COUNSEL: P W Evans (solicitor) for the appellant
P Travis for the respondent

SOLICITORS: Piper Alderman for the appellant
Elliott May Lawyers for the respondent

[1] **WHITE JA**: In proceedings in the District Court, Balanced Securities Limited ("Balanced Securities") sought to recover from David Lionel Thomas ("Mr Thomas") the sum of $113,515.37 being the amount of assessed costs which had been ordered to be paid by Joelco ("Joelco") Pty Ltd in the Supreme Court on 26 August and 23 September 2009 ("the earlier proceedings").[1] Mr Thomas was sued as guarantor of Joelco's indebtedness under the terms of a Facility Agreement between Balanced Securities, Joelco and Mr Thomas. The primary judge ordered that Mr Thomas pay the sum claimed.

Background

[2] To understand the issues raised on this appeal it is necessary first to set out the background to the dealings between the parties and Joelco.

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1 *Joelco Pty Ltd v Balanced Securities Limited* [2009] QSC 236 and *Joelco Pty Ltd v Balanced Securities Limited* [2009] QSC 304.

[3] Mr Thomas is the sole director of Joelco. Joelco was a property developer which owned 96 lots of residential land at Maleny which it had developed with a joint venture partner, Australia Estates Pty Ltd. Differences occurred between the partners and Australia Estates had lodged caveats over the land. The financiers to the development – National Australia Bank and Grant Taylor Technologies Pty Ltd – advised in July 2006 that they would not continue to support the development.

[4] Joelco utilised the services of a finance broker to arrange alternative finance for the development apprehensive that Australia Estates would seek to complete the development alone.[2]

[5] As found by the Chief Justice[3], on 14 December 2006 Mr Thomas signed the Facility Agreement with Balanced Securities as sole director of Joelco and as guarantor of Joelco's indebtedness in his personal capacity.[4] To secure the loan Joelco mortgaged its interest in the land to Balanced Securities.

[6] Between that execution and the execution by Balanced Securities Mr Thomas travelled to Melbourne and discussed the terms of the Facility Agreement with Mr Steven Hodges, Senior Credit Manager of Balanced Securities. Balanced Securities executed the Facility Agreement on 22 December 2007. One of the terms of the Facility Agreement was that Joelco was obliged to obtain a minimum of four sales of blocks of land per interest period during the currency of the loan on terms which it is not necessary to set out. Failure to achieve those sales constituted an event of default under the Facility Agreement which triggered a number of consequences including increase to the interest rate and the withdrawal of the entitlement to have the interest commitment debited to an interest allowance.

[7] It was uncontroversial that Joelco went into default in March 2007 by failing to obtain four concluded sales during the relevant interest period. Default enlivened the operation of certain clauses in the Facility Agreement which entitled Balanced Securities to call up the loan and security.

[8] Balanced Securities served Joelco with a notice of exercise of power of sale in April 2007 but instead of selling the land it extended the term of the loan beyond the repayment date. Under the Facility Agreement this amounted to "rolling over" the loan which attracted a further fee.

[9] The loan was discharged by Joelco on 24 October 2007 after litigation involving other parties was compromised. Balanced Securities retained from the proceeds of sale of the land, in addition to the amount of the loan, certain charges and fees the entitlement to which Joelco challenged in the Supreme Court in the earlier proceedings. It contended that Balanced Securities had breached the Facility Agreement by charging those fees and increasing the interest rate and had acted unconscionably in certain of its dealings with Joelco. Joelco was unsuccessful in those proceedings and the Chief Justice ordered that Joelco pay Balanced Securities' costs of and incidental to those proceedings, including any reserved costs to be assessed on the standard basis. After receiving further submissions[5] the Chief

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2 As pleaded in the statement of claim in proceedings between Joelco and Balanced Securities; AR 75 at para 10(a)(vi)-(viii) of the statement of claim.

3 In *Joelco Pty Ltd v Balanced Securities Limited* [2009] QSC 236.

4 The terms relating to the guarantee were in the Facility Agreement.

5 But only from Balanced Securities.

Justice ordered that the costs be assessed on the indemnity basis. He accepted that cl 5.2 of the Facility Agreement which provided that the borrower (Joelco) must pay the lender (Balanced Securities) on demand

> "(a) The sum of all the costs, expenses and outgoings of the Lender of and incidental to:
>
> …
>
> (ii) any actual or contemplated enforcement of this Agreement or the Securities, or the actual or contemplated exercise, preservation, review or consideration of any rights, powers or remedies under this Agreement or the Securities or in relation to the Mortgaged Property.
>
> This includes legal costs and expenses on a full indemnity basis …"

allowed for such an order.

[10] The solicitors for Balanced Securities prepared a costs statement which was sent to Joelco's (and Mr Thomas') then solicitors who neither filed objections to it nor notified Mr Thomas. Those costs were assessed unopposed by a Registrar of the Supreme Court in the sum of $113,515.37 and on 6 May 2010 were ordered to be paid by Joelco to Balanced Securities. Joelco did not pay those costs.[6]

These proceedings

[11] On 14 May 2010 Balanced Securities commenced proceedings by claim and statement of claim against Mr Thomas in the District Court as guarantor of the indebtedness of Joelco to Balanced Securities.[7] Mr Thomas defended the claim on the grounds that:

- on its proper construction the Facility Agreement did not make him liable for those costs;
- he did not receive legal advice prior to executing the guarantee;
- the payment in full of the debt to Balanced Securities by Joelco discharged his obligations as guarantor.

There was no express pleading by Balanced Securities that Mr Thomas was bound by the Chief Justice's order or by his construction of the provisions in the Facility Agreement which governed the conclusion that costs were to be assessed on the indemnity basis. It its reply, Balanced Securities joined issue and also pleaded that legal advice was given by Mr Thomas' solicitors on 14 December 2006. A solicitor's certificate had been attached to the Facility Agreement.[8] That defence was not an issue below.

The summary judgment proceedings

[12] On 16 July 2010 Balanced Securities filed an application for summary judgment pursuant to r 292 of the *Uniform Civil Procedure Rules* 1999 (Qld). On 10 August

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6 Statement of claim para 15; AR 90.

7 The primary judge considered the "indemnity" provisions in the Facility Agreement and concluded that those provisions were not triggered. That finding is not challenged and it need not be considered on this appeal.

8 AR 64-65.

Mr Thomas filed a summary judgment application pursuant to r 293 and sought, in the alternative, a direction that Balanced Securities serve it with a costs statement (in relation to the costs ordered by the Chief Justice) pursuant to r 705.

[13] When the applications came on before the primary judge he pressed counsel about the appropriateness of the summary judgment procedure and was assured that the dispute primarily concerned the construction of the Facility Agreement and that there were no further facts to be identified on that issue. For Mr Thomas it was contended for the first time, as "a threshold question", that he was not bound by the Chief Justice's findings and order. It was also argued that Mr Thomas was not liable for the costs ordered to be paid by Joelco because "commercially" such a conclusion could not be drawn from the Facility Agreement and it was not the objective intention of the parties that he should be. Facts to that effect had been asserted in Mr Thomas' affidavit.

[14] It was plain, despite the primary judge's misgivings, that the parties were determined to press ahead with their summary judgment applications. Written submissions were handed to his Honour. The oral submissions took less than an hour including the preliminary discussion.

Issues below

(i) Balanced Securities' contentions

[15] Balanced Securities submitted, by reference to the terms of the Facility Agreement, that Joelco was liable to Balanced Securities under the Facility Agreement for the legal fees and costs incurred in enforcing the Facility Agreement; that Mr Thomas guaranteed to Balanced Securities the due and punctual payment of monies recoverable from Joelco under the Facility Agreement; in the earlier proceedings the Chief Justice had held that Balanced Securities' legal costs and expenses fell within cl 5.2(a)(ii) of the Facility Agreement; therefore Mr Thomas, as guarantor, was liable for those costs incurred in the earlier proceedings. Balanced Securities further submitted, (in anticipation of Mr Thomas' defence that any liability as guarantor was discharged when all money due under the Facility Agreement was repaid) that the express terms of the Facility Agreement kept the agreement alive until the obligations incurred under it had been performed.

[16] In response to Mr Thomas' alternative application for a costs statement as a "party liable to pay" costs, Balanced Securities contended that the order sought against Mr Thomas was not "*for*" costs but for a debt under the guarantee.

(ii) Mr Thomas' contentions

[17] Mr Thomas submitted that the debt incurred by Joelco under the costs order did not bar him from advancing a contrary construction of the Facility Agreement (or "additional" to those advanced by Joelco in the earlier proceedings); it was outside the scope of what the parties intended to be secured by the Facility Agreement; alternatively, he sought a finding that Balanced Securities had not complied with r 705 in that he had never been served with a costs statement and should be so served as "… a person not a party to a proceeding by or to whom assessed costs of the proceeding are payable".[9]

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9 UCPR r 679.

[18] In order to advance his argument that on its proper construction the Facility Agreement was not apt to make him liable for the costs of proceedings taken by Joelco against Balanced Securities after the moneys due under the Facility Agreement had been paid to Balanced Securities, Mr Thomas swore an affidavit going to the surrounding circumstances of the loan.

The relevant provisions of the Facility Agreement

[19] The Recitals to the Facility Agreement (upon which Mr Thomas placed some reliance) state:

> "A. The Borrower and the Guarantors have requested the Lender to make financial accommodation available to the Borrower and the Guarantors subject to the terms of this Agreement.
>
> B. The financial accommodation has been requested from the Lender to assist the Borrower to refinance current debt secured over the Property.
>
> C. The Lender has agreed to provide a facility to the Borrower as requested subject to the execution of this Agreement and the fulfilment of the terms and conditions contained herein."

Clause 1 contains definitions and interpretation of the Agreement. By cl 1.1 guarantor:

> "means each Guarantor … who hereby … guarantee[s] to the Lender the payment of the whole of the Moneys Hereby Secured … to the Lender."

"Moneys Hereby Secured"

> "means and includes:
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> (a) …
>
> (b) …
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> (c) all costs, charges, expenses and payments including legal costs and disbursements… which the Lender … may pay incur sustain become liable for or be put to in connection with the exercise or purported exercise of any right or remedy conferred upon the Lender … pursuant to this Agreement … and all costs, charges, expenses and payments including legal costs and disbursements which the Lender … may suffer sustain incur or become liable for or be put to in … obtaining or endeavouring to obtain payment of all or any of the Moneys Hereby Secured and/or in exercising or defending any rights or powers under or pursuant to this Agreement …"

"Repayment Date"

> "means the date of expiry of the Accommodation Period or such other date as may be agreed expressly in writing between the parties."

"Accommodation Period"

> "means … or such later date as the parties hereto may agree upon in writing or ending on the date on which the Lender shall exercise its rights under **Clause 14** hereof …"

Clause 14 concerns events of default.

[20] Clause 1.2, which concerns interpretation provides in (f) that a provision of the Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of the agreement. It was uncontroversial that Balanced Securities was responsible for the preparation of the Facility Agreement.

[21] By cl 2.1, subject to the provisions of the Facility Agreement and provided the lender had not become entitled to require the repayment of the moneys secured pursuant to cl 14, the lender granted the borrower a loan facility in an amount not exceeding the Facility Limit.[10] By cl 2.2:

> "The Facility shall subject to the terms hereof and commence on the Interest Commencement Date and shall expire on the Repayment Date."

By cl 3.1 the borrower "shall repay to the Lender the Moneys Hereby Secured on the Repayment Date or earlier in accordance with **Clause 14**".

[22] Clause 5 concerns "Fees, Costs and Expenses". By cl 5.2:

> "The Borrower shall pay to the Lender on demand:
>
> (a) the sum of all the costs, expenses and outgoings of the Lender of and incidental to:
>
> (i) …
>
> (ii) any actual or contemplated enforcement of this Agreement … or the actual or contemplated exercise, preservation, review or consideration of any rights, powers or remedies under this Agreement …
>
> This includes legal costs and expenses on a full indemnity basis …".

[23] By cl 10.2:

> "The Guarantors each hereby represent and warrant that:
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> …
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> (g) the Guarantors benefit by executing this Agreement …".

By cl 10.3:

> "The representations and warranties contained in this **Clause 10** … shall continue in full force and effect during the Accommodation Period and whilst any of the Moneys Hereby Secured remain outstanding under this facility."

[24] The guarantee is contained in cl 15. It provides:

> "15.1 The Guarantors hereby jointly and severally unconditionally guarantee to the Lender the due and punctual payment of all principal interest damages and other moneys payable by or recoverable from the Borrower under or pursuant to or in connection with this Agreement and the due and punctual performance and observance of all covenants, obligations, terms and conditions contained or implied in the within Agreement and on the part of the Borrower to be performed or observed."

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[10] Balanced Securities advanced $7.7 million comprising $7.26 million as the "loan" and $440,000 interest allowance under the Facility Agreement.

By cl 15.3:

> "This Guarantee shall be without prejudice to and shall not be affected nor shall the rights or remedies of the Lender against the Guarantors be in any way prejudiced or affected by any of the matters following:
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> …
>
> (d) the fact that any moneys hereby guaranteed or any part thereof may not be recoverable or may cease to be recoverable or that the Borrower or any other person purported to be primarily liable to pay such moneys may be discharged from all or any of their respective obligations to make payment for any other reason than that payment has been made."

Clause 15.7 provides that the guarantee is a continuing one for the purposes of

> "… securing the payment of the whole of the moneys and damages … and the performance of the whole of the covenants, obligations, terms and conditions … notwithstanding any partial payment or performance thereof."

[25] Clause 21.4 provides that the Facility Agreement

> "… supersedes all prior representations, arrangements, understandings and agreements between the parties relating to the subject matter … and sets forth the entire complete and exclusive agreement and understanding between the parties".

By cl 21.17 the parties acknowledged (repeating cl 1.2) that no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of the Facility Agreement or any part of it.

Conclusions of the primary judge

[26] The primary judge first considered whether Mr Thomas was bound by the proceedings which found Joelco liable to pay Balanced Securities' costs on the indemnity basis by virtue of the provisions of the Facility Agreement and concluded that an estoppel by representation arose because Joelco was the alter ego of Mr Thomas and vice versa.[11] His Honour concluded that the guarantee was engaged under the terms of the Facility Agreement. On the application for a costs statement (which needed to be considered only if Mr Thomas was unsuccessful on the construction of the Facility Agreement) the primary judge held that he was not so entitled because of his construction of the word "party" in the *UCPR*, the *Legal Profession Act* 2007 (Qld) and the estoppel which operated against Mr Thomas.

Grounds of appeal

[27] Mr Thomas contends that the primary judge erred:

(i)
- in finding that he was the alter ego of Joelco (and vice-versa);
- and thereby estopped by representation from contesting the claim of Balanced Securities in the present proceedings;
- and concluding that he had no entitlement to have the costs assessed; and

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[11] Reasons [37]; AR 135.

(ii) in finding that Mr Thomas elected on behalf of Joelco not to have the costs assessed when the solicitors did not advise of the service of the costs statement; and

(iii) in not finding there was a failure to accord Mr Thomas procedural fairness by denying him the opportunity to challenge the costs statement; and

(iv) in finding that "a party" liable to pay costs mentioned in r 705 did not include a person liable to pay costs under a guarantee, and that the provisions of the *Legal Profession Act* 2007 (Qld) were irrelevant;

(v) in entering judgment by concluding that Mr Thomas had no real prospects of successfully defending all or part of the claim in light of his Honour's conclusion that neither party "could have seriously asserted that there was 'no real prospect' of the other succeeding."[12]

Notice of contention

[28] Balanced Securities sought leave to file a notice of contention out of time which was opposed. By it, Balanced Securities sought to argue that on the proper construction of the Facility Agreement it was entitled to summary judgment having made out a prima facie case; that Mr Thomas had failed to discharge the evidential onus thus cast upon him; and that Mr Thomas was bound by an issue estoppel from challenging the earlier proceedings and the costs order made therein.

[29] The notice of contention was served about a month out of time. The matters raised are largely encompassed in the grounds of appeal. There is no prejudice as Mr Thomas had ample notice and leave should be given.

The decision below

[30] Balanced Securities pleaded its case and approached the applications below on the construction of the Facility Agreement as if Mr Thomas, as guarantor, were not bound by the earlier proceedings. Mr Thomas wanted to contest his liability under the guarantee and to advance a different construction from that in the earlier proceedings which denied its operation in the circumstances. It was in that way the question whether he was bound by the construction of the Facility Agreement in the proceedings against Joelco arose.

[31] The primary judge, after setting out the relevant clauses of the Facility Agreement, the surrounding circumstances of its execution and after considering the applicable principles of construction for a guarantee, turned to consider whether an "estoppel" existed against Mr Thomas. His Honour said it arose because Mr Thomas:

> "… was the sole shareholder and sole director of Joelco and Joelco was the party against whom the plaintiff obtained the judgment and orders … which dismissed the claim brought by Joelco and which led to the order that Joelco pay the plaintiff's costs of and incidental to that proceeding, including any reserved costs, to be assessed on the indemnity basis."[13]

Mr Thomas submitted that those inferences were not justified on the material. Nonetheless, he had sworn in an affidavit filed in his application under r 293 that he

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12 Reasons [70]; AR 141.

13 Reasons [29]; AR 132.

was the sole director of Joelco. He executed the Facility Agreement as sole director and sole company secretary and gave evidence on behalf of Joelco in its proceedings against Balanced Securities, to the effect that he was the negotiator on behalf of Joelco with Balanced Securities for the loan. [14] There was no evidence of any kind about the shareholding in the company but it was not, in all the circumstances, inappropriate for his Honour to infer that Mr Thomas was the guiding mind and controller of the company.

[32] Mr Thomas swore that:

- in December 2007 he travelled to Melbourne on behalf of Joelco at the request of Mr Steven Hodges for a meeting to discuss the possibility of Balanced Securities advancing funds to Joelco;
- they discussed the nature and detail of the project, the amount of the funding and the broad terms of that funding;
- the interpretation of the Facility Agreement contended for by Balanced Securities

> "… was never in the contemplation of the parties when the Facility Agreement was executed. Indeed, the oral statements made between the parties at the Meeting, and the circumstances themselves, were always to the effect that the Guarantee and Indemnity ("the Guarantee") contained in the Facility Agreement was limited to the loan which was that contained in the Facility Agreement. For example, at no time was it said to me that the Guarantee was intended by the plaintiff to extend to matters outside of the loan itself;"[15]
>
> and
>
> "The Proceedings were undertaken by Lindsay Lawrence & Associates and the counsel who acted in that matter on a speculative basis. Had there been any possibility that I was somehow liable to personally pay any adverse costs orders made in those proceedings, or indeed the Company having to fund [its] lawyers to conduct the proceedings, they would not have been undertaken."[16]

[33] The primary judge supported his conclusion that against Mr Thomas an estoppel by representation arose by reference to a passage in Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata.*[17] His Honour also relied upon statements by Einstein J in *Jeans v Bruce*[18] and obiter dicta of Handley AJA in *Champerslife*

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14 AR 63.

15 Affidavit of David Lionel Thomas para 7.1(b); AR 68.

16 Affidavit of David Lionel Thomas para 7.4; AR 69.

17 At [30]. The primary judge referred to the 3rd ed. The 4th ed in 2009 by Spencer Bower and Handley is entitled *Res Judicata*. The passage to which the primary judge had reference in the 3rd ed concerns indemnifiers not guarantors, although his Honour was alive to this. It has not, in terms, been repeated in the 4th ed although the cases footnoted in the 3rd ed have been repeated and others added. The primary judge discussed a decision of the Court of Appeal of Alberta – *420093 BC Pty Ltd v Bank of Montreal* (1995) 128 DLR (4th) 488 mentioned in fn 56 to the 3rd ed. It is unnecessary to do so here as his Honour found the reasoning not consonant with Australian authorities and there are other cases of relevance.

18 [2004] NSWSC 539.

Pty Ltd v Manojlovski.[19] On appeal, none of those propositions were contested by Mr Thomas, merely their application.

[34] The primary judge cited a passage from *Jeans v Bruce*[20] as follows:

> "… Accordingly, a non-party co-guarantor … may be bound by a *res judicata* to which the other guarantor … is directly subject on the basis that, by analogy with the above rule in respect of non-party indemnifiers acting with notice of a litigation, (the non-party co-guarantor) has set up an estoppel by representation to the effect that he/she is content to be bound by the outcome."

The primary judge then concluded:

> "Hence, on the facts of this case, where the defendant is thereby Joelco's alter ego, and vica versa, he is estopped by representation of fact. An inference to that effect is properly made from the limited, but cogent, evidence proffered; see, in particular, paragraphs 7.3 and 7.4 of the defendant's affidavit, noting that the representation of fact flows from his actions in a case such as this, not his unexpressed subjective thoughts."[21]

His Honour referred to Handley AJA's obiter discussion in *Champerslife Pty Ltd v Manojlovski*[22] of a privity of interest sufficient to raise a *res judicata* type estoppel:

> "I see no reason in principle why an issue estoppel binding on a company should not bind its controlling shareholder/director and vice versa where, as will generally be the case, the shareholder has a real financial "interest" in proceedings brought by the company. Nor do I see any reason why the converse should not also apply, although ordinarily a company will have no equivalent interest in proceedings by or against its controlling shareholder/director."[23]

It was principally from these propositions that his Honour reached his conclusion that Mr Thomas was estopped by representation of fact from advancing a position different from that taken by Joelco in the earlier proceedings or from a finding that Joelco was liable for indemnity costs pursuant to the Facility Agreement.

[35] The primary judge concluded:

> "While it is accepted that the order for costs made by de Jersey CJ is not a direct holding as to the liability of [Mr Thomas] under the Facility Agreement, if the guarantee under the Facility Agreement is engaged and the relevant estoppel applies, while it is not a bar to [Mr Thomas] making submissions in this proceeding, the liability of [Mr Thomas], determined by the proper construction of the Facility Agreement, will show that such liability to the stated extent does so arise."[24]

His Honour then considered the ambit of the guarantee obligations in the Facility Agreement and concluded:[25]

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19 (2010) 75 NSWLR 245, 267, [131].
20 [2004] NSWSC 539 at [374].
21 Reasons [33]; AR 133.
22 (2010) 75 NSWLR 245..
23 At [131].
24 Reasons [48]; AR 137.
25 Reasons [59]; AR 139.

> "In the end, it is difficult to escape the conclusion that the claim for damages for breach of contract, for unconscionable conduct, under sections 12GF and 12GN of the *Australian Securities and Investments Commission Act 2001* (Cth) for breach of section 12A of that Act, and pursuant to the provisions of section 991A of the *Corporations Act 2001* (Cth) were all concerned with the ascertainment of the actual amount owed by way of principal, interest, damages and other moneys under the Facility Agreement, even though an amount had been "repaid" as earlier stated in these reasons."

[36] Mr Thomas contended that the reference in Recital B to "current debt" limited what could be recovered by Balanced Securities to the amounts actually lent plus interest and fees and those amounts had been satisfied. Mr Thomas argued that "commercial practice" was inconsistent with any other approach. His Honour said:[26]

> "But to make things clear, I do not accept that, applying the proper interpretation principles that apply to guarantees, taking into account the interpretation clauses in the Facility Agreement itself and then applying both those generally to the objective theory of contract, the guarantee would be limited to the fixed time when principal, interest, damages and other moneys were asserted to have been first paid, especially where there existed later disputation about whether that payment of principal, interest, damages and other moneys was "in full", and especially where the present plaintiff has always alleged that it was "in full".
>
> Reference to clauses such as Cll 10, 11, 12, 13, 14, 15.3(d), 15.7, 16.6. and 17 does not show that the objective intention of the parties was to govern only their relationship with respect to the advance of the facility and the tendering of a sum of money as "full" repayment on 24 October 2007, although factually it might have (but for Joelco's continuing disputation)."[27]

[37] The primary judge concluded that since cl 15.1 obliged the guarantor to guarantee for the benefit of Balanced Securities all moneys recoverable from Joelco "under or pursuant to or 'in connection with' the Facility Agreement" then, by reference to the meaning of "Moneys Hereby Secured" and "Guarantor", and cl 5.2(a)(ii), the costs in defending Balanced Securities' rights were under or in connection with the Facility Agreement.

Discussion

(i) Estoppel

[38] It is necessary to start with some fundamental propositions. A judgment cannot bind a person who is not a party to the proceedings[28] unless he is a privy.[29] In *Ramsay v Pilgram* Barwick CJ explained[30] privies as of three kinds of blood, of title and of interest and added:

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26 Reasons [62]-[63]; AR 139.

27 His Honour at paras [64]-[65] considered other clauses and in particular cl 15 but it is not necessary to canvass his discussion further.

28 *Begley v Attorney-General of New South Wales* (1910) 11 CLR 432 per Griffith CJ at 439-440.

29 *Ramsay v Pilgram* (1968) 118 CLR 271.

30 At 279.

> "The basic requirement of a privy in interest is that the privy must claim under or through the person of whom he is said to be a privy."

[39] In *Gleeson v J Wippell & Co Ltd*[31] Sir Robert Megarry V-C said[32], when discussing privity of interest,

> "… it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. This is in the interest both of the successful party and of the public. But I cannot see that this provides any basis for a successful defendant to say that the successful defence is a bar to the plaintiff suing some third party, or for that third party to say that the successful defence prevents the plaintiff from suing him, unless there is a sufficient degree of identity between the successful defendant and the third party. I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest'."[33]

Although there was no evidence about the shareholding in Joelco (and, unlike the primary judge, I would not draw any inference about it) his Honour was not in error in concluding that Joelco was the alter ego of Mr Thomas.

[40] The Full Federal Court adopted and approved the analysis by Gummow J at first instance in *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (in liq)*[34] where his Honour said:[35]

> "It is important … to appreciate … when finding the necessary privity in a successive or mutual relationship, the courts have looked to legal rather than economic indicia as the criterion of operation of the privity doctrine.

A guarantor is sued under the contract of guarantee not through the principal debtor in respect of whom he is said to be privy. His liability is not identical.[36] Nonetheless, there is a body of dicta to the effect that where a person, such as a guarantor, is closely associated with the subject matter of the proceedings and takes no steps to defend (or advance) his own interest (where he is in a position to do so) he will become bound as a matter of issue estoppel by the result determined between those other parties on an identical issue which affects him.[37]

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31 [1977] 1 WLR 510.

32 At 515.

33 In *Johnson v Gore Wood & Co (a firm)* [2002] AC 1, where the point arose, Lord Bingham noted "WNH [Johnson's Company] was the corporate embodiment of Mr Johnson. He made decisions and gave instructions on its behalf" at 32.

34 (1993) 43 FCR 510.

35 (1992) 36 FCR 406 at 414.

36 *Begley v Attorney-General of New South Wales* (1910) 11 CLR 432.

37 See also *Clambake Pty Ltd v Tipperary Projects Pty Ltd* (*No 5)* [2009] WASC 141 at [62]-[73] per EM Heenan J; *Ann Street Mezzanine Pty Ltd (In Liq) v Beck* (2009) 175 FCR 532; *Canon Australia Pty Ltd v Patton* (2007) 244 ALR 759 per Basten JA at [8] and, doubting, Campbell JA at [68]; and *Gracechurch Holdings Pty Ltd v Breeze* (1992) 7 WAR 518 .

[41] It is necessary to consider what issues were raised and dealt with in the earlier proceedings. The claim by Joelco was for damages for breach of contract, unconscionable conduct, and/or under ss 12GF and 12GM of the *Australian Securities and Investments Commission Act* 2001 (Cth) for breach of s 12C, and/or pursuant to s 991A of the *Corporations Act* 2001 (Cth). The unconscionability related to the penalties and rollover fees and whether the notice of power of sale was a sham. The Chief Justice resolved those issues by reference to the oral evidence of the parties (including Mr Thomas) and their witnesses and an analysis of the terms of the Facility Agreement. Joelco argued that the requirement to sell at least four lots per quarter against a background in which only 2.7 had been achieved over 18 months to prevent it going into default under the agreement was unconscionable. But the Chief Justice found that Joelco's broker was optimistic about an increase in sales to Balanced Securities' Mr Hodges when making a submission for finance. His Honour added:[38]

> "And it is of course important to note that the plaintiff [Joelco], which I regarded as commercially experienced and astute, was prepared to contract on that basis."

His Honour concluded that there was nothing erroneous in requiring that level of sales.

[42] Similarly, the Chief Justice rejected Joelco's claim to be specially disadvantaged vis-à-vis Balanced Securities because it needed the finance urgently, had no alternative finance available, and was in an unequal bargaining position, referring to Gleeson CJ's observations in *Australian Competition and Consumer Commission v Berbatis Holdings Pty Ltd*.[39] His Honour concluded that Joelco, through Mr Thomas, negotiated "with a degree of independence and robustness".[40]

[43] The Chief Justice gave the parties seven days to make further submissions on the costs order that Joelco pay Balanced Securities' costs of the proceedings on the standard basis. The subsequent costs judgment notes that counsel for Balanced Securities in written submissions sought costs on the indemnity basis and that Joelco "made no response to those submissions".[41] Mr Thomas offered no explanation for that failure. Balanced Securities' submissions referred to cl 5.2 of the Facility Agreement as a basis for such an order. His Honour said:

> "I accept the defendant's [Balanced Securities] submission that 'since the legal costs and expenses of the defendant are 'of and incidental to' the enforcement of the Facility Agreement (in this case, by [Joelco]) or the 'preservation, review or consideration of any rights, powers or remedies under' the Facility Agreement, as required to be undertaken by the lender in defence of this proceeding', the court should exercise its discretion by ordering that the plaintiff pay the defendant's costs on the indemnity basis."[42]

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38 [2007] QSC 236 at [17].

39 (2003) 214 CLR 51 at 64-5.

40 At [25].

41 [2009] QSC 304 at [1].

42 At [3]. Where the terms of the agreement between the parties "plainly and unambiguously" provide for assessment other than on the standard (or party and party) basis, the court will order on that basis, *Re Adelphi Hotel (Brighton) Ltd* [1953] 1 WLR 955; *Jamieson v Gosigil Pty Ltd* [1983] 2 Qd R 117; *Platinum United II Pty Ltd v Secured Mortgage Management Limited (in liq)* [2011] QCA 229.

[44] The second basis advanced for indemnity costs was that Joelco's claims were "hopeless" and "bound to fail", as discussed in *Colgate-Palmolive Co v Cussons Pty Ltd.*[43] Of that submission his Honour said:

> "While in my obvious view [Joelco's] position was weak, I would not go so far as to say it was completely hopeless."[44]

[45] The third ground advanced for indemnity costs was Joelco's rejection of two offers to settle which his Honour concluded would have warranted an indemnity costs order from the date the first offer was rejected on 29 June 2009. His Honour concluded that the terms of the Facility Agreement warranted an order for indemnity costs for the whole proceeding.

[46] Turning now to what is in issue or sought to be in issue in these proceedings - paragraph 8(b) of Mr Thomas' defence contends that:

> "… the repayment of the debt discharged the obligations of [Mr Thomas] as regards the alleged guarantee and/or indemnity."

That was not an issue in the earlier proceedings but could have been raised by Joelco itself had it chosen to respond to the costs submissions made by Balanced Securities. If successful, the indemnity costs could have been confined to the period after the offer of settlement. Mr Thomas also pleaded (without particulars) that on the proper construction of the Finance Agreement he was not required to pay those costs.[45] In his written submissions, Mr M Lyons, counsel below for Mr Thomas, submitted that the guarantee was not directed to securing the obligations of Joelco under the costs order because it was only the primary transaction which was intended to be secured by that agreement. Clause 5.2 of the Facility Agreement did not support the conclusion that the costs incurred by Balanced Securities in defending Joelco's claims were costs of the kind contemplated. Again, that issue was not raised in the earlier proceedings but might have been advanced by Joelco had it responded to his Honour's invitation to provide submissions on costs.

[47] The indebtedness of Joelco was not Mr Thomas' indebtedness, nonetheless, Mr Thomas participated in the arguments in the earlier proceedings as the guiding mind of Joelco in respect of identical terms in the same instrument in which he contracted to make good Joelco's liability to Balanced Securities and which he now seeks to re-litigate. Such conduct effectively involves a collateral attack on the findings in the earlier proceedings. However, rather than approach the analysis as an issue estoppel another approach might be, as suggested by EM Heenan J in *Clambake Pty Ltd v Tipperary Projects Pty Ltd (No 5)*[46], to consider such conduct as an abuse of process:

> "… the jurisdiction of the court to prevent an abuse of process may be invoked to prevent a party litigating in one proceeding an issue determined in other proceedings between different parties to which he nevertheless had a sufficiently proximate interest."[47]

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43 (1993) 46 FCR 225.

44 At [4].

45 Paragraph 4 of the defence; AR 93-94.

46 [2009] WASC 141 at [72].

47 See also the discussion by Giles CJ Comm D in *State Bank of New South Wales Ltd v Stenhouse Ltd* [1997] Aust Tort Reports 81-423, 64-086 and following.

This is especially so when the "issue" or argument was never raised, but might have been, in the earlier proceedings. The question is whether a party in Mr Thomas' position may be prevented from doing so in an *Anshun*[48] sense.

[48] In *Bradford & Bingley Building Society v Seddon Hancock*[49], a decision cited with approval by Finkelstein J in *Ann Street Mezzanine Pty Ltd (In Liq) v Beck*[50], Auld LJ discussed the parameters of issue estoppel and abuse of process.[51] He observed that:

> "… mere 're'litigation … does not necessarily give rise to abuse of process … Some additional element is required, such as a collateral attack on a previous decision …"[52]

[49] I would conclude that Mr Thomas should not be permitted, in these proceedings, to challenge the conclusion that the Facility Agreement entitled Balanced Securities to an indemnity costs order on the ground that to do so would constitute an abuse of the court's processes in light of his close identification with Joelco and the earlier proceedings rather than on an estoppel. But if there were an inclination towards an estoppel then it should be on a similar basis, namely, that the issue has been determined between Balanced Securities and Joelco and Mr Thomas is so closely identified with Joelco and its conduct of those proceedings as to preclude him from being heard again. With respect to the primary judge, estoppel by representation raises, at the least, difficulties of reliance not adverted to before his Honour.

(ii) Construction of the Facility Agreement

[50] The relevant provisions of the Facility Agreement have been fully set out above. Clause 15 contains the core terms of the contract of guarantee between Mr Thomas and Balanced Securities. By cl 15.1 Mr Thomas

> "unconditionally" guaranteed "the due and punctual payment of all … damages and other moneys payable by or recoverable from [Joelco] under or pursuant to or in connection with …"

the Facility Agreement. By cl 15.7 the guarantee is

> "… a continuing guarantee for the purposes of securing the payment of the whole of the moneys and damages as aforesaid and the performance of the whole of the covenants, obligations, terms and conditions as aforesaid notwithstanding any partial payment or performance thereof."

It remains to be considered whether the costs ordered to be paid fell within those obligations assumed by Mr Thomas as guarantor.

[51] By cl 5.2 Joelco agreed to pay to Balanced Securities

> "(a) the sum of all the costs, expenses and outgoings of [Balanced Securities] of and incidental to:
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> …

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48 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; *Henderson v Henderson* (1843) 3 Hare 100, at 115; 67 ER 313, 319-320.

49 [1999] 1 WLR 1482.

50 (2009) 175 FCR 532, 581-582, [33]-[34].

51 At pp 1490-1496.

52 At pp 1492-1493.

> (ii) any actual or contemplated enforcement of this Agreement … or the actual or contemplated exercise, preservation, review or consideration of any rights, powers or remedies under this Agreement …
>
> This includes legal costs and expenses on a full indemnity basis …".

Mr Thomas contended that the proceedings brought by Joelco against Balanced Securities were not brought "under or pursuant to or in connection with" the Facility Agreement but were separate proceedings for damages arising out of unconscientious conduct and/or provisions of the *ASIC Act* or the *Corporations Act*. Those proceedings all revolved around the Facility Agreement and the circumstances of its procurement, execution and implementation. "In connection with" would encompass that proceeding with no strain to the language or need to resort to the principles of construction concerned with guarantees.

[52] Mr Thomas submitted that the reference to "current debt" in recital B circumscribed the ambit of the moneys secured by the Facility Agreement. While the purpose was to assist in refinancing current debt secured over the land the agreement to do so was subject to the fulfilment of the terms and conditions of the Facility Agreement.[53] The "Moneys Hereby Secured" included

> "all costs, charges, expenses and payments including legal costs … which [Balanced Securities] may incur or … be put to defending … and enforcing … or endeavouring to obtain payment of all or any of [the money] …"[54]

Those terms and expression are apt to include the defence of proceedings by Joelco seeking to order the disgorgement by Balanced Securities of moneys which it claimed under the Facility Agreement.

[53] Mr Thomas also contended that as a matter of commercial practice such a continuing obligation on the part of Joelco and, *a fortiori*, a guarantor, after discharge of the principal indebtedness was not open. What Mr Thomas advanced to support his contention that in his extensive commercial experience, an agreement such as the Facility Agreement would never continue in force after the debt and fees were extinguished, is no more than his subjective opinion. Mr Thomas' evidence (referred to in para 32) was merely evidence of negotiations with Balanced Securities to obtain the loan and his subjective understanding of the terms of the loan and, as such, was inadmissible. That evidence was contradicted by the unambiguous terms of the Facility Agreement. There was no evidence of surrounding circumstances which might alter the meaning of the text.[55]

[54] It is a fundamental and necessary principle of contractual interpretation, where the contract is constituted by a document or documents, and in the absence of other contrary established factors that the text governs the ambit of the terms of the agreement.[56] This must be even more so when the parties have expressly agreed

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53 Recital C.

54 Clause 1.1.

55 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352.

56 *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at [33]-[36].

that the text constitutes the entire agreement as does cl 21.4.[57] The earlier proceedings brought by Joelco against Balanced Securities, rejected any notion of inequality in bargaining power in the circumstances of the entry into the Facility Agreement. Had Joelco not brought proceedings against Balanced Securities the Facility Agreement would, indeed, have come to an end.

[55] Mr Thomas has contended that he was not bound by Joelco's failure to participate in submissions about costs. He was plainly aware of the court orders against Joelco including liberty to make submissions about the order for costs on the standard basis. As the guiding mind of Joelco it may readily be inferred that he was aware of the offers to settle the proceedings made by Balanced Securities prior to the trial, which, at the very least, exposed Joelco to an order for indemnity costs.

[56] The primary judge was clearly correct in his approach to the Facility Agreement as it related to Mr Thomas as guarantor.

(iii) Costs statement

[57] In the event that Mr Thomas is unsuccessful in his grounds of appeal about the Facility Agreement his further ground of appeal is that the primary judge erred in finding that he was not entitled to be served with a costs statement pursuant to r 705 of the *UCPR*. He argued, and it may be accepted, that the right to recover the costs of a proceeding is governed by r 680:

> "A party to a proceeding can not recover any costs of the proceeding from another party other than under these rules or an order of the court."

By r 681 the costs of a proceeding are in the discretion of the court but follow the event unless the court otherwise orders. "Party" is defined in r 679 as including:

> "… a person not a party to a proceeding by or to whom assessed costs of the proceeding are payable."

By r 705:

> "A party entitled to be paid costs must serve a costs statement in the approved form on the party liable to pay the costs."

[58] The primary judge said:[58]

> "Since I have concluded below that the guarantee has been engaged and above that an estoppel by representation binds the defendant, and since there is no legally identified irregularity in the way the assessment of costs has been made, it seems inevitable that the amount of the costs assessment is also a matter covered by the estoppel. After all, it is the failure of the defendant who had total executive and administrative control of Joelco who elected, as its controlling mind, not to contest, by way of filing objections to the costs statement, the assessment of costs, such that it was determined as a default assessment.
>
> Any deficiency on the part of the solicitors for Joelco in not seeking instructions from the person presumably authorized to give

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57 See discussion by Hon JJ Spigelman AC in *Contractual Interpretation: A Comparative Perspective* in (2011) 85 ALJ 412 at 424.

58 Reasons [44]-[45]; AR 136.

> instructions on Joelco's behalf is not a relevant matter here, especially where it was obvious from the original judgment (and liberty reserved) that costs were awarded and needed to be assessed."

[59] His Honour concluded, on the authority of *Glenwood Homes Pty Ltd v Eberhard*[59] that the purpose,

> "… of the 'party rules' is to embrace those persons to whom the court extends the obligation in a particular proceeding because of the particular circumstances of that proceeding itself."[60]

His Honour concluded that the expression "party" was not so broad as to encompass a person who might be liable to pay the amount of the costs pursuant to a guarantee. It is plainly arguable that "party" in r 679 may be broad enough to encompass Mr Thomas as the person behind Joelco's litigation.[61] Had an application been made successfully for Mr Thomas, as a non-party, to pay the costs ordered to be paid by Joelco in the earlier proceedings, Mr Thomas would have been entitled to be served with a costs assessment under r 705.

[60] Balanced Securities did, however, sue Mr Thomas on the contract of guarantee. By cl 15.1 Mr Thomas contracted with Balanced Securities to secure the performance by Joelco of its obligations under the Facility Agreement. Mason CJ in *Sunbird Plaza Pty Ltd v Maloney*[62] described the guarantor's undertaking as "… a promise to 'answer for' the debt or default of the debtor …".[63] The nature of proceedings to enforce a guarantee, if the principal transaction guaranteed is a debt or liquidated sum is for a money sum and is appropriately framed in debt.[64]

[61] It is not apt to describe these proceedings under a contract of guarantee as proceedings to enforce a legal liability to pay costs. But even if it were, as the primary judge found, Mr Thomas was so closely identified with Joelco's proceedings against Balanced Securities that he is bound by its failure to file objections to the costs statement. His Honour did couch the conduct of Mr Thomas too widely when he said that Joelco (and hence Mr Thomas) "elected" not to contest the costs statement by filing objections.[65] The explanation for Joelco not doing so was derived from the uncontested statement by Mr Thomas that Joelco's and his former solicitors had never informed him of the receipt of the costs statement. As his Honour observed, that is, in the circumstances of this case, a matter between Joelco, Mr Thomas and the solicitors.

[62] The primary judge also rejected the contention that Mr Thomas fell within s 335 of the *Legal Profession Act* 2007 as "irrelevant". His Honour said:

> "As for the contention that s 335 of the *Legal Profession Act* shows a consistency of approach between the submissions made as to the proper interpretation of the *UCPR* concerning [Mr Thomas], it is just irrelevant in this proceeding that a person who is not a client of a law

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59 [2009] 1 Qd R 127 at [15]; [2008] QSC 192.
60 Reasons [50]; AR 137.
61 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178.
62 (1988) 166 CLR 245.
63 At 256.
64 At 255-6.
65 Reasons [44]; AR 136.

> practice but is under a legal obligation to pay the legal costs of the client has a right to apply for an assessment."[66]

Mr Thomas, relying upon *Legal Services Commissioner v Wright*[67], contended that the primary judge erred in this conclusion. His Honour was clearly correct. This is not a claim by a law practice to recover its costs against a client or a third party payer and s 335 of the *Legal Profession Act* 2007 has no application.

[63] There is nothing plainly wrong with a bill of costs of this magnitude which has been assessed on the indemnity basis, albeit, without filed objections, by a Registrar of the Supreme Court after a contested trial in the Supreme Court involving a number of witnesses, cross-examination, matters of some legal complexity as well as two offers to settle.

(iv) Procedural fairness

[64] Mr Thomas argued that he had been denied procedural fairness by being deprived of the opportunity to challenge the costs statement. He relied on *Harris v Commissioner of Taxation*[68] which concerned proceedings brought by the liquidator of a company against the Commissioner of Taxation for the payment of a sum said to have been received as an unfair preference when the company was insolvent. A consent order had been entered by those parties without notice to the directors whom the liquidators had joined as third parties and from whom the Commissioner sought to be indemnified. Those directors wished to avail themselves of a defence under s 588FGB(3) or (4) of the *Corporations Act* 2001 (Cth). The directors were named third parties in the liquidator's proceedings and also statutory third parties under the *Corporations Act*. Mackenzie J concluded that the directors had been deprived of procedural fairness and ought to have had an opportunity to be heard.

[65] As the primary judge found, that was a different situation to the present. It would be quite unusual to make a guarantor whose obligation does not arise until after default by the principal debtor, a third party in every proceeding involving the principal debtor (particularly here where the proceedings were brought *by* the principal debtor). Had Mr Thomas been found to be a party to whom a costs statement, on application, should be given, he would have had a right to be heard on the assessment. I have concluded, however, that he had no such right. I have concluded on the estoppel issue that either he was bound by the determination of that issue or, that it would be an abuse of process to allow him a further opportunity to argue the matter. He has no separate right to be heard.

(v) Summary judgment

[66] Mr Thomas has contended that the primary judge could not have concluded that he had no real prospects of successfully defending the proceedings. Counsel in his written submissions said:

> "The appellant submits that the primary judge was overly bold so as to err in the exercise of the discretion:
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> a by inferring that the various matters outlined in ground 1 of the appeal, in order to find that an estoppel by representation of fact arose;

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66 Reasons [50], AR 137.

67 [2010] QCA 321.

68 [2006] 2 Qd R 445.

b in deciding the issue of construction against the appellant absent a trial, which would include the oral evidence of at least the appellant;

c in light of the apparent conflict between the recitals which set out the purpose of the Facility Agreement and various other clauses;

d in not accepting the uncontested sworn evidence of the appellant to the effect that commercial practice was that such finance agreements would not be considered to create the type of liability for costs in guarantors in relation to actions based on a contravention of the ASIC Act, *Trade Practices Act 1974* or similar rights;

e in light of the express finding by the primary judge that '*It certainly is not a case in which either the plaintiff or the defendant could have seriously asserted that [there] was 'no real prospect' of the other succeeding'*."[69]

[67] I have dealt with each of a, c, and d above. As for "b" – Mr Thomas swore an affidavit setting out his version of the surrounding circumstances and his subjective intention and understanding. There is nothing to suggest that other evidence relevant to the dispute between the parties might throw a different light on the Facility Agreement. He must be supposed to have "put his best foot forward" in his response to Balanced Securities' summary judgment application. The primary judge mentioned his concerns when counsel pressed him to deal with their applications. When his Honour came to consider the complex issues raised he did not regard further evidence was called for. As it was, some of Mr Thomas' statements of his understanding of the ambit of the Facility Agreement coloured by his perception of "commercial practise" were not consonant with the Australian approach to construction of a written contract, as discussed above.

[68] His Honour could have declined to grant summary judgment in light of the complexity of the issues to be determined but having embarked upon a consideration of the very full written arguments advanced by counsel and, being pressed by the parties' representatives to do so, it was open to him to proceed to dispose of the claim and in a summary way.[70] In *Australian Can Co Pty Ltd v Levin & Co Pty Ltd*[71] (as quoted by Stephen J in *Theseus Exploration*[72]) the Court said:

> "… We think this Court being clear as to the meaning of the contract is not so helpless that it cannot prevent the absurdity of remitting the case to a single judge for trial because before full argument there might have been some uncertainty as to the meaning of the document."[73]

Similarly, a judge hearing a summary judgment application may be prepared to tackle a legally difficult analysis without being in error in doing so.

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69 Appellant's Outline of Argument at para 31.
70 *Theseus Exploration NL v Foyster* (1972) 126 CLR 507.
71 [1947] VLR 332.
72 At 523.
73 At 338.

[69] The approach to r 292 and its corollary for a defendant, r 293, is as enunciated in *Deputy Commissioner of Taxation v Salcedo*[74] and confirmed and elaborated in *Coldham-Fussell v Commissioner of Taxation.*[75] In the latter decision it was noted that rr 292 and 293 must be applied in the context of the overriding purpose of the *UCPR* to "facilitate the just and expeditious resolution" of the matter in dispute.[76]

[70] While the primary judge could have declined to embark on the applications, no error has been demonstrated in him having done so.

Conclusion

[71] Mr Thomas has not succeeded on any of his grounds of appeal. The judgment below should be affirmed although in respect of the estoppel point, for a slightly different reason.

Order

[72] The orders I would make are:

1. Grant leave to the respondent to file its Notice of Contention.
2. Dismiss the appeal.
3. The appellant pay the respondent's costs assessed on the standard basis.

[73] **MARGARET WILSON AJA**: I agree with the orders proposed by White JA and with her Honour's reasons for judgment.

[74] **MARTIN J**: I agree, for the reasons given by White JA, with the orders she proposes.

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74 [2005] 2 Qd R 232.

75 [2011] QCA 45 at [97] and following.

76 At [101] per White JA with whom the Chief Justice and the President agreed.